

1 IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
2 Wednesday, March 6, 1974

3 NO. 9821

4 MICHAEL P. GRACE II and
5 CORINNE GRACE,

6 Petitioners-Appellants,

7 vs.

Eddy County

8 OIL CONSERVATION COMMISSION
9 OF NEW MEXICO,

10 Respondent-Appellee,

11 and

12 CITIES SERVICE OIL COMPANY
13 and the CITY OF CARLSBAD,

14 Intervenors.

15 This matter coming on for consideration by the Court upon
16 motion of City of Mesa, Arizona to file amicus curiae brief in
17 the above entitled cause, and the Court having considered said
18 motion and being sufficiently advised in the premises;

19 IT IS ORDERED that motion of City of Mesa, Arizona to file
20 amicus curiae brief in the above entitled cause be and the same
21 is hereby denied.

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23
24 ATTEST: A True Copy

25 *Rose Marie Aldrete*
26 Clerk of the Supreme Court
27 of the State of New Mexico
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31
32

COORS, SINGER & BROULLIRE

Attorneys and Counselors at Law

HENRY G. COORS, IV
ROBERT N. SINGER
PETER J. BROULLIRE III
ROBERT H. BORKENHAGEN

SUITE 1100
AMERICAN BANK OF COMMERCE BUILDING
200 LOMAS BOULEVARD, N.W.
ALBUQUERQUE, NEW MEXICO 87102

TELEPHONE 243-3547
AREA CODE 505

March 5, 1974

William F. Carr
Oil Conservation Commission
Santa Fe, New Mexico 87501

Re: No. 9821 (District Court File No. 28181)

Dear Mr. Carr:

Enclosed herewith please find a copy of a motion
in connection with the above captioned matter.

Sincerely,



Robert H. Borkenhagen

tap

Enclosures

cc: Marchiondo and Berry, Losie and Carson, Callahan
and Fox (w/enclso.)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MICHAEL P. GRACE, II, and
CORRINE GRACE,

Petitioners-Appellants,

-vs-

No. 9821 (District Court
File No. 28181)

THE OIL CONSERVATION COMMISSION OF
NEW MEXICO, and CITIES SERVICE OIL
COMPANY, and THE CITY OF CARLSBAD,
NEW MEXICO,

Intervener-Appellees.

THE ALBUQUERQUE CONSUMER FEDERATION
and THE NEW MEXICO GASOLINE RETAILERS
ASSOCIATION,

Amicus Curiae

M O T I O N

Comes now the ALBUQUERQUE CONSUMER FEDERATION, and
THE NEW MEXICO GASOLINE RETAILERS through their attorneys,
Coors, Singer & Broullire, and would petition this Court
for an order allowing them to present oral argument through
their attorney when this matter comes before this Court for
oral argument on the appeal herein, and as grounds therefore
would show the Court the following:

That AMICI have filed a brief herein and feel that
oral argument in support of said brief would more fully
explain Amici's position as well as be beneficial to this
Court in the development of the issues surrounding this
controversy.

COORS, SINGER & BROULLIRE

I hereby certify
that a true copy
of the foregoing
was mailed to
all opposing counsel
of record this 5th day
of March, 1974.

ROBERT H. BORKENHAGEN
Suite 1100
American Bank of Commerce
200 Lomas NW
Albuquerque, New Mexico 87102

SUPREME COURT - MOTION OF MESA - TO FILE AMICUS
CURIAE BRIEF - AND ORAL ARGUMENT

no one in suit to protect Mesa & Supp

I. Challenge this Motion on two grounds.

A. Matters raised in Motion —
outside the scope of review in
this case

B. General statement on scope of review:

OTERO v. N.M. STATE POLICE BOARD

83 N.M. 594, 595, 495 P.2d 374 (1972):

1. Scope of Review in District Ct.

[1-4] It is the rule that the district court may not, on appeal, substitute its judgment for that of the administrative body, but is restricted to considering whether, as a matter of law, the administrative body acted fraudulently, arbitrarily, or capriciously, whether the administrative order is substantially supported by evidence, and whether the action of the administrative body was within the general scope of its authority. Seidenberg v. New Mexico Board of Medical Examiners, 80 N.M. 135, 452 P.2d 469 (1969); Llano, Inc. v. Southern Union Gas Company, 75 N.M. 7, 399 P.2d 646 (1964).

2. Same Review before the Supreme Ct:

This court in reviewing the district court's judgment, must, in the first instance, make the same review of the State Police Board's action as did the district court. Reynolds v. Wiggins, 74 N.M. 670, 397 P.2d 469 (1964).

SINCE THIS COURT — SHOULD CONSIDER
WHETHER OR NOT THE COMMISSION
ORDER — SUPPORTED BY SUBSTANTIAL
EVIDENCE — SHOULD NOT TAKE NEW
EVIDENCE

C. Questions on appeal are those raised in the application for rehearing:

'65-3-22 (b) ... the questions reviewed on appeal shall be only questions presented to the Commission by the application for rehearing... The trial upon appeal shall be de novo, without a jury, and the transcript of proceedings before the Commission, shall be received in evidence by the court in whole or in part upon offer by either party, subject to legal objections to evidence. Appeals may be taken from the judgment or decision of the District Court to the Supreme Court in the same manner as provided for appeals from any other final judgment entered by a District Court in this State,..."

D. This statute discussed in Continental Oil Co. v. Oil Conservation Commission (70 N.M. 310, 325, 326, 373 P.2d 809, 1962)

Johnson v. Sanchez, 1960, 67 N.M. 41, 351 P.2d 449, and the cases cited therein. Insofar as § 65-3-22(b), supra, purports to allow the district court, on appeal from the commission, to consider new evidence, to base its decision on the preponderance of the evidence or to modify the orders of the commission, it is void as an unconstitutional delegation of power, contravening art. III, § 1, of the New Mexico Constitution. In Johnson v. Sanchez, supra,

E. This Court then cites in approval!

quote →

See, California Co. v. State Oil & Gas Board, 1946, 200 Miss. 824, 27 So.2d 542, 28 So.2d 120, which struck down a Mississippi statutory provision, insofar as it provided for a "trial de novo." A statement in the specially concurring opinion is especially pertinent:

The essential nature of such a review is such that it must be of what the Board had before it at the time it made its order. It would be an incongruity as remarkable to permit another and different record to be made up on appeal to the circuit court as it would be to allow another and a different record to be presented to this Court on an appeal to it. The question is, and must be, what did the Oil and Gas Board have before it, and all this the majority opinion has well and sufficiently pointed out."

See, also, City of Meridian v. Davidson 1951, 211 Miss. 683, 53 So.2d 48; Borreson v. Department of Public Welfare, 1938, 368 Ill. 425, 14 N.E.2d 485; and Household Finance Corp. v. State, 1952, 40 Wash.2d 451, 244 P.2d 260.

In the instant case, it is apparent that the trial court's decision to allow the additional testimony was in an effort to determine whether the commission had exceeded its delegated authority and, in effect, determined ownership of property. Such testimony, outside the record of that received by the commission, was not proper and additionally the over-all effect of allowing the same was to show the practical result of the workings of the formula, which were matters that were within the jurisdiction of the commission and not such as would warrant the court in substituting its judgment for that of the commission. The admission of testimony, relating to the conditions subsequent to the issuance of the order, has the net effect of negating or minimizing the factual situation as it existed before the commission. Thus, instead of judicially passing upon the action of the commission, the court is also considering facts which did not even exist at the time of the original hearing. In doing so, the court must of necessity substitute its judgment on the merits for that of the commission, and this is not within its province.

testimony relating
to conditions
subsequent to the
order.

III - Not Timely filed:

A. Posture of this Case

1. Brief-in-Chief - filed 12/7/73
2. Amicus briefs - at approximately same time

- ALBUQUERQUE CONSUMER
FEDERATION

- NEW MEXICO GASOLINE
RETAILERS ASSOCIATION

3. Answer Brief - filed 2/12/74

4. NO REPLY BRIEF (Rule 15 - allows 10 days)

B. NOT TIMELY

New Rule 9 - effective April 1, 1974 -
only standard -

court can consider in
its discretion

provides for amicus curiae briefs
to be filed "within the time
allowed the party whose
position the amicus brief
will support unless the
court for good cause shown
grants an extension of
time."

1. - Not filed at time brief due for
Mr. & Mrs. Grace -

2. no extension should be granted
since raises information which
should not be considered
in this case - cases previously
cited

C. Granting motion = delay

new material - occ right to respond.

D. This is not the 1st time the City of Mesa has appeared in this case:

1. December 1973 - motion to intervene in one of the petitions for stay of judgment - DENIED - 12/28/73

WANTED UNTIL PARTIES TO GO TO ORAL ARGUMENTS BEFORE MOVE TO INTERVENE.

May - Motion to file Amicus Curie Brief - Denied

Also request permission to present short oral argument:

Rule 9 - new rules:

"A motion of an amicus curiae to participate in the oral argument shall be granted only for extraordinary reasons."

In the cts. discretion - The same standards could apply here -

no extraordinary reasons have been shown - request for permission to make oral arguments should be denied.

Rule 9

each request. Statement of the grounds urged in support of claimed error must be set forth in the argument and not in the statement of proceedings.

(5) If any ruling or action by the trial court is complained of other than those above specified, a concise statement or summary of each of such ruling or action, with transcript references and a parenthetical note indicating the appropriate numbered point in the argument.

(n) **Form and Order of Answer Brief.** The form and order of treatment in the answer brief shall be substantially as follows:

(1) Index and table of authorities.

(2) If, and only if, deemed necessary, an independent statement of the case conforming to the requirements of Rule 9(1).

(3) If, and only if, deemed necessary, a supplementary or independent statement of proceedings. Detailed objections to the statement of proceedings in the brief in chief are not contemplated and will not be entertained.

(4) A separate argument in response to each point argued by appellant. This portion of the brief shall not exceed thirty-five typewritten pages unless leave of court is obtained.

(5) Argument and authorities in support of points, if any, relied on under Rule 3(b).

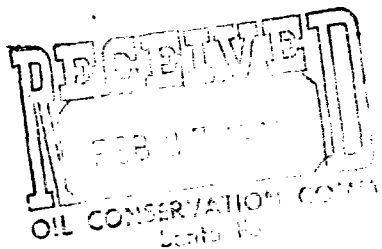
(o) **Reply Brief.** Reply briefs shall be directed only to new arguments or authorities presented in the answer brief and shall not exceed fifteen typewritten pages unless leave of court is obtained.

(p) **Reference in Briefs to Parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," or the like.

(q) **Amicus Curiae Briefs.** A brief of an amicus curiae may be filed only if accompanied by written consent of all parties² by leave of court granted on motion or³ at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by the State of New Mexico or an officer or agency thereof. The brief may be conditionally filed with the motion for leave. A motion for leave shall

Rule 9

identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Except to the extent that all parties otherwise consent, an amicus curiae shall file its brief within the time allowed the party whose position the amicus brief will support unless the court for cause shown grants an extension of time, in which event it shall specify within what period an opposing party may file a responsive brief. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.



February 26, 1974

M E M O R A N D U M

TO THE HONORABLE CHIEF JUSTICE
AND JUSTICES OF THE SUPREME COURT

From the Clerk:

No. 9821 - Appeal from District Court Eddy County

Michael P. Grace, II, and
Corrine Grace,

Petitioners-Appellants,

vs.

Oil Conservation Commission of
New Mexico,

Respondent-Appellee,

and

Cities Service Oil Company and
City of Carlsbad, New Mexico,

Intervenors.

This matter will be heard on the motion of City of Mesa,
Arizona, for leave to file brief of Amicus Curiae on
Wednesday, March 6, 1974 at the hour of 9:00 o'clock A.M.
in the Supreme Court Hearing Room.

Marchiondo & Berry
P.O. Box 568
Albuquerque, N.M. 87103

Losee & Carson
P.O. Drawer 239
Artesia, N.M. 88210

John Otto
45 W. Jefferson
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Jason Kellahin
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Robert Borkenhagen
1100 American Bank of
Commerce Bldg.
200 Lomas NW
Albuquerque, N. M. 87102

William F. Carr
Special Asst. Attorney General
Oil Conservation Commission
State Land Office Building
Santa Fe, N. M. 87501

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MICHAEL P. GRACE, II, and
CORRINE GRACE,

Petitioners-Appellants,

vs.

OIL CONSERVATION COMMISSION OF
NEW MEXICO,

Respondent-Appellee,

and

CITIES SERVICE OIL COMPANY and
CITY OF CARLSBAD, NEW MEXICO,

Intervenors.

No. 9821
(District Court
File No. 28181)

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS
CURIAE ON BEHALF OF THE CITY OF MESA, ARIZONA

The City of Mesa, Arizona, through MALCOLM L. SHANNON, JR.,
of the law firm of Kool, Kool, Bloomfield, Eaves & Mayfield, does
hereby respectfully move this court for an Ex Parte Order allowing
it to file a brief as Amicus curiae and for permission to present
short oral argument at the hearing of the above captioned matter

The City of Mesa's brief will be limited to the basic
issues surrounding the oil conservation commission of New Mexico's
and the District Court of Eddy County's findings (1) that the
combined capacity of wells in the South Carlsbad-Morrow Gas Pool
is in excess of the capacity of the combined gas transportation
facilities connected to the wells in the pool and (2) that gas
was being taken from some wells in excess of market demand.

As defined in New Mexico Statutes Annotated Sec. 65-3-3(E),
"reasonable market demand" is "...the demand for natural gas for

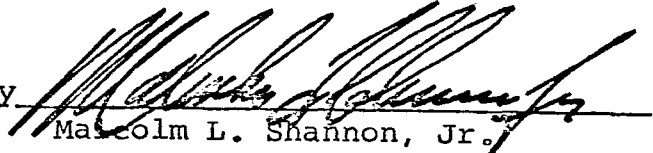
1 reasonable current requirements, for current consumption and for
2 use within or outside the state, together with the demand for
3 such amounts as are necessary for building up or maintaining
4 reasonable storage reserved of natural gas or products thereof, or
5 both such natural gas and products." (emphasis added)

6 The City of Mesa is a municipality incorporated under the
7 laws of the State of Arizona. Mesa's utilities, electric, natural
8 gas and water are municipally owned. El Paso Natural Gas Company
9 is the sole supplier of natural gas to the City of Mesa. El Paso
10 purchases natural gas from the Carlsbad-Morrow Gas Pool. Portions
11 of such gas are transported to supply the City of Mesa's needs.
12 El Paso has notified the City of Mesa of the projected estimate
13 of natural gas that El Paso will be able to supply. The estimated
14 supply falls short of the City of Mesa's estimated consumption.
15 El Paso's pipelines are presently not operating at full capacity
16 because sufficient natural gas is not available for purchase and
17 transportation.

18 The City of Mesa is gravely concerned over the decisions of
19 the Oil Conservation Commission of New Mexico and the District
20 Court of Eddy County, part of which decisions are apparently based
21 on the assumption that production from the Carlsbad-Morrow Gas
22 Pool is in excess of reasonable market demand. Such assumption or
23 finding appears not to be accurate. These decisions, which
24 directly affect the critical needs of the citizens of both the
25 states of Arizona and New Mexico should be based upon correct
26 facts regarding the existence of reasonable market demand.

1 For the foregoing reasons, the City of Mesa respectfully
2 requests that this motion be granted.

3 KOOL, KOOL, BLOOMFIELD,
4 EAVES & MAYFIELD
Attorneys for the City of Mesa
1516 San Pedro, N.E.
5 Albuquerque, New Mexico 87110

6
7 By 
8 Malcolm L. Shannon, Jr.

KOOL, KOOL & BLOOMFIELD
ATTORNEYS AT LAW
FIRST NATIONAL BANK BUILDING
ALBUQUERQUE, NEW MEXICO 87101

1 IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
2 Friday, December 28, 1973

3 NO. 9821

4 MICHAEL P. GRACE II and
5 CORINNE GRACE,

6 Petitioners-Appellants,

7 vs.

Eddy County

8 OIL CONSERVATION COMMISSION
9 OF NEW MEXICO,

10 Respondent-Appellee,

11 and

12 CITIES SERVICE OIL COMPANY
13 and the CITY OF CARLSBAD,

Intervenors.

14 This matter coming on for consideration by the Court upon
15 motion of City of Mesa, Arizona to appear as amicus curiae on
16 petition for stay of judgment, and the Court having considered said
17 motion and being sufficiently advised in the premises;

18 IT IS ORDERED that motion to appear as amicus curiae on petition
19 for stay of judgment be and the same is hereby denied.
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22 ATTEST: A True Copy

23 *John Marie Uderita*
24 Clerk of the Supreme Court
25 of the State of New Mexico
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