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July 1, 1997
(Our File No. 97-1.75)

MICHAEL J. CONDON

HAND-DELIVERED
Michael E. Stogner, Chief Hearing Examiner
Rand Carroll, Esq.
New Mexico Oil Conservation Division
2040 South Pacheco
Santa Fe, NM 87505

Re: Application of Doyle Hartman, Case No. 6987, 11792

Gentlemen:

Enclosed are the following materials which I promised you I would deliver during the hearing yesterday afternoon. They include:

1. Copies of the four New Mexico cases I cited for the proposition that a void administrative order is subject to collateral attack;

2. NMOCD Memo No. 3-77 dated August 24, 1977;

3. Memo dated July 27, 1982 from Joe Ramey to operators of injection wells dealing with administrative requests to establish single pressure limits in projects for wells that have been approved over time with different injection pressure limits for individual wells; and

4. Copies of pages 19 through 22 of the transcript of the hearing in Case No. 11168 where Mr. Kellahin and Mr. Gengler discussed the .2 psi per foot of depth surface injection pressure guideline which the Division uses for surface pressure control.

If you need anything else, please feel free to contact me.

Very truly yours,

GALLEGOS LAW FIRM, P.C.

By Michael J. Condon
MICHAEL J. CONDON

MJC:sa
cc: William F. Carr (w/encl.)
Thomas Kellahin (w/encl.)
fxc: Doyle Hartman/Linda Land
ioc: J.E. Gallegos

[4] Section 50-13-6(2) (3) (a) (b) is couched in permissive language. It says an entrustee "may" give notice of intention to sell and after notice "may" sell. It also specifies what shall be deemed sufficient notice. It in no way indicates that the notice which is specified as being sufficient is the only notice permitted or the exclusive method. We know of no reason for holding that actual notice is not sufficient and dispenses with the notice provided for in the statute and stated to be sufficient.

[5, 6] We conclude that the proof would support a finding that the trustee had actual knowledge of the sale and this issue cannot be resolved by summary judgment. Where there is the slightest doubt as to whether a factual issue exists, summary judgment is not proper. Ginn v. MacAluso, 62 N.M. 375, 310 P.2d 1034; Brown v. King, 66 N.M. 218, 345 P.2d 748.

We have considered appellees' cross-appeal and, in view of what has been said, it is found to be without merit.

The judgment should be reversed with direction to the lower court to proceed in a manner not inconsistent herewith. IT IS SO ORDERED.

CARMODY and MOISE, JJ., concur.

CHAVEZ and NOBLE, JJ., not participating.

373 P.2d 809

CONTINENTAL OIL COMPANY, Amerada Petroleum Corporation, Pan American Petroleum Corporation, Shell Oil Company, The Atlantic Refining Company, Standard Oil Company of Texas, and Humble Oil & Refining Company, Petitioner-Appellants and Cross-Appellees,

v.

OIL CONSERVATION COMMISSION, Respondent-Appellee and Cross-Appellant,

Texas Pacific Coal & Oil Company, a Foreign Corporation, El Paso Natural Gas Company, a Foreign Corporation, Permian Basin Pipeline Company, a Foreign Corporation, and Southern Union Gas Company, a Foreign Corporation, Respondents-Appellees.

No. 6830.

Supreme Court of New Mexico.

May 16, 1962.

Rehearing Denied Aug. 20, 1962.

Proceedings on application for change of gas proration formula. The District Court, Lea County, John R. Brand, D. J., affirmed the commission's order, and an appeal was taken. The Supreme Court, Carmody, J., held that the commission's order lacked basic findings necessary to, and upon which, its jurisdiction depended; that commission should have been permitted to participate in appeal to district court; and that district court should not have admitted additional evidence.

Reversed with directions.

1. Constitutional Law ⇐62

Administrative body may be delegated power to make fact determinations to which law, as set forth by legislative body, is to be applied.

2. Mines and Minerals ⇐92.15

The oil conservation commission is a creature of statute, expressly defined, limited and empowered by laws creating it. 1953 Comp. §§ 65-3-10, 65-3-13(c), 65-3-14(b, f), 65-3-29(h).

3. Mines and Minerals ⇐92.59

Commission, prorating production, must determine, insofar as practicable, (1) amount of recoverable gas under each producer's tract, (2) total amount of recoverable gas in pool, (3) proportion that (1) bears to (2), and (4) what portion of arrived at proportion can be recovered without waste. 1953 Comp. §§ 65-3-10, 65-3-13(c), 65-3-14(b), 65-3-29(h).

4. Mines and Minerals ⇐92.60

"Pure acreage" formula, which commission had originally applied would have to be assumed valid until it was successfully attacked on application for change of proration formula. 1953 Comp. §§ 65-3-2, 65-3-3(e), 65-3-5, 65-3-10, 65-3-13(c), 65-3-14 (a, b, f), 65-3-15(e), 65-3-22(b), 65-3-29 (h).

5. Mines and Minerals ⇐92.59

Commission's finding, that new proration formula would result in more equitable allocation of gas production than formula in use under prior order, was not equivalent of, or proper substitute for, required finding that present formula did not protect correlative rights. 1953 Comp. §§ 65-3-2, 65-3-3(e), 65-3-5, 65-3-10, 65-3-13(c), 65-3-14(a, b, f), 65-3-15(e), 65-3-22(b), 65-3-29(h).

6. Mines and Minerals ⇐92.60

Commission's finding, that there was general correlation between deliverabilities of gas wells in pool and recoverable gas in place under tracts dedicated to said wells, was not tantamount to finding that new proration formula, based 25 percent upon acreage and 75 percent upon deliverability, was based on amounts of recoverable gas in pool and under tracts, insofar as those amounts could be practically determined and obtained without waste.

7. Mines and Minerals ⇐92.59

A supposedly valid proration order in current use cannot be replaced in absence of findings that present formula does not protect correlative rights and that new formula is based on amounts of recoverable gas in pool and under tracts, insofar as those amounts can be practically determined and obtained without waste. 1953 Comp. §§ 65-3-10, 65-3-13(c), 65-3-14(b, f), 65-3-29 (h).

8. Mines and Minerals ⇐92.53

Even after pool is prorated, market demand must be determined since, if allowable

production from pool exceeds market demand, waste will result if allowable is produced; and conversely, production must be limited to allowable even if market demand exceeds that amount, since setting of allowables is necessary in order to prevent waste. 1953 Comp. §§ 65-3-3(e), 65-3-13(c), 65-3-15(e).

9. Mines and Minerals ⇐92.53

Enabling gas purchasers to more nearly meet market demand is not authorized statutory basis upon which change of allowables may be placed, and commission has no authority to require production of greater percentage of allowable, or to see to it that gas purchasers can more nearly meet market demand, unless such results stem from or are made necessary for prevention of waste or protection of correlative rights. 1953 Comp. §§ 65-3-3(e), 65-3-13(c), 65-3-15(e).

10. Administrative Law and Procedure ⇐485, 486
Mines and Minerals ⇐92.59

Formal and elaborate findings are not absolutely necessary, in proration case, but nevertheless basic jurisdictional findings, supported by evidence, are required to show that commission has heeded mandate and standards set out by statute.

11. Administrative Law and Procedure ⇐486

Administrative findings by expert administrative commission should be sufficiently extensive to show not only jurisdiction but basis of commission's order.

12. Administrative Law and Procedure ⇐673

Where public interest is involved, administrative body is proper party to judicial appeal calling in question its exercise of an administrative function.

13. Mines and Minerals ⇐92.49

The two fundamental powers and duties of commission in proration matters are prevention of waste and protection of correlative rights; and prevention of waste is of paramount interest, with protection of correlative rights being interrelated and inseparable from it. 1953 Comp. §§ 65-3-2 et seq., 65-3-10, 65-3-22(b).

14. Mines and Minerals ⇐92.54

Property right of owner of natural gas is not absolute or unconditional and consists of merely (1) opportunity to produce, (2) only insofar as it is practicable to do so, (3) without waste, (4) a proportion, (5) insofar as it can be practically determined and obtained without waste, (6) of gas in pool.

15. Mines and Minerals ⇐92.59, 92.61

Protection of correlative rights depends upon commission's findings as to extent and limitations of property right of each owner, and in making such findings commission acts in an administrative capacity, and not in judicial or quasi-judicial capacity, and therefore commission is entitled to participate in appeal challenging proration order. 1953 Comp. §§ 65-3-2 et seq., 65-3-10, 65-3-22(b).

16. Mines and Minerals ⇐92.59, 92.64

Oil conservation commission cannot perform judicial functions; but neither can court perform administrative one; and net effect of court's admission and consideration of additional evidence, on appeal taken from proration order, was to perform administrative function.

17. Constitutional Law ⇐74
Mines and Minerals ⇐92.4

Insofar as statute purported to allow district court, on appeal from oil conservation commission's proration order, to consider new evidence, to base its decision on preponderance of evidence, or to modify orders of commission, statute was void as unconstitutional delegation of power. 1953 Comp. § 65-3-22(b); Const. art. 3, § 1.

18. Administrative Law and Procedure ⇐305

Administrative bodies, however well intentioned, must comply with law.

Atwood & Malone, Hervey, Dow & Hinkle, Roswell, Kellahin & Fox, Santa Fe, for appellants.

Hilton A. Dickson, Jr., Atty. Gen., Oliver E. Payne, Sp. Asst. Atty. Gen., Santa Fe, for appellee and cross-appellant.

Campbell & Russell, Roswell, for Texas Pacific Coal & Oil Co.

Ray C. Cowan, Hobbs, Hardie, Grambling, Sims & Galatzan, El Paso, Tex., for El Paso Natural Gas Co.

Robert W. Ward, Lovington, for Permian Basin Pipeline Co.

CARMODY, Justice.

Appellants seek to reverse the judgment of the district court, which, on appeal, affirmed a contested order by the appellee commission.

Appellants are seven of the producers of natural gas in the Jalmat Pool, and the appellees, in addition to the Oil Conservation Commission, consist of one of the producers in the same field and three pipeline companies which take gas from the field. The Oil Conservation Commission, as appellee, is also a cross-appellant on a question which will later be discussed.

The law creating the Oil Conservation Commission was originally enacted as Ch. 72, Sess.Laws of 1935, which, as amended, is now § 65-3-2 et seq., N.M.S.A.1953. It is a compliment to the members of the commission and the industry that, throughout the years, this is the first case to reach this court concerning the merits of any controversy determined by the commission. The parties were, however, before us in State ex rel. Oil Conservation Commission v. Brand, 1959, 65 N.M. 384, 338 P.2d 113, wherein the appellees sought, in an original action, to prohibit the trial court from receiving additional evidence other than that which had been considered by the commission. Upon our denial of pro-

hibition, the trial court considered the record before the commission, heard additional evidence, and confirmed the commission's order. The trial court, at the time of the trial, prohibited the appellee—cross-appellant commission from participating as an adverse party, and this is the subject of the cross-appeal.

In 1954, the commission prorated the Jalmat Pool in Lea County, New Mexico. At that time, the natural gas allowables for the individual wells were determined by the use of the "pure acreage" formula. Under such a system, each producer is allowed to produce his portion of the total allowable, based upon the acreage of his tract as compared to the total acreage overlying the pool or gas reservoir. In January 1958, following the application of appellee, Texas Pacific Coal & Oil Company, seeking termination of proration, or, alternatively, a change of the gas proration formula, the commission held a hearing, as a result of which it determined to continue proration but did grant the change of the formula. Order No. R-1092-A was issued by the commission, which directed that the method of computing allowables in the Jalmat Pool should be changed to one based upon 25% acreage and 75% deliverability. Appellants sought a rehearing and, at its conclusion, the commission affirmed Order No. R-1092-A by Order No. R-1092-C. The appeal to the district court and here followed, under the provisions of § 65-3-22(b), N.M.S.A. 1953 Comp.

It should be observed at this time that, although the appeal under the statute must be from the order entered by the commission on rehearing, actually the commission, with one minor change, merely affirmed its original order and declared that the same should remain in full force and effect. Therefore, from a practical standpoint, it is the validity of Order No. R-1092-A that is in issue.

Appellants urge that the order of the commission is unlawful and unreasonable in depriving appellants of their property without due process of law, in that: (1) The order does not rest upon an authorized statutory basis; (2) the order is not supported by substantial evidence; and (3) the order is incomplete, vague and indefinite.

For clarity, we hereinafter quote the statutes, or portions thereof, with which we are concerned on this main appeal:

"65-3-2. Waste prohibited.—The production or handling of crude petroleum oil or natural gas of any type or in any form, or the handling of products thereof, in such manner or under such conditions or in such amounts as to constitute or result in waste is each hereby prohibited.

"65-3-3. Waste—Definitions.—As used in this act the term 'waste,' in ad-

dition to its ordinary meaning, shall include:

"* * * * * *

"(e) The production in this state of natural gas from any gas well or wells, or from any gas pool, in excess of the reasonable market demand from such source for natural gas of the type produced or in excess of the capacity of gas transportation facilities for such type of natural gas. The words 'reasonable market demand,' as used herein with respect to natural gas, shall be construed to mean the demand for natural gas for reasonable current requirements, for current consumption and for use within or outside the state, together with the demand for such amounts as are necessary for building up or maintaining reasonable storage reserves of natural gas or products thereof, or both such natural gas and products.

"* * * * * *

"65-3-5. Commission's powers and duties.—The commission shall have, and it is hereby given, jurisdiction and authority over all matters relating to the conservation of oil and gas in this state, and of the enforcement of all the provisions of this act, and of any other law of this state relating to the conservation of oil or gas. It shall have jurisdiction and control of and over all persons or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas.

"* * * * * *

"65-3-10. Power of commission to prevent waste and protect correlative rights.—The commission is hereby empowered, and it is its duty, to prevent the waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the commission is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof.

"* * * * * *

"65-3-13. Allocation of allowable production in field or pool.—* * *

"* * * * * *

"(c) Whenever, to prevent waste, the total allowable natural gas production from gas wells producing from any pool in this state is fixed by the commission in an amount less than that which the pool could produce if no restrictions were imposed, the commission shall allocate the allowable production among the gas wells in the pool delivering to a gas transportation facility upon a reasonable basis and recognizing correlative rights, and shall include

in the proration schedule of such pool any well which it finds is being unreasonably discriminated against through denial of access to a gas transportation facility which is reasonably capable of handling the type of gas produced by such well. In protecting correlative rights the commission may give equitable consideration to acreage, pressure, open flow, porosity, permeability, deliverability and quality of the gas and to such other pertinent factors as may from time to time exist, and in so far as is practicable, shall prevent drainage between producing tracts in a pool which is not equalized by counter-drainage. In allocating production pursuant to the provisions of section 12(c) the commission shall fix proration periods of not less than six [6] months. It shall determine reasonable market demand and make allocations of production during each such period, upon notice and hearing, at least 30 days prior to the beginning of each proration period. In so far as is feasible and practicable, gas wells having an allowable in a pool shall be regularly produced in proportion to their allowables in effect for the current proration period. * * *

"* * * * * *

"65-3-14. Equitable allocation of allowable production—Pooling—Spacing. —(a) The rules, regulations or orders of the commission shall, so far as it is practicable to do so, afford to the owner of each property in a pool the opportunity to produce his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practically determined, and so far as such can be practicably obtained without waste, substantially in the proportion that the quantity of the recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas or both in the pool, and for this purpose to use his just and equitable share of the reservoir energy.

"(b) The commission may establish a proration unit for each pool, such being the area that can be efficiently and economically drained and developed by one [1] well, and in so doing the commission shall consider the economic loss caused by the drilling of unnecessary wells, the protection of correlative rights, including those of royalty owners, the prevention of waste, the avoidance of the augmentation of risks arising from the drilling of an excessive number of wells, and the prevention of reduced recovery which might result from the drilling of too few wells.

"* * * * * *

"(f) After the effective date of any rule, regulation or order fixing the allowable production, no person shall

produce more than the allowable production applicable to him, his wells, leases or properties determined as in this act provided, and the allowable production shall be produced in accordance with the applicable rules, regulations or orders.

"65-3-15. Common purchasers—Discrimination in purchasing prohibited.— * * *

"* * * * * *

"(e) Any common purchaser taking gas produced from gas wells from a common source of supply shall take ratably under such rules, regulations and orders, concerning quantity, as may be promulgated by the commission consistent with this act. The commission, in promulgating such rules, regulations and orders may consider the quality and the deliverability of the gas, the pressure of the gas at the point of delivery, acreage attributable to the well, market requirements in the case of unprorated pools, and other pertinent factors.

"* * * * * *

"65-3-29. Definitions of words used in act.— * * *

"* * * * * *

"(h) 'Correlative rights' means the opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practically determined, and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy."

(The similarity of this section and § 65-3-14(a) is to be noted, although not of consequence to this decision.)

(It is also of interest, although not determinative, that the original act (Ch. 72, Laws 1935) was bottomed almost entirely upon the theory of prevention of waste, and it was not until the passage of Ch. 168, Laws 1949, that the legislature saw fit in the various sections, some of which are set out above, to add the language relating to the protection of "correlative rights" and to define the term.)

The order of the commission was based upon certain findings, only the following of which relate to the controversy in issue:

"(5) That the applicant has proved that there is a general correlation between the deliverabilities of the gas wells in the Jalmat Gas Pool and the [recoverable] gas in place under the tracts dedicated to said wells, and that

the inclusion of a deliverability factor in the proration formula for the Jalmat Gas Pool would, therefore, result in a more equitable allocation of the gas production in said pool than under the present gas proration formula." (The word "recoverable" in brackets above is the only change made by the Commission by its affirmatory Order No. R-1092-C.)

"(6) That the inclusion of a deliverability factor in the proration formula for the Jalmat Gas Pool will result in the production of a greater percentage of the pool allowable, and that it will more nearly enable the various gas purchasers in the Jalmat Gas Pool to meet the market demand for gas from said pool.

"(7) That the allowable gas production in the Jalmat Gas Pool should be allocated to the non-marginal wells in said pool in accordance with a proration formula based on seventy-five per cent (75%) acreage times deliverability plus twenty-five per cent (25%) acreage only."

We have not overlooked the commission's Finding No. 3, which is the only one mentioning "waste," but this particular finding related to the commission's refusal to terminate proration in the pool, and, in context, did not apply to the method of computing allowables.

[1] Proceeding to appellants' argument that the order does not rest upon an authorized statutory basis, it should be initially recognized that an administrative body may be delegated the power to make fact determinations to which the law, as set forth by the legislative body, is to be applied. See, Opp Cotton Mills v. Administrator, 1941, 312 U.S. 126, 657, 61 S.Ct. 524, 85 L.Ed. 624, in which it is said:

"The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."

[2] The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it. The commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico, but the basis of its powers is founded on the duty to prevent waste and to protect correlative rights. See, § 65-3-10, supra. Actually, the prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights.

[3] The commission was here concerned with a formula for computing al-

lowables, which is obviously directly related to correlative rights. In order to protect correlative rights, it is incumbent upon the commission to determine, "so far as it is practical to do so," certain foundationary matters, without which the correlative rights of the various owners cannot be ascertained. Therefore, the commission, by "basic conclusions of fact" (or what might be termed "findings"), must determine, insofar as practicable, (1) the amount of recoverable gas under each producer's tract; (2) the total amount of recoverable gas in the pool; (3) the proportion that (1) bears to (2); and (4) what portion of the arrived at proportion can be recovered *without waste*. That the extent of the correlative rights must first be determined before the commission can act to protect them is manifest.

The practical necessity for findings such as those mentioned is made evident, under the provisions of § 65–3–14(b) and (f) (pertaining to allocation of allowable production) and § 65–3–29(h) (defining "correlative rights"). Additionally, it should be observed that the commission, "in so far as is practicable, shall prevent drainage between producing tracts in a pool which is not equalized by counter-drainage," under the provisions of § 65–3–13 (c).

The findings and conclusions of the commission, contained in the order complained of, lack any mention of any of the above factors. The commission made no finding as to the amounts of recoverable gas in the pool, or under the various tracts; it made no finding as to the amount of gas that could be practicably obtained without waste; it made no finding concerning drainage; it made no finding that correlative rights were not being protected under the old formula, or at least that they would be better protected under the new formula. There is no indication that the commission attempted to do any of these things, even to the extent of "insofar as is practicable."

All of the above factors were in issue before the commission, and are on appeal because they were all raised in the appellants' application for rehearing.

[4] We will assume that the former "pure acreage" formula is valid until it is successfully attacked. Hester v. Sinclair Oil & Gas Company (Okl.1960), 351 P.2d 751. The attack in the instant case has failed. The commission made no finding, even "insofar as can be practically determined," as to the amounts of recoverable gas in the pool or under the tracts. How, then, can the commission *protect* correlative rights in the absence of such a finding?

> "However, simply stated, plaintiffs are adversely affected by an order which failed to include a finding of the jurisdictional fact upon which its

issuance is conditioned by the legislature, and the issuance of which order plaintiffs opposed in the preceding hearing on the ground that the Commissioner had no power to issue same. For the order is not valid; and in this instance does not negative the 'net drainage' and loss of their 'just and equitable share' of production which plaintiffs claim its issuance will cause them, and which jurisdictional facts were requisites to the validity of the order." Hunter v. Hussey (La.App. 1956), 90 So.2d 429, 441.

[5–7] Referring to the commission's finding No. 5, part of which is to the effect that the new formula will result in a "more equitable allocation of the gas production in said pool than under the present gas proration formula," we do not believe it is a substitute for, nor the equivalent of, a finding that the present gas proration formula does not protect correlative rights. Further, that portion of the same finding that there is a "general correlation between the deliverabilities of the gas wells in the Jalmat Gas Pool and the recoverable gas in place under the tracts dedicated to said wells" is not tantamount to a finding that the new formula is based on the amounts of recoverable gas in the pool and under the tracts, insofar as these amounts can be practically determined and obtained without waste. Lacking such findings, or their equivalents, a supposedly valid order in current use cannot be replaced. Such findings are necessary requisites to the validity of the order, for it is upon them that the very power of the commission to act depends. See, Hunter v. Hussey, supra; and Hester v. Sinclair Oil & Gas Company, supra.

[8, 9] In considering finding No. 6, the record of the commission furnishes us nothing upon which to base an assumption that the finding relates to the prevention of waste, or to the protection of correlative rights. We find no statutory authority vested in the commission to require the production of a greater percentage of the allowable, or to see to it that the gas purchasers can more nearly meet market demand *unless such results stem from or are made necessary by the prevention of waste or the protection of correlative rights.*

When § 65–3–13(c) and § 65–3–15(e) are read together, one salient fact is evident —even after a pool is prorated, the market demand must be determined, since, if the allowable production from the pool exceeds market demand, waste would result if the allowable is produced. See, § 65–3–3(e), supra. Conversely, production must be limited to the allowable even if market demand exceeds that amount, since the setting of allowables was made necessary in order to prevent waste. See, § 65–3–13(c), supra. The reason for the consideration of market requirements in the case of unprorated pools is self-evident,

and needs no discussion. From what has been said, it is obvious that the commission's finding that the enabling of gas purchasers to more nearly meet the market demand is not an authorized statutory basis upon which a change of allowables may be placed. The same is true of the finding as to "the production of a greater percentage of the pool allowable" and for the same reasons.

[10, 11] We therefore find that the order of the commission lacked the basic findings necessary to and upon which jurisdiction depended, and that therefore Order No. R-1092-C and Order No. R-1092-A are invalid and void. We would add that although formal and elaborate findings are not absolutely necessary, nevertheless basic jurisdictional findings, supported by evidence, are required to show that the commission has heeded the mandate and the standards set out by statute. Administrative findings by an expert administrative commission should be sufficiently extensive to show not only the jurisdiction but the basis of the commission's order. See, City of Yonkers v. United States, 1944, 320 U.S. 685, 64 S.Ct. 327, 88 L.Ed. 400, wherein it is stated:

> "The insistence that the Commission make these jurisdictional findings * * * gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject."

We have carefully examined and considered the various authorities cited by the parties, other than those herein specifically discussed, and find them to be either not in point or having been decided under different statutes and constitutional provisions, and, where conflicting, we decline to follow the reasoning thereof. Having reached this conclusion, there is no necessity for any discussion or consideration of the other points raised by appellants.

We have intentionally omitted any mention of the findings and conclusions of the trial court, because of our disposition of the cross-appeal. In so deciding, it is necessary to explain the circumstances in the trial court.

Appellants filed their application for appeal from the commission's orders; the commission filed its response, as did the other appellees, all but one of whom merely adopted the response filed by the commission. Thereafter, two pretrial conferences were held, at which point the appellee commission brought the original prohibition case in this court, seeking to prevent the taking of any additional evidence by the trial court. See, State v. Brand, supra. Our decision, refusing to rule at that time on the propriety of taking additional evidence, returned the case to the trial court. Thereafter, at the commencement of the actual trial, appellants moved that the commission be prohibited from participating as an adverse party,

because the sole question in the case related to the correlative rights of the owners of wells in the pool and that waste was not in issue. The attorney for the commission objected, saying that waste was in issue and that also the commission was an adverse party whenever its decision is appealed. The court sustained appellants' motion, but allowed counsel for the commission to remain in court, somewhat as an observer.

[12] It is this ruling that is the subject of the cross-appeal. However, the disposition of the question raised must of necessity include consideration of the scope of review upon appeal from the Oil Conservation Commission, inasmuch as the function of the commission, i. e., whether administrative or quasi-judicial, is all-important, because, if administrative, the authorities generally hold that, where the public interest is involved, such body is a proper party in the appeal to the court. See, Plummer v. Johnson, 1956, 61 N.M. 423, 301 P.2d 529. In addition, the question of the constitutional division of powers must be considered relative to the admission of testimony in the court, which was not offered before the administrative body. Thus, we must dispose of the question raised in State v. Brand, supra, as allied to the problem on cross-appeal, even though neither of the parties has presented the question, apparently because each opposing party is relying, at least in part, upon the evidence which was introduced in the trial court.

The appeal statute, § 65-3-22(b), N.M. S.A. 1953 Comp., insofar as material, reads as follows:

"Any party to such rehearing proceeding, dissatisfied with the disposition of the application for rehearing, may appeal therefrom to the district court of the county * * *. Provided, however, that the questions reviewed on appeal shall be only questions presented to the commission by the application for rehearing. Notice of such appeal shall be served upon the adverse party or parties and the commission in the manner provided for the service of summons in civil proceedings. The trial upon appeal shall be de novo, without a jury, and the transcript of proceedings before the commission, including the evidence taken in hearings by 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, in the same manner as if such evidence was originally offered in the district court. The commission action complained of shall be prima facie valid and the burden shall be upon the party or parties seeking review to establish the invalidity of such action of the commis-

sion. The court shall determine the issues of fact and of law and shall, upon a preponderance of the evidence introduced before the court, which may include evidence in addition to the transcript of proceedings before the commission, and the law applicable thereto, enter its order either affirming, modifying, or vacating the order of the commission. In the event the court shall modify or vacate the order or decision of the commission, it shall enter such order in lieu thereof as it may determine to be proper. 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. * * *"

[13] It is apparent from a study of the entire act (§ 65–3–2 et seq., N.M.S.A. 1953 Comp., particularly § 65–3–10, supra) that the two fundamental powers and duties of the commission are prevention of waste and protection of correlative rights. The Supreme Court of Oklahoma had occasion to consider their statute, which is similar though not identical to ours, and in Choctaw Gas Co. v. Corporation Commission, (Okl.1956), 295 P.2d 800, said:

"And these two fundamental purposes of the exercise of the Commission's powers in proration matters are interrelated, for, if the State, through this or some other agency, could not protect such rights, and each owner of a portion of the gas in a natural reservoir was left to protect his own, we would have resort to the wasteful drilling practices and races of the preproration days."

[14–17] Our legislature has explictly defined both "waste" and "correlative rights" and placed upon the commission the duty of preventing one and protecting the other. Inasmuch as there is no express mention of prevention of waste in the commission's findings, insofar as they concern correlative rights, it is obvious that the order must have been principally concerned with protecting correlative rights. However, as we have said, certain basic findings must be made before correlative rights can be effectively protected. From a practical standpoint, the legislature cannot define, in cubic feet, the property right of each owner of natural gas in New Mexico. It must, of necessity, delegate this legislative duty to an administrative body such as the commission. The legislature, however, has stated definitively the elements contained in such right. It is not absolute or unconditional. Summarizing, it consists of merely (1) an opportunity to produce, (2) only insofar as it is practicable to do so, (3) without waste, (4) a proportion, (5) insofar as it can be practically determined and obtained without waste, (6) of the gas in the pool

The prevention of waste is of paramount interest, and protection of correlative rights is interrelated and inseparable from it. The very definition of "correlative rights" emphasizes the term "without waste." However, the protection of correlative rights is a necessary adjunct to the prevention of waste. Waste will result unless the commission can also act to protect correlative rights. See, Choctaw Gas Co. v. Corporation Commission, supra. Although subservient to the prevention of waste and perhaps to the practicalities of the situation, the protection of correlative rights must depend upon the commission's findings as to the extent and limitations of the right. This the commission is required to do under the legislative mandate. As such, it is acting in an administrative capacity in following legislative directions, and not in a judicial or quasi-judicial capacity. The commission's actions are controlled by adequate legislative standards, and it is performing its functions to conserve a very vital natural resource.

To state the problem in a different way, if the commission had determined, from a practical standpoint, that each owner had a certain amount of gas underlying his acreage; that the pool contained a certain amount of gas; and that a determined amount of gas could be produced and obtained without waste; then the commission would have complied with the mandate of the statute and its actions would have been protecting the public interest, thereby, quite obviously, entitling it to defend, for the public, whatever order it issued. Thus, it should be obvious that the commission is a necessary adverse party, and it was error for the trial court to refuse to allow the commission to participate as such. Plummer v. Johnson, supra; Board of Adjustment of City of Fort Worth v. Stovall, 1949, 147 Tex. 366, 216 S.W.2d 171; and Hasbrouck Heights, etc. v. Division of Tax Appeals, 1958, 48 N.J.Super. 328, 137 A.2d 585. The owners are understandably concerned only with their own interests and cannot be expected to litigate anything except that which concerns them. Therefore, absent the commission, the public would not be represented. If the protection of correlative rights were completely separate from the prevention of waste, then there might be no need in having the commission as a party; but if such were true, it is very probable that the commission would be performing a judicial function, i. e., determining property rights, and grave constitutional problems would arise. For the same reason, it must follow that, just as the commission cannot perform a judicial function, neither can the court perform an administrative one. See, O'Meara v. Union Oil Co. of California, 1948, 212 La. 745, 33 So.2d 506; Fire Department of City v. City of Fort Worth, 1949, 147 Tex. 505, 217 S.W.2d 664; Bartkowiak v. Board of Supervisors,

1954, 341 Mich. 333, 67 N.W.2d 96; and Cicotte v. Damron, 1956, 345 Mich. 528, 77 N.W.2d 139. This is the net effect of the admission and consideration by the trial court of the additional evidence in this case. Such a procedure inevitably leads to the substitution of the court's discretion for that of the expert administrative body. We do not believe that such procedure is valid constitutionally. See, 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, we stated:

"It has long been the policy in the state of New Mexico, as shown by the various decisions of this court, that on appeals from administrative bodies the questions to be answered by the court are questions of law and are actually restricted to whether the administrative body acted fraudulently, arbitrarily or capriciously, whether the order was supported by substantial evidence, and, generally, whether the action of the administrative head was within the scope of his authority." (Citing cases.)

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 ad-

ditionally 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 negativing 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.

[18] The trial court, after hearing the testimony, and examining the testimony before the commission, felt that the new formula was preferable to the old "pure acreage" formula, thereby making a determination that the commission's order was proper. As to this, we express no opinion, because we are bound, as the trial court should have been, to dispose of the case upon the obvious illegality of the commission's order. Administrative bodies, however well intentioned, must comply with the law; and it is necessary that they be required to do so, to prevent any possible abuse.

We are fully cognizant that there is authority from other jurisdictions in conflict with the rule herein announced, particularly the decisions of the Texas courts; however, considering our own decisions and our statutes, we decline to follow the precedents in other jurisdictions, other than those cited.

It is apparent, from what has been said heretofore, that there was error, both on behalf of the commission and by the trial court. Ordinarily, the result would be to remand the case for another hearing before the trial court with the commission as an adverse party and the court merely considering whether the action of the commission was fraudulent, arbitrary or capricious, whether the order was supported by substantial evidence, and whether the action of the administrative body was within the scope of its authority. However, in this particular instance, we can conceive of no benefit which would result from such action, because there can be only one final conclusion based on the record before the commission, and that is that the order of the commission is void.

We are moved to finally dispose of the matter, and do not believe that the commission, as such, is prejudiced, inasmuch as its counsel was present during all of the proceedings in the trial court and participated in the appeal, to the extent at least of signing the briefs of appellees in addition to the brief as cross-appellant. We take the view that the commission and the public have been adequately represented and their view

of the case fully presented to the court. Thus, a remand would only amount to an unnecessary act and result in considerable additional delay.

The order of the district court, affirming the order of the Oil Conservation Commission, is reversed, with directions to set the same aside and enter an order sustaining appellants' appeal and declaring the orders of the commission No. R-1092-C and No. R-1092-A as invalid and void. IT IS SO ORDERED.

COMPTON, C. J., and CHAVEZ and NOBLE, JJ., concur.

MOISE, J., having recused himself, not participating.

373 P.2d 820

Robert ESPINOSA, Plaintiff-Appellant,

v.

Gust PETRITIS and Robert Espinosa, as Executors of the Last Will and Testament of Mike Lelekos, Deceased, Defendants-Appellees.

No. 6937.

Supreme Court of New Mexico.

July 30, 1962.

Action to assert claim to ownership, as surviving joint tenant, in decedent's bank account. The District Court, Colfax County, Fred J. Federici, D. J., denied relief, and plaintiff appealed. The Supreme Court, Carmody, J., held that evidence sustained finding that decedent, who had retained passbook, had not made any delivery or contract such as would give donee equal or coextensive right of withdrawal or control.

Affirmed.

1. Gifts ⇐4

Elements of gift are: property subject to gift; competent donor; donative intent, not induced by force or fraud; delivery; acceptance; and present gift fully executed.

2. Gifts ⇐30(1)

Requirement of delivery in inter vivos gift of interest in bank account is fulfilled when donor gives donee equal power to withdraw from account.

3. Gifts ⇐30(1)

Donor's mere intention to make gift of interest in bank account, without effectuating it by delivery, creates no right in donee and no power to withdraw from fund.

4. Gifts ⇐30(3)

Surrender of passbook to donee is not prerequisite to creation of valid inter vivos gift in bank account, but there must be something by which donor creates in donee equal right to possession of book.

ler v. Heintz, 137 Wis. 169, 118 N.W. 543 (1908).

[4] It is well established that a building is "substantially completed" notwithstanding trivial imperfections or omissions. Allison v. Schuler, supra; Christenson v. Behrens, supra; Wilcox v. Cloward, 88 Utah 503, 56 P.2d 1 (1936); General Fire Extinguisher Co. v. Schwartz Bros. Com'n Co., 165 Mo. 171, 65 S.W. 318 (1901); Taylor Seidenbach, Inc. v. Healy, La.App., 90 So.2d 158 (1956); Louisiana Plumbing and Heating, Inc. v. Miranne and Harris, Inc., La.App., 181 So.2d 261 (1966); Fox & Co. v. Roman Catholic Bishop of the Diocese of Baker City, 107 Or. 557, 215 P. 178 (1923); W. E. Owens Lumber Co. v. Holmes, 277 Ala. 557, 173 So.2d 99 (1965); Sawyer v. Sawyer, 79 Wyo. 489, 335 P.2d 794 (1959).

[5] The items which were completed after the Baughmans took possession October 28, 1965, are not, in our opinion, sufficient to show that the house was not substantially complete prior to January 15, 1966, the crucial date upon which the validity of the lien depends.

The installation of the bar sink and adjustment of the furnace on January 12, 1966, clearly cannot be considered because these items were completed before January 15, 1966. The two mirrors and handrails, weatherstripping of two doors and the omission to hook up the wiring and the air conditioner appear to us to be so trivial as to lead inescapably to the conclusion that the house was substantially complete without them. Tabet does not contend, nor can it, that because of these omissions the purpose for which the house was constructed was not accomplished.

[6] With respect to the dumbwaiter the undisputed evidence as we have said is that this accessory was abandoned by agreement between the Baughmans and Clayton. The abandonment appears to have been agreed upon not later than December of 1965. Abandonment is equivalent in law to completion. See Allison v. Schuler, supra; Albuquerque Lumber Company v. Montevista Company, 39 N.M. 6, 38 P.2d 77 (1934); Eastern & Western Lumber Company v. Williams, 129 Or. 1, 276 P. 257 (1929); Stark-Davis Co. v. Fellows, 129 Or. 281, 277 P. 110 (1929).

In our opinion the judgment is not supportable. It will be reversed and the cause remanded to the District Court with instructions to vacate the judgment and render judgment denying the lien and dismissing the complaint.

It is so ordered.

CHAVEZ, C. J., and NOBLE, J., concur.

439 P.2d 709

GROENDYKE TRANSPORT, INC., a corporation, Plaintiff-Appellee,

v.

NEW MEXICO STATE CORPORATION COMMISSION, Murray E. Morgan, Columbus Ferguson and Floyd Cross, Commissioners, Defendants-Appellants,

Steere Tank Lines, Inc. and E. B. Law & Son, Inc., Intervenors-Defendants-Appellants.

No. 8477.

Supreme Court of New Mexico.

April 15, 1968.

Proceeding to review order of State Corporation Commission. The District Court, Santa Fe County, Waldo Spiess, Chief Judge Court of Appeals, entered judgment reversing order of Commission, which together with motor common carrier appealed. The Supreme Court, Compton, J., held that orders of Commission altering certificate of public convenience issued to motor common carriers without notice of hearing to interested parties rendered orders void and subject to collateral attack.

Judgment reversed and cause remanded with directions to affirm order of Commission.

1. Automobiles ⇐85

Orders of Corporation Commission altering certificate of public convenience issued to motor common carriers without notice of hearing to interested parties rendered orders void and subject to collateral attack. Const. art. 11, §§ 7, 8; 1953 Comp. §§ 64-27-6, 64-27-8, 64-27-13.

2. Administrative Law and Procedure ⇐751

Scope of review by district court on appeal from administrative body is restricted to record made before administrative body and is limited to determination whether order of administrative body is supported by substantial evidence, whether administrative body acted unlawfully, arbitrarily, or capriciously, and generally whether action of the body was within scope of its authority.

3. Administrative Law and Procedure ⇐760, 763

On appeal from an order of an administrative body, district court may by its findings point out its reasons for concluding that order of body is arbitrary, unlawful, or capricious, but it may not substitute its judgment for that of such body.

4. Automobiles ⇐84

Where complaint before Corporation Commission by motor common carrier merely alleged that certificate of public convenience was altered without proper hearing and complaint did not go into merits of such alteration, district court, on appeal from Commission's order that certificate be issued in its original form, went outside its scope of review in making findings of fact on merits of such alteration.

Girand, Cowan & Reese, Hobbs, Stanley, Kegel & Campos, Santa Fe, for appellee.

Boston E. Witt, Atty. Gen., Myles E. Flint, James V. Noble, Asst. Attys. Gen., Santa Fe, for appellants.

Jones, Gallegos, Snead & Wertheim, Santa Fe, for intervenors-appellants.

OPINION

COMPTON, Justice.

This is an appeal from a judgment reversing an order of the State Corporation Commission.

In 1953, the commission issued a certificate of public convenience and necessity to Griffin Brothers, Inc., authorizing:

> "Transportation of sand, gravel, crushed rock, clay, fill dirt, pumice, cinder aggregate, ready mixed concrete, graphite, lime, stone, mortar, asphalt, fertilizer, and bulk water, *by means of dump truck only*, between all points and places in the State of New Mexico, over irregular routes under non-scheduled service." (Emphasis added.)

The certificate was transferred by order of the commission from Griffin Brothers, Inc. to Field Service, Inc. in 1963, but the restrictive language, "by means of dump truck only," was deleted. On March 11, 1965, by order of the commission the certificate was transferred to Groendyke Transport, Inc., the appellee; again the restrictive language was deleted.

On March 29, 1965, the intervenors-appellants, Steere Tank Lines, Inc., and others, filed a complaint before the commission seeking to have the certificate restored to its original form. At the hearing the commission found that the deletion was a clerical error and ordered that the certificate be issued in its original form. Groendyke Transport, Inc., appealed the order of the commission to the district court, where judgment was entered reversing the order.

The court found, finding No. 7, that the certificate had remained on the records of the commission for more than three years and that no appeal had been taken from either order as required by § 64-27-69, N.M.S.A.1953. The court then concluded that the orders of the commission had become final; that the commission was without jurisdiction to entertain intervenors-appellants' complaint questioning the validity of the orders. Judgment was entered accord-

ingly, and the intervenors-appellants and the commission appealed.

[1] We think the court fell into error. It is clear that the alteration of the certificate by the commission in 1963 and 1965 was without compliance with Art. XI, § 8, New Mexico Constitution and the provisions of §§ 64-27-8 and 13, N.M.S.A.1953, in that no notice of hearing was given to interested parties. Such noncompliance by the commission renders the orders void and subject to collateral attack. State v. Mountain States Tel. & Tel. Co., 54 N.M. 315, 224 P. 2d 155; In re Atchison, T. & S. F. Ry. Co.'s Protest of Rates, 44 N.M. 608, 107 P.2d 123; Maxwell Land Grant Co. v. Jones, 28 N.M. 427, 213 P. 1034; Philipp Brothers Chemicals, Inc. v. United States, Cust.Ct., 222 F. Supp. 489; Elof Hansson, Inc. v. United States, Cust.Ct., 178 F.Supp. 922; Schmidt Pritchard & Co. v. United States, Cust.Ct., 167 F.Supp. 272; Cravey v. Southeastern Underwriters Association, 214 Ga. 450, 105 S.E.2d 497. See, also, Flavell v. Department of Welfare, 144 Colo. 203, 355 P.2d 941; Aylward v. State Board of Chiropractic Examiners, 31 Cal.2d 833, 192 P.2d 929.

The commission has constitutional authority to alter or amend its orders. Article XI, § 7, New Mexico Constitution. Section 64-27-6, N.M.S.A.1953, provides that the commission may "do all things necessary to carry out and enforce" the motor carrier act. Section 64-27-13, N.M.S.A. 1953, provides that the commission may alter or amend any certificate for good cause after proper notice and opportunity for a hearing. See Petroleum Club Inn Co. v. Franklin, 72 N.M. 347, 383 P.2d 824; Musslewhite v. State Corporation Commission, 61 N.M. 97, 295 P.2d 216. See, also, American Trucking Association v. Frisco Transportation Company, 358 U.S. 133, 79 S.Ct. 170, 3 L.Ed.2d 172.

The court further found:

* * * * * *

"8. That it is a matter of common knowledge that the commodities authorized by Certificate No. 1226, to-wit: ready mix concrete, mortar, asphalt, fertilizer (in liquid form), and bulk water cannot be transported by dump trucks within the territory authorized by Certificate No. 1226.

"9. That the restriction 'by means of dump truck only' would defeat the transportation of the commodities which the Commission had determined public convenience and necessity required within the territory the Commission had previously determined needed the service.

* * * * * *

"12. That the Order of the State Corporation Commission entered in Docket No. 3733 on December 14, 1965, is unlawful and unreasonable in that the requirement of limiting the means to be employed to transport the commodities authorized to be transported is in direct conflict and tends to defeat the carrier's ability to transport said commodities. By the inclusion of the restriction in the certificate, it obstructs the free flow of traffic as well as impairs the efficiency of the common carrier holding the certificate."

The court then concluded:

* * * * * *

"6. That the restriction 'by dump truck only' authorized by the Order to be inserted in Certificate No. 1226 is contrary to the mandate to the Commission set out in Section 64-27-8 in that this restriction could not in any way assist public convenience and necessity but on the contrary tends to obstruct the free flow of traffic and the efficiency of the carrier.

* * * * * *

"10. That the Order of the Commission entered in Docket No. 3733 is unlawful and unreasonable and should be set aside."

[2, 3] The appellants contend that the court exceeded its authority in making its findings of fact and conclusions of law. We think the contention is well founded. The scope of review of the district court on appeal is restricted to the record made before the commission. Based thereon the court is limited to a determination whether

the order of the commission is supported by substantial evidence; whether the administrative agency acted unlawfully, arbitrarily, or capriciously; and, generally, whether the administrative agency acted within the scope of its authority. S.I.C. Finance-Loans of Menaul, Inc. v. Upton, 75 N.M. 780, 411 P.2d 755; Llano, Inc. v. Southern Union Gas Company, 75 N.M. 7, 399 P.2d 646; Ferguson-Steere Motor Company v. State Corporation Commission, 63 N.M. 137, 314 P.2d 894; Yarbrough v. Montoya, 54 N.M. 91, 214 P.2d 769; Harris v. State Corporation Commission, 46 N.M. 352, 129 P. 2d 323; Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225. This is not to say that the court cannot point out by findings its reason for concluding that an order of the commission is arbitrary, unlawful, or capricious. It may not, however, substitute its judgment for that of the administrative body. Llano, Inc. v. Southern Union Gas Company, supra; Ferguson-Steere Motor Company v. State Corporation Commission, supra; Transcontinental Bus System v. State Corporation Commission, 56 N.M. 158, 241 P.2d 829; Harris v. State Corporation Commission, supra.

[4] The complaint brought before the commission by the intervenors-appellants merely alleged that the certificate was altered without a proper hearing; it did not go into the possible merit of such alteration had the proper procedure been followed. The parties stipulated that only certain portions of the transcript of the commission's hearing would be included in the record. From these few pages it appears that the reasonableness of the certificate as originally issued in 1953 was not an issue. The commission hearing did not delve into the merits of the certificate as originally drawn as did the court in its finding of fact No. 8. Finding of fact No. 8 might very well be true as seen through the eyes of many carriers, but the facts must be determined by the fact-finding agency, the commission, after each party has had an opportunity to present evidence to support its view. We think it is obvious that the court went outside its scope of review in making its finding of fact No. 8.

The judgment must be reversed. The cause is remanded with directions to the court to affirm the order of the commission.

It is so ordered.

CHAVEZ, Jr., C. J., and MOISE, J., concur.

439 P.2d 712

Julia TREVINO, by her Next Friend, Leon M. Trevino, Plaintiff-Appellant,

v.

MUTUAL OF OMAHA INSURANCE COMPANY, a corporation, formerly known as Mutual Benefit Health and Accident Association, and H. C. Moore, Defendants-Appellees.

No. 8532.

Supreme Court of New Mexico.

April 15, 1968.

Action for damages against insurance company, in which fraud was alleged in the obtaining of a release of all claims under a policy. The District Court, Bernalillo County, James M. Scarborough, D. J., directed a verdict for insurance company, and appeal was taken. The Supreme Court, Noble, J., held that evidence presented issues of fact for jury's determination, and credibility of witnesses was not an issue for the court but was solely a jury matter in situation where court took case from jury and directed a verdict for insurer at close of plaintiff's case.

Reversed with directions.

1. Trial ⇐178

Upon motion for a directed verdict at conclusion of plaintiff's case all testimony and all reasonable inferences flowing therefrom tending to prove plaintiff's case must

sion. *Moorhead v. Gray Ranch Co.*, 90 N.M. 220, 561 P.2d 493 (Ct.App.), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977).

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

SOSA, Senior Justice, and FEDERICI, J., concur.

634 P.2d 690

Richard S. MECHEM and Verna L. Mechem, his wife, Plaintiffs-Appellants,

v.

CITY OF SANTA FE, et al., Defendants-Appellees.

No. 13503.

Supreme Court of New Mexico.

Oct. 5, 1981.

Property owner brought action against city, seeking declaratory and injunctive relief from effect of personal restriction imposed in a special exception. The District Court, Santa Fe County, Bruce E. Kaufman, D. J., denied relief, and property owner appealed. The Supreme Court, Federici, J., held that: (1) property owner was entitled to collaterally attack restriction and thus avoid statute of limitations; (2) doctrine of unclean hands did not bar property owner from seeking relief; (3) delay in seeking relief until 1978 from restriction imposed in 1967 did not constitute laches; and (4) city could not condition exception to use of real property upon personal rights of ownership rather than upon use, even if restriction at issue had been negotiated between parties.

Reversed.

1. Zoning and Planning ⇐431

Property owner could collaterally attack personal restriction in special exception imposed upon him by city, and thus avoid statute of limitation, where city acted beyond scope of its statutory authority in imposing personal restriction. NMSA 1978, §§ 3-21-1 to 3-21-26.

2. Equity ⇐65(3)

Doctrine of unclean hands did not bar property owner from seeking equitable relief from personal restriction to special exception zoning permit imposed upon him by city where his misconduct in expanding facility for which permit had been granted was irrelevant to determination of his unclean hands at time restriction was imposed.

3. Equity ⇐84

Whether or not rule governing laches is to be applied depends upon circumstances in each particular case.

4. Equity ⇐71(1)

Laches is not favored and rule is applied only in cases where party is guilty of inexcusable neglect in enforcing his rights.

5. Zoning and Planning ⇐584

Property owner was not guilty of laches in delaying until 1978 his attack on personal restriction in zoning special exception granted by city in 1967 where city had not materially changed its position to its detriment during period, evidence had not become unavailable, and city had not expended money or incurred new obligation in reliance upon property owner's inaction.

6. Zoning and Planning ⇐382

City could not condition special exception to use of real property upon personal right of ownership rather than upon use, even if restriction at issue had been negotiated by owner and city. NMSA 1978, §§ 3-21-1 to 3-21-26.

Sommer, Lawler & Scheuer, Joseph G. Lawler, Houston Lee Morrow, Santa Fe, for plaintiffs-appellants.

Coppler & Walter, Frank R. Coppler, Santa Fe, for defendants-appellees.

White, Koch, Kelly & McCarthy, Daniel H. Friedman, Santa Fe, amicus curiae.

OPINION

FEDERICI, Justice.

This is an appeal from the District Court of Santa Fe County. Appellant, Richard S. Mechem (Mechem), sought declaratory and injunctive relief from the effect of a restriction imposed in a special exception by the Board of Adjustment of Santa Fe (City) upon the person and property of Mechem. Mechem alleges that the personal restriction is unconstitutional, illegal, ultra vires and null and void. The parties stipulated to all pertinent facts and to the admissibility of the evidence presented. The trial court denied appellant relief. We reverse.

In 1967, the Santa Fe Board of Adjustment granted a special exception to operate a private tennis club in an R-1 district in Santa Fe. In granting the exception, the City required that the special exception terminate with any change in ownership of the premises. In 1976, the City approved an expansion of the tennis facility. During those proceedings, Mechem questioned the enforceability of the restriction referred to above. Soon thereafter, neighbors of Mechem who opposed the expansion of the facility brought an action in district court in an attempt to prevent the expansion, but were unsuccessful. In 1977, Mechem discovered that a facility similar to his own had been granted a special exception in an R-1 district without imposition of the added restriction at issue here. Mechem at that time again requested that the restriction be lifted, but the City refused to lift it. In 1978, claiming changed circumstances due to marital difficulties, Mechem again requested that the restriction be lifted. The City refused to act upon Mechem's request, even though the request had been placed on the agenda of the City Council for December 13, 1978. This suit was filed on January 5, 1979.

The issues we discuss on appeal are:

I. Whether Mechem is barred from the present action by the statute of limitations;

II. Whether Mechem is barred from the present action by unclean hands;

III. Whether Mechem is barred from the present action by laches; and

IV. Whether the City has the authority to impose a restriction on ownership of property when granting a special exception to a zoning ordinance.

I.

[1] In deciding whether Mechem is barred by the statute of limitations from initiating the present proceedings, we look to the applicable statute, Section 3-21-9, N.M.S.A. 1978. It reads:

> A. Any person aggrieved by a decision of the zoning authority, or any officer, department, board or bureau of the zoning authority may present to the district court a petition, duly verified, setting forth that the decision is illegal, in whole or in part, and specifying the grounds of illegality. The petition shall be presented to the court within thirty days after the decision is entered in the records of the clerk of the zoning authority.

The record shows that Mechem did not appeal to the district court following the 1967 and 1976 proceedings between the City and Mechem wherein the restriction was imposed. He may not now directly attack the restriction imposed by the City, *Bolin v. City of Portales*, 89 N.M. 192, 548 P.2d 1210 (1976), unless the restriction is void. *See Nesbit v. City of Albuquerque*, 91 N.M. 455, 575 P.2d 1340 (1977).

Mechem contends that he may collaterally attack the prior determination made by the City in 1967 and 1976, and the statute of limitations is therefore inapplicable. The basis of Mechem's collateral attack is that the City acted beyond the scope of its statutory authority and its actions were ultra vires and void. Collateral attack of a city ordinance was upheld in *Dale J. Bellamah Corporation v. City of Santa Fe*, 88 N.M. 288, 291, 540 P.2d 218, 221 (1975), where the court stated:

> Various courts have permitted collateral attacks upon ordinances which are void in the sense that the legislative body had no constitutional or statutory power to pass it or because the ordinance was never legally enacted. *State v. Vargas*, 6 Conn. Cir. 69, 265 A.2d 345 (1969); *Bowling Green-Warren County Airport Bd. v. Long*, 364 S.W.2d 167 (Ky.Ct.App.1962); *Simmons v. Holm*, 229 Or. 373, 367 P.2d 368 (1961); 6 E. McQuillen, Municipal Corporations § 20.14 (3rd ed. rev. 1969). Since [§ 3–21–9] *does not present the exclusive method for attacking invalid ordinances, we hold that a collateral attack upon the ordinance was permissible in the instant case.* (Emphasis added.)

Compare Bolin v. City of Portales, supra, and *Serna v. Board of Cty. Com'rs of Bernalillo County*, 88 N.M. 282, 540 P.2d 212 (1975).

Collateral attack upon judicial proceedings has been permitted where the determinations of judicial bodies are found to be void. *Nesbit v. City of Albuquerque, supra.* Collateral attack has likewise been permitted to challenge an administrative determination which is void because it was made without express or implied statutory power. *See State v. Civil Service Board*, 226 Minn. 253, 32 N.W.2d 583 (1948); *Foy v. Schechter*, 1 N.Y.2d 604, 154 N.Y.S.2d 927, 136 N.E.2d 883 (1956).

In *Bischoff v. Hennessy*, 251 S.W.2d 582 (Ky.1952), based upon facts similar to those in this case, the Kentucky court held that a thirty-day time limitation applicable to a zoning action was not exclusive and an action was permitted beyond the thirty-day limitation period, where the zoning authority acted illegally, and vested rights were denied in violation of the law or the constitutional provisions.

We hold that Mechem is entitled to collaterally attack the restriction imposed upon him by the City that made the special exception personal to him.

II.

[2] The City contends that Mechem may not seek equitable relief because he has unclean hands. The key element under this doctrine is that Mechem's misconduct must be related to the transaction giving rise to the claim involved here. "What is material is not that plaintiff's hands are dirty, but that he dirtied them in acquiring the right he now asserts, ..." *Republic Molding Corporation v. B. W. Photo Utilities*, 319 F.2d 347 (9th Cir. 1963), cited in D.B. Dobbs, *Remedies* § 2.4 at 46 (1973).

The City argues that the tennis facility is being run as a business enterprise rather than as a private club. It claims that since Mechem has expanded the operation beyond the type of club he represented to City officials he would run, his actions were deceitful and amount to unclean hands. Mechem counters, stating that the record supplies ample evidence of instances of agreement and harmony between the City and himself directly related to the expansion of the club.

The record indicates that the special exception was granted to Mechem in 1967 upon the following conditions: (1) daylight hour operation only; (2) membership was not to exceed a maximum of 100; (3) no liquor was to be sold on the premises; and (4) this special exception was to remain valid only so long as the ownership and operation remained in the name of Mechem. In 1976, Mechem was allowed to expand his operation subject to the following additional conditions: (1) all sales by the Pro Shop were to be limited to members only; (2) the use of guest cottages was to be limited to members only; (3) membership was not to exceed 150; and (4) additional tennis courts were to be permitted north of Camino Corrales and the tract south of Camino Corrales was to be utilized as an off-street parking area only. These facts indicate that Mechem had two major transactions with the City regarding the conditions under which he was to operate his tennis facility. First, in 1967, he acquired the special exception which gave him the right to operate the facility in a residential zone, and second, in 1976, he acquired the right to expand his operation. It was in the 1967 transaction that Mechem became subject to

the restriction at issue. Whether or not Mechem's later conduct relating to the expansion of his facility was inequitable, is irrelevant to the determination of whether he was guilty of unclean hands at the time he acquired the exception in 1967. If Mechem had sought an equitable remedy to protect his right to expand his tennis facility, then his acts relating to how he expanded the facility would be relevant. This is not the case here. The record does not show that Mechem intended to expand his facility beyond the scope of the conditions contained in the special exception at the time he acquired it. The right to challenge the restriction at issue was acquired in 1967 when it was granted. The acts of Mechem in 1967 upon which the City relies for its defense of "unclean hands" cannot be used as a defense in the present proceedings.

III.

The City contends that Mechem is barred from bringing the present suit by laches.

[3, 4] The elements of laches are: (1) the City's invasion of Mechem's rights; (2) delay in asserting Mechem's rights, once Mechem had notice and opportunity to take legal action; (3) lack of knowledge by the City that Mechem would assert his rights; and (4) injury or prejudice to the City in the event relief is accorded to Mechem or the suit is not held to be barred. *Butcher v. City of Albuquerque*, 95 N.M. 242, 620 P.2d 1267 (1980). Whether or not the rule governing laches is to be applied depends upon the circumstances in each particular case. *Hart v. Northeastern N.M. Fair Ass'n.*, 58 N.M. 9, 265 P.2d 341 (1953). Laches is not favored and the rule is applied only in cases where a party is guilty of inexcusable neglect in enforcing his rights. *Cain v. Cain*, 91 N.M. 423, 575 P.2d 607 (1978).

[5] We do not believe that the rule of laches applies in this case. While Mechem did not assert his rights between 1967 and 1978, the delay alone does not necessarily constitute laches. In *Trujillo v. Padilla*, 79 N.M. 245, 442 P.2d 203 (1968), the court stated that laches is not necessarily a matter of time, but a question of the inequity of permitting the claim to be enforced. Mechem's inaction from 1967 to 1976 must be considered in the light of all the facts in the case as they relate to the element of laches.

The evidence falls short of proving that the City was prejudiced. The City has not materially changed its position to its detriment during this period, it has pointed to no evidence that has become unavailable, nor has it expended money or incurred new obligations in reliance upon Mechem's inaction. The City cannot claim prejudice because of an expanding commercial enterprise in a neighborhood when the City itself approved the enterprise. If Mechem has expanded the enterprise beyond the permitted special exception, that issue is not properly addressed in this lawsuit, nor is it a basis for a claim of laches by the City.

Absent a showing of prejudice, the doctrine of laches is not available to the City.

IV.

[6] Having disposed of the above preliminary issues, we now turn to the merits of Mechem's claim, that the restriction upon personal ownership is ultra vires and void.

The City obtains its authority to zone from Sections 3-21-1 through 3-21-26, N.M.S.A. 1978 (Orig. Pamp. and Cum.Supp. 1981). It has no zoning authority beyond that provided by statute. *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964). Section 3-21-1, N.M.S.A. 1978 limits the regulations and restrictions the City may impose when zoning:

> A. For the purpose of promoting health, safety, morals or the general welfare, a ... municipality ... may regulate and restrict within its jurisdiction the:
>
> (1) height, number of stories and size of buildings and other structures;
>
> (2) percentage of a lot that may be occupied;
>
> (3) size of yards, courts and other open space;
>
> (4) density of population; and

(5) location and use of buildings, structures and land for trade, industry, residence or other purposes.

Section 3–21–8, N.M.S.A. 1978 (Cum.Supp. 1981), allows the City to grant special exceptions in certain situations:

C. . . . [T]he zoning authority by a majority vote of all its members may:

(1) authorize, in appropriate cases and subject to appropriate conditions and safeguards, special exceptions to the terms of the zoning ordinance or resolution:

(a) which are not contrary to the public interest;

(b) where, owing to special conditions, a literal enforcement of the zoning ordinance will result in unnecessary hardship; and

(c) so that the spirit of the zoning ordinance is observed and substantial justice done. . . .

If the City has authority to terminate a special exception upon a change in ownership, it must be found in the above statutes. The statutes do not expressly provide for regulation of land by making a special exception personal to a particular owner. Any power to do so must be by necessary implication and must reasonably relate to the objectives of zoning. Otherwise the regulation is ultra vires and unenforceable. *See Vlahos v. Little Boar's Head District*, 101 N.H. 460, 146 A.2d 257 (1958); *Olevson v. Zoning Board of Review*, 71 R.I. 303, 44 A.2d 720 (1945).

In *Olevson*, a restriction similar to that involved in this case was held to be invalid. The court reasoned that the restriction went beyond the zoning function of regulating real estate and attempted to regulate ownership.

The City contends that even under *Olevson* the conditions of the special exceptions now in issue do not restrict ownership because Mechem can sell his property at any time, and then the burden is upon the new owners to apply for a renewal of the special exception. However, the basis of the court's decision in *Olevson* was that the zoning authority is limited to regulating matters relating to the real estate itself and not the person who owns or occupies it. A restriction upon ownership, the court held, amounts to a mere license or privilege to an individual and is not related to the use of the property. Our Court has also previously stated that zoning concerns regulation of the *uses* of land and buildings. *See Bd. of Cty. Com'rs., Etc. v. City of Las Vegas*, 95 N.M. 387, 622 P.2d 695 (1980).

We hold that it is not within the proper function of the zoning authority to condition an exception to the use of real property upon personal rights of ownership rather than use.

The City points out that an agreement was negotiated between the parties. It argues that regardless of any authority the City may have, Mechem is bound by the agreement. In *Edmonds v. Los Angeles County*, 40 Cal.2d 642, 255 P.2d 772 (1953), the court applied promissory estoppel to prevent a plaintiff from circumventing an agreement he made with zoning officials. In *Bringle v. Board of Supervisors of County of Orange*, 54 Cal.2d 86, 4 Cal.Rptr. 493, 351 P.2d 765 (1960), a landowner was unsuccessful in revoking an agreement he made with zoning officials which committed him to the grant of an easement in exchange for a variance. Even so-called "contract zoning" has been upheld under certain circumstances. *See* R. Anderson, *American Law of Zoning 2d* § 9.21 (1976). We have no quarrel with the rule announced in those cases. The question here, however, is one of limits. As the court in *Olevson, supra*, stated:

It seems clear, speaking generally, that under the terms of the statute and of the ordinance applicable in this cause the respondent zoning board of review is given broad discretion in fixing conditions and safeguards when variances or exceptions are permitted. That discretion, however, is not unlimited.

Id., 44 A.2d at 722. The cases cited by the City do not involve the type of restriction involved in this case. While it is true that Mechem is not specifically restricted from

selling his property, the effect of the condition expressed in the exception and variance is to do just that. Mechem cannot sell the property and a purchaser cannot buy it without subjecting themselves to the probability of substantial and costly changes in the character of the property together with significant diminution in value of the property.

Even if the restriction at issue were negotiated, it is not enforceable because it is ultra vires. A zoning authority may not impose conditions upon a special exception whether it is negotiated or not if it has no power to impose the conditions. *See Olevson, supra.*

The trial court is reversed and directed to enter judgment in accordance with this opinion.

We do not express an opinion on whether Mechem is now in compliance with the other special conditions originally imposed by the City. We further express no opinion on their applicability to any prospective successor in interest to Mechem's property.

IT IS SO ORDERED.

RIORDAN, J., and STOWERS, District Judge, concur.

634 P.2d 695

NEW MEXICO STATE LABOR AND INDUSTRIAL COMMISSION, ex rel. Leslie L. TOLMAN, Plaintiff-Appellant,

v.

DEMING NATIONAL BANK, a national banking association, Defendant-Appellee.

No. 13401.

Supreme Court of New Mexico.

Oct. 6, 1981.

The State Labor and Industrial Commission sued employer on behalf of employee to recover money compensation in lieu of vacation time. The District Court, Luna County, Ray Hughes, D.J., entered judgment in favor of employer. The Commission appealed. The Supreme Court, Easley, C. J., held that employer's personnel guidelines were not against public policy or void in that provisions prevented employee from collecting vacation pay when she voluntarily terminated her employment prior to date she had selected to take her vacation.

Affirmed.

1. Master and Servant ⇐70(1)

An employee has no right to a paid vacation in the absence of an agreement, either express or implied.

2. Master and Servant ⇐70(1)

Bank's personnel guidelines were not against public policy or void in that provision prevented an employee from collecting vacation pay when she voluntarily terminated her employment prior to the date she had selected to take her vacation.

Ralph E. Ellinwood, Dist. Atty., Deming, David A. Lane, Asst. Dist. Atty., Silver City, for plaintiff-appellant.

Sherman & Sherman, Benjamin M. Sherman, Deming, for defendant-appellee.

OPINION

EASLEY, Chief Justice.

New Mexico State Labor and Industrial Commission (Commission) sued Deming National Bank (Bank) on behalf of Leslie Tolman (Tolman) to recover money compensation in lieu of vacation time. The case was submitted on stipulated facts and the district court entered judgment in favor of Bank. The Commission appeals and we affirm.

The sole question is whether the Bank's Personnel Guidelines is against public policy and void in that it prevents Tolman from collecting vacation pay when she voluntari-

made upon his hands at the hospital to determine presence of antimony and barium, absent a search warrant, further violated his Fourth Amendment rights. The tests were made by wiping defendant's hands with a cotton swab soaked in nitric acid solution. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), although concerned with the issue of stop and frisk, recognizes that the reasonableness of a detention is determined by balancing the need to seize for investigatory purposes against the intrusion which the detention entails. Here there was no physical detention; defendant was near death in the hospital. The intrusion was minimal; and because it was hospital procedure to immediately wash and cleanse patients brought to the emergency room, exigent circumstances existed, coupled with probable cause to believe defendant had committed a crime, to allow a search for evidence likely to be imminently destroyed. Under such conditions, acting to preserve possible evidence does not require a search warrant. *Cupp v. Murphy*, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973). The facts surrounding seizure of this evidence have no similarity to the facts of *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), which defendant relies on.

Because we feel the trial court erred in permitting the trial to continue after the newspaper episode occurred, we pass over other trial matters urged as presenting cumulative error. We are confident that improper evidence volunteered by a witness about which the trial court had to caution the jury, and improper hypothetical questions posed by the State, will not be repeated at a second trial.

The conviction is reversed. The matter is remanded for a new trial. It is so ordered.

HERNANDEZ, C.J. and LOPEZ, J., concur.

626 P.2d 854

NEW MEXICO BOARD OF PHARMACY, Appellant,

v.

NEW MEXICO BOARD OF OSTEOPATHIC MEDICAL EXAMINERS, Appellee.

No. 4619.

Court of Appeals of New Mexico.

March 3, 1981.

The New Mexico Board of Pharmacy brought an administrative appeal to challenge a rule adopted by the Board of Osteopathic Medical Examiners. The Court of Appeals, Hernandez, C. J., held that the Board of Osteopathic Medical Examiners did not have authority to issue a rule permitting osteopathic physicians to delegate to physicians' assistants the authority to prescribe certain controlled substances.

Petition granted.

1. Drugs and Narcotics ⇐42

The State Board of Osteopathic Medical Examiners did not have authority to issue a rule permitting osteopathic physicians to delegate to physicians' assistants the authority to prescribe drugs controlled by certain schedules of the Controlled Substances Act, provided that the physician's assistant had worked for the supervising physician for at least six months; the rule impermissibly enlarged the class of persons authorized to dispense controlled substances, whether "dangerous" or not. N.M.S.A.1978, §§ 30–31–18, subds. A, C, 61–1–31, subd. C, 61–10–5, subd. D, 61–10A–6, subds. A, C.

2. Statutes ⇐212.1

The Legislature is presumed to have enacted law with existing law in mind.

3. Statutes ⇐223.1

The Court of Appeals has the duty to construe a statute so as to render it consistent with previously enacted statutes, if that is possible.

4. Administrative Law and Procedure ⇐387

An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority.

Frank P. Dickson, Jr., Dickson & Dubois, P. A., Albuquerque, for appellant.

Jeff Bingaman, Atty. Gen., Andrea B. McCarty, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HERNANDEZ, Chief Judge.

[1] This appeal arises out of the adoption of the following rule by the New Mexico Board of Osteopathic Medical Examiners:

> Article XIV, § M. Prescriptions for controlled substances.
>
> 1. An osteopathic physician may delegate to a physician's assistant the authority to prescribe any drugs controlled by the Schedules II through V, of the New Mexico Controlled Substances Act, provided that the physician's assistant has worked for the supervising physician for at least 6 months. Such delegations may be for all drugs in Schedules II through V, or only for certain drugs, or only for drugs in one or more of the Schedules.

The authority of the Osteopathic Board to issue rules and regulations is set forth in Section 61–10–5(D), N.M.S.A.1978 (1980 Cum.Supp.), which recites in pertinent part:

> The board shall have and use a common seal and is authorized to make and adopt all necessary rules and regulations relating to the enforcement of the provisions of Chapter 61, Article 10, NMSA 1978.

The appellant contends that the Osteopathic Board does not have the authority to issue such a rule. We agree. The standard for appellate review is set forth in Section 61–1–31(C), N.M.S.A.1978 of the Uniform Licensing Act:

> Upon appeal, the court of appeals shall set aside the regulation only if found to be:
>
> (1) arbitrary, capricious or an abuse of discretion;
>
> (2) contrary to law; or
>
> (3) against the clear weight of substantial evidence of the record.

Section 30–31–18(A) and (C), N.M.S.A. 1978 of the Controlled Substances Act provide:

> A. No controlled substance listed in Schedule II which is a prescription drug as determined by the federal food and drug administration, may be dispensed without a written prescription of a practitioner, unless administered directly to an ultimate user. No prescription for a Schedule II substance may be refilled. No person other than a practitioner shall prescribe or write a prescription.
>
> . . . .
>
> C. A controlled substance included in Schedule III or IV, which is a prescription drug as determined under the New Mexico Drug and Cosmetic Act . . . shall not be dispensed without a written or oral prescription of a practitioner, except when administered directly by a practitioner to an ultimate user. The prescription shall not be filled or refilled more than six months after the date of issue or be refilled more than five times, unless renewed by the practitioner and a new prescription is placed in the file. Prescriptions shall be retained in conformity with the regulations of the board.

Section 30–31–12(A) of the Act provides:

> A. Every person who manufactures, distributes or dispenses any controlled substance or who proposes to engage in the manufacture, distribution or dispensing of any controlled substance must obtain annually a registration issued by the board in accordance with its regulations. Registration of practitioners, however, may be obtained annually from the practitioners' respective examining and licensing authorities pursuant to regulations promulgated by the board and on forms supplied by the board. Copies of all registrations shall be provided to the board by all such examining and licensing authorities at such time as registration is

initiated. Practitioners whose examining and licensing authorities do not elect to obtain registration of their own licensees, as provided in this subsection, shall be registered directly by the board.

Sections 30–31–2(H) and (I) of the Act provide:

H. "dispense" means to deliver a controlled substance to an ultimate user or research subject pursuant to the lawful order of a practitioner, including the administering, prescribing, packaging, labeling or compounding necessary to prepare the controlled substance for that delivery; . . . .

I. "dispenser" means a practitioner who dispenses and includes hospitals, pharmacies and clinics where controlled substances are dispensed; . . . .

Section 61–10A–6(C), N.M.S.A.1978 (1980 Cum.Supp.), provides:

The board [Board of Osteopathic Medical Examiners] may adopt and enforce reasonable rules and regulations:

C. for the purpose of carrying out all other provisions of the Osteopathic Physicians' Assistants Act [61–10A–1 to 61–10A–7 NMSA 1978].

Provided, however, *the board shall not adopt any rule or regulation allowing an osteopathic physician's assistant to dispense dangerous drugs*, to measure the powers, range or accommodative status of human vision, diagnose vision problems, prescribe lenses, prisms, vision training or contact lenses or fit contact lenses. This paragraph shall not preclude vision screening; and provided further, the board shall not adopt any rule or regulation allowing an osteopathic physician's assistant to perform diagnosis or medical, surgical, mechanical, manipulative or orthopedic treatment of the human foot. [Emphasis added.]

The appellant maintains that the word "dispense" as it pertains to "controlled substances" encompasses the act of prescribing. Appellee's position is that the prohibition against a rule permitting a physician's assistant to "dispense" dangerous drugs does not preclude a rule permitting a physician's assistant to "prescribe" dangerous drugs.

[2, 3] At the outset we note that § 61–10A–6(C) was enacted in 1979, whereas the Controlled Substances Act was enacted in 1972. The legislature is presumed to have enacted law with existing law in mind. *State v. Trivitt*, 89 N.M. 162, 548 P.2d 442 (1976). Section 61–10A–6(C) prohibits dispensation only of "dangerous drugs" by physician's assistants; however, this court has the duty to construe a statute so as to render it consistent with previously enacted statutes, if that is possible. *State v. New Mexico State Authority*, 76 N.M. 1, 411 P.2d 984 (1966). The Controlled Substances Act is a comprehensive statute designed to enable the State to try to control the drug abuse problem. It specifies, with considerable particularity, who can dispense controlled substances which have a potential for abuse. To adopt appellee's position would constitute an impermissible enlargement of the class of persons authorized by the Act to dispense these substances, whether "dangerous" or not. Nothing in the language of § 61–10A–6(A) shows a legislative intent to permit such a result. Quite the contrary, the following language in subsection (C) of that section unequivocally shows the intention of the legislature: "... the board shall not adopt any rule or regulation allowing an osteopathic physician's assistant to dispense dangerous drugs...."

[4] An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority. *Public Service Co. v. N. M. Environmental Improvement Board*, 89 N.M. 223, 549 P.2d 638 (Ct.App.1976).

Accordingly, the petition to set aside Article XIV, § M of the rules of the New Mexico Board of Osteopathic Medical Examiners is granted, because the rule is not in accordance with law.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

OIL CONSERVATION COMMISSION

STATE OF NEW MEXICO
P. O. BOX 2088 - SANTA FE
87501

DIRECTOR
JOE D. RAMEY

LAND COMMISSIONER
PHIL R. LUCERO

STATE GEOLOGIST
EMERY C. ARNOLD

Memo No. 3-77
August 24, 1977

M E M O R A N D U M

TO: OPERATORS AND ATTORNEYS

FROM: JOE D. RAMEY, SECRETARY-DIRECTOR

SUBJECT: APPLICATIONS FOR APPROVAL OF SECONDARY RECOVERY OR SALT WATER DISPOSAL INJECTION WELLS

The Commission has delayed revising its Rules and Regulations relative to injection wells because of the impending U. S. Environmental Protection Agency Underground Injection Control Regulations. During the interim before those regulations may be finalized, the following policy shall apply to applications for approval of injection wells whether by hearing or by administrative order:

(1) No surface injection pressure greater than 0.2 psi per foot of depth to the top of the injection zone will be permitted unless there is strong evidence that the strata confining the injection fluid has a fracture gradient which would support a higher pressure.

(2) That applications must include a tabular summary of all wells within one-half mile of the injection well(s) and which penetrate the injection zone showing all casing strings, setting depths, sacks of cement used, cement tops, total depth, producing interval, well identification, and location. Applications for expansion of projects need not include the tabulation if the same is on file and no additional wells are included.

(3) Application must include a schematic of all plugged and abandoned wells within the one-half mile radius and which have penetrated the injection zone showing all information required under (2) above plus the size and location of all plugs and the date of abandonment. Applications for expansion of projects need not include the schematics if the same is on file and no additional wells are included.

EXHIBIT
X-105

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

BRUCE KING
GOVERNOR

POST OFFICE BOX 2088
STATE LAND OFFICE BUILDING
SANTA FE, NEW MEXICO 87501
(505) 827-2434

M E M O R A N D U M

TO: ALL OPERATORS OF INJECTION WELLS (SECONDARY RECOVERY, PRESSURE MAINTENANCE, DISPOSAL)

FROM: JOE D. RAMEY, DIVISION DIRECTOR

SUBJECT: PRESSURE LIMITING DEVICES

Beginning in 1975, essentially all Division Orders authorizing the use of injection wells for production or disposal purposes included a provision for equipping the well or injection system with a pressure limiting switch or device. Provisions of such orders also spelled out the particular pressure limit for the specific well or system.

Beginning in September of this year I am directing our district offices to begin a special inspection of injection wells and systems to ensure that these pressure limiting devices are in place. Failure to have these required devices installed may result in suspension of authority to inject pending their installation. Serious violations of established pressure limits may result in legal action seeking fines.

The Division will accept administrative requests to establish single pressure limits in projects where wells have been approved over time with different limits for individual wells. Applications for such a single limit should be filed with this office with one copy to the appropriate district office. The application should include any relevant data including order numbers, area or project maps, range of pressure limits, results of recent step rate tests, or any other data considered pertinent.

July 27, 1982
fd/

EXHIBIT
61

TMD202710

STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING:	)	CASE NO. 11,168
APPLICATION OF OXY USA, INC.	)	

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

BEFORE: MICHAEL E. STOGNER, Hearing Examiner

December 15th, 1994

Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Division on Thursday, December 15th, 1994, at the New Mexico Energy, Minerals and Natural Resources Department, Porter Hall, 2040 South Pacheco, Santa Fe, New Mexico, before Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

* * *

A. Yes, I have two freshwater analyses.

Q. And do we have an analysis of the water that's to be injected into the reservoir?

A. Not in the Application.

Q. It's part of the original filing in the waterflood, I assume?

A. That is correct.

Q. All right. What kind of injection pressures are you currently using with the injection wells in the project area?

A. They range from well to well, but on an average, approximately 1100 pounds.

Q. Are we within or above the .2-p.s.i.-per-foot-of-depth guideline the Division uses for surface pressure control?

A. Most of those wells have had step-rate tests run and are above the .2 p.s.i. per foot.

Q. All right. But their surface injection pressure has been authorized at a rate based upon injection step-rate tests?

A. That is correct.

Q. Does the actual injection interval change in the project area from what is currently being utilized as the injection interval?

A. No, it does not.

Q. You're currently using the lower Seven Rivers and Queen portion of the pool?

A. And the Penrose.

Q. And the Penrose.

Notifications of this Application were sent to the offset operators, to the owners of the surface, for each surface injection well, as noted on Exhibits 2 and 3 of Exhibit 3, Mr. Gengler?

A. That is correct.

Q. And to your knowledge, did you receive any objection or complaint for any of those interested parties?

A. I did not receive any.

Q. Let's take one of the injection well schematics, if you will, that's in the C-108. Find one that is typical, and go through the mechanics of how you propose to convert these producers to injection.

Q. I'll just take the first well, which is Myers Langlie-Mattix Unit Number 70 on page number 5. This is an open-hole completion.

Our plans are to -- in this particular wellbore, to clean out to TD, put a light acid job on it, run a packer with fiberglass-lined tubing and set the packer above the open-hole interval.

Q. Has the waterflood experienced any out-of-zone water flows as a result of water injection?

A. Not to my knowledge.

Q. Okay. We're not suffering any kind of operational problem with regards to injectivity of water into this particular portion of the pool?

A. No.

Q. Do you have an estimate for us, Mr. Gengler, of the anticipated value of the additional hydrocarbons to be recovered if the Division approves this project, not only as an expanded waterflood with the additional injection authority, but as a qualified enhanced oil recovery project pursuant to State statute?

A. Yes, I do.

Q. And what is that opinion?

A. We expect the value of the oil to be produced at $14.8 million.

Q. Were Exhibits 1, 2 and 3 prepared by you or compiled under your direction or supervision?

A. Yes, they were.

Q. When you -- Let's take a typical conversion of a producer to an injector. Once you have it converted, you'll establish what that pressure, injection pressure, is at the surface. And if it requires an injection pressure greater than the .2-p.s.i.-per-foot-of-depth criteria, then you go through the process of having a step-rate test, filing with the Division and getting approved?

A. Yes, we would inject below that .2 p.s.i. per foot until such time as we had a step-rate test on that particular wellbore, and then we would file that with the State to increase that injection if necessary.

Q. All right, and you would request the opportunity to be able to do that administratively in this particular waterflood?

A. That is correct.

MR. KELLAHIN: Mr. Examiner, that concludes my examination of Mr. Gengler. We move the introduction of his Exhibits 1, 2 and 3.

EXAMINER STOGNER: Exhibits 1, 2 and 3 will be admitted into evidence.

EXAMINATION

BY EXAMINER STOGNER:

Q. Mr. Gengler, I believe in your Application you want to convert 16 wells and then bring one back on line; is that correct?

A. That is correct.

Q. And which one is the one to be brought back with injection?

A. It's Well Number 134.

Q. Is that the one in Section 6?

A. That is correct.

Q. In the -- particular, in the northeast of the

FINDINGS:

(xx) Clarification of the Division's interpretation of the Statutory Unitization Act, Sections 70-7-1 through 70-7-21 NMSA 1978, (the "Act") and Order No. R-6447 is requested by Hartman and is justified due to the issues raised in this case.

(xx) If a party avails itself of the Act to unitize interests not yet voluntarily committed, however small those interests may be, such party and interests as well as all other interests in the Unit are subject to all the provisions of the Act, including Subsection F of Section 70-7-7. There is no language in the Act limiting its effect to only those interests not yet voluntarily committed to the unit.That is a consequence, whether desired or not, of availing oneself of the Act.

(xx) Subsection F of Section 70-7-7 of the Act requires that the plan or unit agreement for unit operation include a provision for carrying a working interest owner, payable out of production. Such provision is not limited and therefor applies to all interests in the unit, not just those interests that have not yet voluntarily committed.

(xx) The MLMU Unit Agreement and Unit Operating Agreement (the "Agreements") are based on Model Unit Agreements predating the enactment of the Statutory Unitization Act in New Mexico and other states. Said agreements would thus not necessarily contain a carry provision for nonconsenting working interest owners, unless later amended. Said Agreements do provide for the situation where a working interest owner does not pay its share of costs, but do not provide for a nonconsent right of working interest owners or the carrrying of a nonconsenting working interest owner, payable out of production.

(xx) Although Order No. R-6447 found that the Agreements contain the provision mandated by Section 70-7-7.F (Finding 21), such Finding was incorrect.

(xx) Section 70-7-7.F requires that the Agreements contain such a provison. Such statute operates regardless of a Division order. Said Agreements were therefore modified by Order No. R-6447, issued pursuant to the Act and which mistakenly found such a provision in the Agreements, to include such a provision. Absent any limitation on the carrying provision (and since the Division now finds there was no such provision, there is therefor no limitation), the carry should be a full carry for the operations/costs for which there was a nonconsent election.

(xx) Hartman gave timely notice of his nonconsent election and therefore had the right to go nonconsent on the operations approved by the Division in Order No. R-4680-A. Oxy shall adjust its accounting records to reflect such nonconsent election by Hartman

ORDERING:

(xx) Order No. R-6447 imposed on the Agreeements a nonconsent right and provided for the carrying, out of production, of any nonconsenting working interest owner

(xx) Hartman made a timely election to go nonconsent on the operations approved by the Division in Order No. R-4680-A. Oxy shall adjust its accounting to reflect such nonconsent election by Hartman.