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ADMINISTRATIVE LAW

MICHAEL B. BROWDE*

INTRODUCTION

The primary purpose of this section of the *Survey* is to review the past year's appellate decisions in administrative law in a way which will prove helpful to the practitioner. This discussion attempts to review the major cases in the context of existing New Mexico law and to explain how the new cases fit (or fail to fit) within the framework of pre-existing law. A brief critical comment follows, where appropriate, on the status of the law or the value of the particular case.

This treatment seeks to organize the cases traditionally, dividing administrative law into three major topics: 1) the authority of agencies to act, 2) the exercise of administrative power, and 3) judicial review of the administrative actions.¹ Subtopics may be utilized under each topic, although the dearth of appellate cases decided during any given year means that no yearly survey will cover the full gamut of administrative law.²

Three appendices have been added to aid the reader in using this material: an alphabetical index of the cases in administrative law decided during the year (Appendix A); an index arranged by government agency (Appendix B); and an index of cases arranged according to the topics used as the organizational format of this article (Appendix C).³

It is imperative to note what is not covered here. While every effort has been made to list in the appendices all the administrative cases decided during the year, every case has not been deemed worthy of treatment in the body of the article. Furthermore, the discussion does not review the substantive law of the particular agencies (that is,

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1. This organizational pattern follows the outline of leading texts, K. Davis, *Administrative Law Text* (3rd ed. 1972); B. Schwartz, *Administrative Law* (1976), and the format utilized in many of the case book treatments of the subject. See W. Gelhorn, C. Byse & P. Strauss, *Administrative Law: Cases & Comments* (7th ed. 1979).

2. If this *Survey* proves successful and is repeated in succeeding years it is anticipated that the current format would be followed. As future cases are decided under given topics those areas will be developed in the context of this outline.

3. Some cases deal with more than one administrative law topic, and where appropriate those cases will be discussed in more than one context.

public utility law, tax law, welfare law, and the like).⁴ Rather, when administrative procedure has been given more than cursory treatment or passing mention by the appellate courts, this article seeks to explain the area of law involved and to examine each case within its context.

I. AUTHORITY OF AGENCY TO ACT

A. Statutory Authority.

The touchstone for all administrative decision-making is the authority conferred on the agency by law.⁵ In most instances it is statutory authority which creates an agency's power to act,⁶ although in New Mexico certain select administrative agencies derive specific authority from the state constitution.⁷

Because an agency only has power to act in a manner consonant with the authority conferred on it by law,⁸ and because the legislative grant of authority is not always clear in a given situation,⁹ legal challenges to agency action as *ultra vires*—outside the scope of agency authority—are quite common.¹⁰ While this year's cases do not break

4. For example, most of the tax cases decided during the year dealt almost exclusively with substantive tax questions. References to administrative law questions (primarily scope of review) were so cursory that little textual treatment has been given to those cases. All the tax cases are, however, collected in the Appendices.

5. The relationship of an agency to its governing statute is comparable to that of a corporation to its charter; as the corporation is to its charter, the agency is to its enabling legislation. . . .

The statute is the source of agency authority as well as of its limits. If an agency act is within the statutory limits (or *vires*) its action is valid; if it is outside them (*ultra vires*), it is invalid. No statute is needed to establish this; it is inherent in the constitutional positions of agencies and courts.

B. Schwartz, *Administrative Law: A Casebook* 73 (1973).

6. When that is the case it is certainly fair to say as the courts often do that the "administrative agency is a creature of statute." *Soriano v. United States*, 494 F.2d 681 (9th Cir. 1974).

7. For example, the Corporation Commission, N.M. Const. art. 11; the State Department of Education, *id.* at art. 12, § 6; the Commissioner of Public Lands, *id.* at art. 13, § 2; and the State Mine Inspector, *id.* at art. 18, § 1, derive their fundamental authority from the constitution, although specific duties and powers, consonant with the constitutional grants of authority, are then conferred by statute.

8. "When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark v. Wickland*, 321 U.S. 288, 309 (1944). *See, e.g., Willoughby v. Board of Veterinary Examiners*, 82 N.M. 443, 483 P.2d 498 (1971); *Public Serv. Co. v. New Mexico Environmental Improvement Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976); *Brininstool v. New Mexico State Bd. of Educ.*, 81 N.M. 319, 466 P.2d 885 (Ct. App. 1970).

9. For example the statutory grant of authority at issue in *Parker v. Board of County Comm'rs*, 93 N.M. 641, 603 P.2d 1098 (1979), only stated that the subdivider must submit *sufficient information* to the county, and left it to the county to determine, by regulation, what would be sufficient and in what form the information ought to be submitted.

10. "Judicial review . . . enables practical effect to be given to the *ultra vires* theory

any new ground, they do illustrate some of the fundamental principles involved in the consideration of agency authority. Furthermore, the latest expressions of our appellate courts on the subject may prove to be helpful.

In *Parker v. Board of County Commissioners*,^{1 1} the court pointed out that the authority conferred on an agency by law may be general in nature, and that agency action must be measured against a statutory standard within the broad parameters of "the purpose and requirements of the Act [in question]."^{1 2} Because the applicable statute in *Parker* referred only briefly to the type of subdivision being developed, appellant argued that a more detailed county regulation exceeded the narrow statutory authority to regulate subdivisions. The court rejected such a narrow reading of the law: "Because the Section 47-6-12(B) requirement of submission of sufficient information is general, the county is left to determine what quantum of information amounts to 'sufficient information' and to specify the form for acquiring it."^{1 3} Viewing the regulation involved^{1 4} "in light of the purposes and requirements of the Subdivision Act,"^{1 5} the

upon which administrative power is based. . . . Without judicial review, statutory limits would be nothing but empty words." B. Schwartz, *supra* note 1, § 143, at 429.

The ultra vires doctrine is most often involved in challenges to the rule-making rather than adjudicative function of administrative agencies. See, e.g., *Parker v. Board of County Comm'rs*, 93 N.M. 641, 603 P.2d 1098 (1979); *Bokum Resources v. New Mexico Water Quality Control Comm'n*, 93 N.M. 546, 603 P.2d 285 (1979). The ultra vires problem is addressed by section 10(e)(2)(C) of the Federal Administrative Procedures Act [hereinafter referred to as Federal APA], which requires reversal of agency action "in excess of statutory jurisdiction, authority or limitations, or short of statutory requirement." 7 U.S.C. § 706(2)(C) (1976). See N.M. Stat. Ann. § 12-8-22(A)(2) (1978).

Other review standards, most notably the arbitrary and capricious standard, 7 U.S.C. § 706(2)(A) (1976); N.M. Stat. Ann. § 12-8-22(A)(6) (1978), and the substantial evidence standard, 7 U.S.C. § 706(2)(E) (1976); N.M. Stat. Ann. § 12-8-22(A)(5) (1978), are more generally applicable to adjudicatory proceedings. For a discussion of cases involving judicial review of adjudicatory fact finding, see text accompanying notes 169-200 *infra*.

11. 93 N.M. 641, 603 P.2d 1098 (1979).

12. *Id.* at 642, 603 P.2d at 1099. Plaintiff Parker subdivided land under state law and applicable county regulations. He submitted the required disclosure statement and made certain agreements as required by the county. When he failed to meet those obligations, and the county sought to revoke his permit, he challenged the applicable regulations which allowed the county to suspend its approval if the developer failed to honor his commitments. Plaintiff attacked the regulation as being in excess of the authority conferred by statute.

13. *Id.* at 643, 603 P.2d at 1100.

14. The section of the regulation attacked reserved to the Commission, subsequent to the approval of a subdivision plat, the power to suspend or revoke approval if the developer failed to comply with a material provision of the required disclosure statement upon which the Commission relied. *Id.*

15. *Id.* The clear purpose of the Act was to allow counties to regulate subdivisions, and the statute gave the county commission power to adopt regulations "to ensure that development is well planned, giving consideration to population density in the area." N.M. Stat. Ann. § 47-6-9(A)(10) (1978).

court found that the regulation was a "reasonable exercise of the delegated power,"¹⁶ thereby upholding the specific power exercised as falling within the general power conferred.¹⁷

Not only may the power conferred be general in nature, but "[t]he authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy."¹⁸ This principle was reaffirmed this year in *Bokum Resources Corp. v. New Mexico Water Quality Control Commission*.¹⁹ In *Bokum* the court invalidated some Commission regulations,²⁰ but upheld the regulation which placed the burden on the discharger of pollutants to demonstrate that its discharge would not violate Commission standards. In upholding this regulation, the court referred to the broad objectives of the Water Quality Act "to abate and prevent" water pollution, and found the requirements of the regulation to be "well within the statutory mandate."²¹

This portion of the *Bokum* opinion also relied on the corollary principle that, when enacting regulations under a broad delegation of authority, agencies must engage in administrative interpretations of

16. 93 N.M. at 643, 603 P.2d at 1100. The court found that the regulation prevented subdividers from violating the Act after approval of the plat has been given, noting that "the county could not consistently require a disclosure statement for approval and then not insure compliance therewith." *Id.*

17. A major administrative law doctrine involving the conferring of authority on an agency involves the question of whether the statutory delegation itself is constitutionally valid. The non-delegation doctrine precludes, on separation of powers principles, the delegation to executive agencies of those matters which are within the exclusive province of the legislature or the courts. *E.g.*, *State v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957) (adjudication of "private" as opposed to "public" rights within the exclusive province of the courts).

The non-delegation doctrine in its purest form, however, stems from the theoretical notion derived from agency law that the legislature, as a delegatee of power conferred by the people through the constitution cannot in turn delegate authority to others. *Cf. Shankland v. Mayor of Washington*, 30 U.S. 390, 395 (1831) ("a delegated authority cannot be delegated"). The practical necessities of modern governmental life has necessitated a moderation of this principle so that the modern non-delegation doctrine prohibits only unrestricted delegation which grants totally unbridled discretion to the agency. To avoid the non-delegation trap, a delegation must contain some statutory standard, *Lee v. Hartman*, 69 N.M. 419, 367 P.2d 918 (1961), or intelligible principle, *State v. New Mexico State Authority*, 76 N.M. 1, 411 P.2d 984 (1966), which will provide legislative guidance to administrative departments.

As a state with a firmly-rooted separation of powers tradition, New Mexico has a well developed body of non-delegation law. *See, e.g.*, *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976); *State v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957). There were no cases decided in this area, however, during the current year.

18. *Public Serv. Co. v. New Mexico Environmental Improvement Bd.*, 89 N.M. 223, 227, 549 P.2d 638, 642 (Ct. App. 1976).

19. 93 N.M. 546, 603 P.2d 285 (1979). The *Bokum* court adopted the *Public Service Co.* standard as its own. 93 N.M. at 555, 603 P.2d at 294.

20. The court invalidated the regulation which defined "toxic pollutants" as constitutionally vague. That portion of the opinion is discussed in a subsequent section of this *Survey*. *See* text accompanying notes 61-74 *infra*.

21. 93 N.M. at 555, 603 P.2d at 294.

their authorizing statutes, and “‘[r]eviewing Courts [should] overturn the administrative interpretation of statutes by appropriate agencies only if they are clearly incorrect.’”²² While the *Bokum* court viewed this principle in terms of the limited scope of review the court ought to apply, in *Miller v. Bureau of Revenue*²³ the court elaborated on this principle: “the construction given a statute by the administrative agency charged with the enforcement of it is a significant factor to be considered by the courts in ascertaining the meaning of such statute.”²⁴

The delegated authority, then, can be broad and general. It must be construed to permit the carrying out of the statutory purpose and, to the extent that deriving the authority requires statutory interpretation, great weight must be given to the agency’s interpretation of its own statute. Therefore, although *ultra vires* attacks are quite frequent, successes are less so, and the cases decided this year demonstrate this point.²⁵

B. Federal Authority in State Administered Federal Programs.

A further question involving the authority of the agency comes into play when a state administrative agency carries out federal functions under a cooperative federal-state program.²⁶ In these programs,

22. *Id.* (quoting with approval *Pharmaceutical Mfrs. Ass’n v. New Mexico Bd. of Pharmacy*, 86 N.M. 571, 576, 525 P.2d 931, 936 (Ct. App.), *cert. denied*, 86 N.M. 657, 526 P.2d 799 (1974)).

23. 93 N.M. 252, 599 P.2d 1049 (Ct. App.), *cert. denied*, 92 N.M. 532, 591 P.2d 286 (1979).

24. 93 N.M. at 254, 599 P.2d at 1051 (quoting *California Drive In Restaurant Ass’n v. Clink*, 22 Cal. 2d 287, 294, 140 P.2d 657, 661 (1943)).

[T]he administrative interpretation is to be given great weight—not merely as the opinion of some men or even of a lower tribunal, but as the opinion of a body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it. This may be particularly significant when the legislature deals with complex matters calling for expert knowledge and judgment.

Report of the Attorney General’s Committee on Administrative Procedure 90-91 (1941). For a more detailed discussion of the scope of review of questions of law, see text accompanying notes 150-68 *infra*.

25. *But see* *Strebeck Properties, Inc. v. Bureau of Revenue*, 93 N.M. 262, 599 P.2d 1059 (Ct. App.), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979); *Miller v. Bureau of Revenue*, 93 N.M. 252, 599 P.2d 1049 (Ct. App.), *cert. denied*, 92 N.M. 532, 591 P.2d 286 (1979) (statute unambiguous and interpretation of the agency clearly erroneous).

26. Most of these involve public welfare programs initiated and founded by the federal government and administered by the states. The Supreme Court has denominated such enterprises as “cooperative federalism.” *King v. Smith*, 392 U.S. 309 (1968). Another similar area of the law involves the national environmental protection effort, whereby the federal government sets minimal standards which the states are required to meet, and in which the states may play enforcement roles. *See, e.g., Kennecott Copper Corp. v. New Mexico Environmental Improvement Bd.*, 94 N.M. 610, 614 P.2d 22 (Ct. App.), *cert. denied*, _____ N.M. _____, 615 P.2d 992 (1980) (adherence to federal requirements does not compel conclusion that agency violated state law).

state administrative regulations must be measured against federal as well as state statutory standards, as is illustrated by two cases decided this year involving the same Department of Human Services regulation. In *Nolan v. C. de Baca*²⁷ and *Barela v. New Mexico Department of Human Services*²⁸ the courts held invalid the Department's community property regulation which deemed a step-father's income available to meet the needs of welfare eligible stepchildren.²⁹ The attack focused not on the state law granting authority to the Department to enact regulations³⁰ but rather on the federal law which created the program³¹ and on the implementing federal regulations.³² In *Nolan*, the federal court of appeals held that the Department's "community property regulation obviously contravenes the federal act and HEW's regulation,"³³ and in *Barela* the state court of appeals agreed.³⁴

The *Barela* court made it clear that, when measuring a state regula-

27. 603 F.2d 810 (10th Cir. 1979), *cert. denied*, 444 U.S. 1068 (1980).

28. 94 N.M. 288, 609 P.2d 1244 (Ct. App. 1979).

29. The state regulation read as follows:

A. *Availability of Income*—In determining whether the budget group is eligible for AFDC on the condition of need, income currently received by members of the household is considered available to the budget group in the amounts specified below. . . .

1. *Division of Income between Spouses*—In keeping with the State's community property law, one half (½) the community property income of spouses is considered available to each spouse when they live together. . . .

New Mexico Department of Human Services Manual § 221.832(A)(1).

30. Indeed the state authorizing statute specifically references the applicability of federal supremacy:

Any section of the NMSA 1978 relating to public assistance which is in conflict with the provisions of the federal act or the federal Food Stamp Act, as may be amended from time to time, and federal regulations issued pursuant thereto, shall be suspended in its operation if the attorney general certifies that such conflict exists.

N.M. Stat. Ann. § 27-2-13 (1978).

31. The Aid to Families with Dependent Children program is established under the Social Security Act of 1935, 42 U.S.C. § § 602-610 (1976).

32. The applicable federal regulation was previously upheld as a valid exercise of federal administrative power consonant with the federal law. *Lewis v. Martin*, 397 U.S. 552 (1970). That regulation limits the states to consider *only* actual contributions to the family support except for income of natural or adoptive parents or step parents with a legal duty to supply support. *See* 45 C.F.R. § 233.90(a) (1979).

33. 603 F.2d at 813.

34. In an interesting later development, another panel of the court of appeals in *Duran v. Department of Human Servs.*, ____ N.M. ____, 619 P.2d 1240 (Ct. App. 1979), ruled contrary to *Barela* and *Nolan*. As a result of the conflict in opinions a third case was certified to the state supreme court for resolution of the conflict. In that case, *Harper v. Department of Human Servs.*, 19 N.M. St. B. Bull. 964 (Sept. 30, 1980), the supreme court struck down the regulation, reaffirming *Barela*, and on the same day the court reversed the court of appeals in *Duran*, ____ N.M. ____, 619 P.2d 1232 (1980).

tion against applicable federal law as opposed to state law, it is federal supremacy, rather than *ultra vires*, that controls: "State regulations concerning AFDC programs cannot contravene the federal law and valid federal regulations implementing those programs. In cases of conflict the state regulations are rendered invalid by the Supremacy Clause of the United States Constitution."³⁵

Thus, when state agencies seek to exercise their regulatory power, the question is always present whether the particular regulation is consonant with the authority conferred by state law. Furthermore, when state agencies are administering federal programs, the question of legal authority rises to a level of federal constitutional concern. While the cases decided this year add little to these well developed areas of the law, they clearly demonstrate the way in which these bedrock administrative law principles are applied.

II. THE EXERCISE OF ADMINISTRATIVE POWER

A. *Gathering and Disseminating Information.*

Without the ability to gather sufficient information, administrative agencies, like other institutions, would be unable to perform their essential functions.³⁶ Most needed information is readily available from public governmental sources or is willingly supplied by cooperative private citizens. At times, however, compulsion is required to acquire information, and in those instances agencies must resort to the powers delegated to them by law.³⁷

One of the most direct ways to obtain information is by subpoena. This power to compel testimony or the production of documents is often granted to an agency by statute. Normally, however, the agency has no contempt power to enforce its own subpoenas, and must resort to the courts to obtain an enforcement order. If that order is

35. 94 N.M. at 290, 609 P.2d at 1246. The doctrine of supremacy applies with equal force to claims of conflict between state law or regulations with federal regulations. A valid federal regulation becomes part of the fabric of federal law and must be given such weight under our federal system. See *Lewis v. Martin*, 397 U.S. 552 (1970).

36. B. Schwartz, *supra* note 1, at 87.

37. Many—but not all—administrative agencies have been authorized by statute to obtain factual information (1) by issuing subpoenas which direct the recipient to testify or to produce documents they possess, (2) by inspecting records or premises either periodically or randomly, or (3) by requiring the filing of reports. W. Gelhorn, C. Byse & P. Strauss, *supra* note 1, at 516.

Administrative agencies do not have unrestricted power to gather information. The unenforceability of *ultra vires* acts, see text accompanying notes 5-21 *supra*, insures that a court will not compel obedience to a command which is not authorized by law.

disobeyed, the court may issue a contempt order.³⁸ Needless to say, the administrative subpoena, if not carefully controlled, could lead to the invasion of privacy and of other constitutionally protected rights. It is therefore the duty of the enforcing courts to strike a balance between the agency's need for information and the protection of citizens from the officious intermeddling³⁹ of governmental agencies.⁴⁰

Once an agency has gathered information, a concomitant problem of personal rights comes into play, especially when information has been compelled or obtained under a pledge or veil of government confidentiality.⁴¹ The problem arises when other persons claim some right to the information and the government finds itself caught on the horns of a dilemma—it must seek to honor the public's right to acquire information from its government while at the same time protecting its own pledge or some lawful shield of confidentiality.⁴²

38. The Interstate Commerce Commission Act subpoena enforcement provision is typical and served as a model for such procedures:

[A]ny of the district courts . . . may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this chapter, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

49 U.S.C. § 12(3) (1970).

39. "Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 213 (1946).

40. To protect persons from unwarranted subpoenas the courts insist that: the subpoena must be issued in pursuit of an authorized objective, the evidence sought must be germane to a lawful subject of inquiry, the demands made must not be unduly vague or unreasonably burdensome, the administrative command must be issued in proper form, and, of course, the administrative command must not ignore a privilege to remain uncommunicative. *W. Gelhorn, C. Byse & P. Strauss, supra* note 1, at 559-72.

41. In many instances the government in carrying out its regulatory functions receives data which include trade secrets and other confidential business information. Much of that information is given to the government under pledges of confidentiality. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Other information may involve matters of personal privacy, *see Department of Air Force v. Rose*, 425 U.S. 352 (1976), to say nothing of the vast amount of government information which, for one reason or another, the government itself has a legitimate interest in keeping confidential. *See NLRB v. Sears Roebuck & Co.*, 421 U.S. 132 (1975).

42. This problem came crashing down on the federal government with the passage of the Freedom of Information Act in 1967. 5 U.S.C. § 552 (1976). *See generally* Note, *The Freedom of Information Act: A Seven-year Assessment*, 74 Colum. L. Rev. 895 (1974). New Mexico, like most states, does not have a freedom of information act. The public meetings law, however, N.M. Stat. Ann. § § 10-15-1 to -4 (1978), which makes it more difficult for agencies to reach their decisions behind closed doors, complicates agency life when confidentiality is at issue and presents something of the same dilemma.

Again, it is the duty of the courts to strike the essential balance between these interests.⁴³

This year, in two separate cases involving the same agency, the supreme court had to confront both of these issues. In *In re Investigation No. 2 of the Governor's Organized Crime Prevention Commission*,⁴⁴ the court dealt with the right of the Commission to get information notwithstanding a claim of fifth amendment privilege. In *In re Motion for Subpoena Duces Tecum to the Governor's Organized Crime Prevention Commission*,⁴⁵ the court was confronted with an attempt to obtain documents from the Commission when the Commission claimed a competing need for confidentiality.

In *In re Investigation No. 2*, the court decided the issue of when the privilege against self incrimination must be raised or waived with respect to the production of documents subpoenaed by an administrative agency.⁴⁶ Following a well established line of cases from other jurisdictions, the court adopted as the New Mexico rule the principle that claims of privilege need only be raised when the "information is specifically requested either in the form of questions or documents, by the investigating agency."⁴⁷ Claims of privilege are,

43. At the federal level, litigation centers around the exceptions to the Freedom of Information Act, *see, e.g.*, *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), and the interrelationship between the Act and such independent protective statutes as the Trade Secrets Act, 18 U.S.C. § 1905 (1976), and the Federal Privacy Act, 5 U.S.C. § 552(a) (1976). *See Chrysler v. Brown*, 99 S. Ct. 1705 (1979); *Department of Air Force v. Rose*, 425 U.S. 352 (1976).

In New Mexico similar considerations come into play in litigation over the exceptions to the public meetings law. *See State v. Hernandez*, 89 N.M. 698, 556 P.2d 1174 (1976). Furthermore, statutes like the Organized Crime Act, N.M. Stat. Ann. §§ 29-9-1 to -17 (1978), raise their own questions of governmental confidentiality which require judicial balancing. *See text accompanying notes 55-57 infra*.

44. 93 N.M. 525, 602 P.2d 622 (1979).

45. 94 N.M. 1, 606 P.2d 539 (1980).

46. Mr. Jaramillo was subpoenaed to appear before the Commission and to bring certain documents. When he failed to appear the Commission sought an order to enforce the subpoena. At the hearing Jaramillo argued only that production would be burdensome and that the Commission already had the information. The trial court ordered the subpoena to be enforced. Only when he appeared at the hearing did he refuse to produce the documents in question on fifth amendment grounds.

The district court found him in contempt, holding that the fifth amendment privilege was waived when not raised at the earlier subpoena enforcement hearing. *See* 93 N.M. at 526, 602 P.2d at 623.

47. *Id.* at 527, 602 P.2d at 624. The court began with the important principle that "[w]aiver of constitutional rights is not lightly to be inferred." *Id.* (quoting *Smith v. United States*, 337 U.S. 137, 150 (1949)). Finding that Jaramillo could not have "known the incriminatory aspects of specific documents until the hearing, when . . . [they] could be considered in the contexts of the specific questions asked," 93 N.M. at 526, 602 P.2d at 623, the court reversed, concluding that "waiver was 'lightly' inferred by the trial court." *Id.* at 527, 602 P.2d at 624.

It, of course, assisted Jaramillo's case that at the enforcement hearing, his counsel had

then, a bar to agency information gathering, and *In re Investigation No. 2* makes clear for the first time in New Mexico just when and how such a claim must be made.

In re Motion for Subpoena focuses on the Commission's claim of confidentiality when its records are sought by private parties.⁴⁸ The court initially focused on that issue,⁴⁹ but then, *sua sponte*, directed the parties to brief the issue of the constitutionality of the statute which appeared to give the supreme court original jurisdiction over the matter.⁵⁰ The court held the statute unconstitutional,⁵¹ and then went on to consider just how the Commission's needs for confidentiality were to be balanced against the need for producing Commission information.

Exercising its power of superintending control over the "pleading, practice and procedure in all courts,"⁵² the court authorized district courts to entertain applications for subpoenas *duces tecum*.⁵³ The court mandated guidelines for the district courts to: 1) "determine . . . whether the records . . . of the . . . Commission may be subpoenaed, . . . [2] if so, upon what conditions" but in any event held that disclosure should only be ordered after 3) "an *in camera* hearing to determine what records . . . shall be produced, bearing in mind the . . . [statutes] which are calculated to protect confidentiality in furtherance of the purposes of the Crime Prevention Act."⁵⁴ While per-

specifically reserved the privilege by noting that before the Commission he would assert whatever privileges were available in response to questions, and that at the hearing before the Commission he did so. See 93 N.M. at 526, 527, 602 P.2d 623, 624. The former fact (reserving the privilege at the enforcement hearing) cannot be material to the result, however, since the court finds the claim of privilege premature at that point. *Id.*

48. While the opinion does not make it clear, the cause arose when private litigants in another action sought Commission documents for purposes which were claimed relevant to the other action. They did so by way of an original motion in the supreme court because N.M. Stat. Ann. § 29-9-8(B) (1978) provided that: "The records . . . of the commission shall not be subject to subpoena except by order of the Supreme Court of New Mexico."

49. The court initially ordered the Commission's records turned over to the court for *in camera* inspection, looking toward ultimate production to the movants. 94 N.M. at _____, 606 P.2d at 539.

50. N.M. Stat. Ann. § 29-9-8(B) (1978).

51. The court referred to N.M. Const. art. 11, § 3, which prescribes the original jurisdiction of the court and its superintending control, as well as N.M. Const. art. 11, § 2, which confers appellate jurisdiction on the court. It is unclear whether the court struck down the statute as an unconstitutional attempt by the legislature to expand the original jurisdiction of the court, see *Marbury v. Madison*, 5 U.S. 137 (1803), or whether it did so because the statute represents an unconstitutional attempt by the legislature to control judicial procedures. See *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976). The court's holding is susceptible to a conclusion that the statute contravened both constitutional prohibitions. See 94 N.M. at _____, 606 P.2d at 540.

52. 94 N.M. at _____, 606 P.2d at 540.

53. The court pointed out that the procedure therefore was contained in N.M.R. Civ. P. 45.

54. 94 N.M. at _____, 606 P.2d at 541.

haps sidestepping the ultimate question,⁵⁵ the supreme court at least intimated that, under some limited circumstances, Commission documents can be obtained,⁵⁶ as long as that confidentiality which is truly essential to the working of the Commission is maintained. Thus, even in this sensitive area, the court recognized the importance of balancing governmental confidentiality against the particularized need for disclosure of governmental information.⁵⁷

B. Rules and Rule-making.

The essential administrative functions are either rule-making or adjudicative.⁵⁸ Since diverse consequences may flow from these different functions, the distinction between them is important.⁵⁹ Invariably, the question is a definitional one,⁶⁰ and this year the supreme court had occasion to discuss in some detail the definition of "rule." In *Bokum Resources Corp. v. New Mexico Water Quality Control Commission*,⁶¹ the court also reviewed when a rule is penal in nature such that the vagueness doctrine of constitutional law becomes applicable to the question of its validity.

In *Bokum* the court considered the question of whether "standards" adopted by the Commission⁶² were rules within the meaning

55. The court clearly did not hold that Commission records are subject to subpoena, and left that question to be determined in the first instance by a district court confronted with a Rule 45 application.

56. It is hard to read the court's opinion, with its careful attention to district court procedures and the nature of the considerations the district court must weigh, without concluding that the supreme court envisioned some circumstances under which production should be ordered.

57. See *United States v. Nixon*, 418 U.S. 683 (1974).

58. Rule-making applies to the legislative function of agencies in formulating requirements which are general in nature, prospective in application, and applicable to a broad class of individuals. See 5 U.S.C. § 553 (1976); N.M. Stat. Ann. § 12-8-3 (1978); *American Airlines, Inc. v. CAB*, 359 F.2d 624, 636 (D.C. Cir.) (Burger, J., dissenting), cert. denied, 385 U.S. 843 (1966). Adjudication, on the other hand, applies to the judicial function of agencies in enforcing liabilities against particular individuals by the application of laws and rules to present or past facts. See 5 U.S.C. § 554 (1976); N.M. Stat. Ann. § 12-8-10 (1978); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908) (Holmes, J.).

59. Rule-making does not require a hearing as a matter of constitutional compulsion while adjudication does. Furthermore, the procedures in rule-making hearings tend to be informal whereas adjudicatory hearings are more formal and trial-like in nature. See generally B. Schwartz, *supra* note 1, at 143-44.

60. Rule-making results in a rule, which the Federal APA defines in part as "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy." 5 U.S.C. § 551(4) (1976); see N.M. Stat. Ann. § 12-8-2(G) (1978). An adjudication, on the other hand, gives rise to an order which the Federal APA defines as "a final disposition . . . of an agency in a matter other than rule-making but including licensing." 5 U.S.C. § 551(6) (1976); see N.M. Stat. Ann. § 12-8-2(I) (1978).

61. 93 N.M. 546, 603 P.2d 285 (1979).

62. At issue were standards for selenium, totally dissolved solids, and definitions of toxic pollutants. 93 N.M. at 554, 603 P.2d at 293.

of the statute which conferred appellate review jurisdiction on the court of appeals.⁶³ The supreme court rejected the distinction between standards and rules,⁶⁴ and found that the standards enacted by the Commission met the definitional requirements of the State Rules Act: "an enactment by an agency designed to have the force and effect of law and to control the actions of persons who are being regulated by the agency."⁶⁵ The court therefore held that "the standards for the evaluation of waste water . . . were adopted as rules and are appealable to the Court of Appeals."⁶⁶ The court then specifically overruled a prior court of appeals decision⁶⁷ which held that there was no right of appeal from the adoption of standards by the Commission.⁶⁸

In its consideration of Bokum's argument that the definition of toxic pollutants was unconstitutionally vague,⁶⁹ the court had to

63. The applicable statute reads in pertinent part: "Any person who is or may be affected by a regulation adopted by the commission may appeal to the court of appeals for further relief." N.M. Stat. Ann. § 75-6-7(A) (Repl. 1979).

The court of appeals had held that the statute "provides for an appeal . . . only from the promulgation of regulations," not standards. 93 N.M. at 553, 603 P.2d at 292. The court of appeals defined standards as "the criteria for judging whether given levels of performance have been achieved," and regulations as "the rules of procedure by which a course of conduct or specific acts are directed or controlled according to certain standards." *Id.*

Two other issues involved in *Bokum* are discussed elsewhere in this *Survey*. The issue of agency action in excess of conferred powers is covered in a previous section dealing with the statutory creation of agency authority. See text accompanying notes 18-25 *supra*. The requirement of stating the reasons for enactment of a rule is dealt with in a subsequent section. See text accompanying notes 102-106 *infra*.

64. Bokum argued persuasively that if the court of appeals could not review "standards," then an aggrieved citizen would be required to violate them and risk criminal penalty in order to challenge them. 93 N.M. at 553, 603 P.2d at 292.

65. *Id.* The State Rules Act defines a rule as any "rule, regulation, order, standard, statement of policy. . ." N.M. Stat. Ann. § 14-4-2(C) (1978). The court concluded the Rules Act gave clear indication of what the legislature intended for the definition of agency rules.

66. 93 N.M. at 553, 603 P.2d at 291. The court made much out of the fact that the standards at issue were adopted following all the procedures required by the State Rules Act, including filing with the appropriate record center. See N.M. Stat. Ann. § 14-4-4, -5 (1978). The court may have somewhat overstated the case, however, in concluding that "[a] standard is a rule, if the proper procedure has been followed in promulgating it." 93 N.M. at 553, 603 P.2d at 291. Surely, the court does not mean to suggest that the mere following of adoption and filing requirements may transform non-rules into rules, and conversely, the court cannot mean that rules are transformed into non-rules by agency failure to file them with the state library.

67. *Taos Ski Valley Water & Sanitation Dist. v. New Mexico Water Quality Control Comm'n*, 91 N.M. 203, 572 P.2d 550 (Ct. App. 1977).

68. The court also went on to uphold the selenium and total dissolved solids standards, and found that the toxic pollutants standards had to stand or fall as rules. 93 N.M. at 554, 603 P.2d at 293.

69. Bokum argued that the standard defining toxic pollutants as contaminants which "on the basis of information available to the director or the commission" would cause death or other dire results, leaves the discharger without a discernible standard, thereby subjecting it to criminal penalties without adequate notice required by due process. 93 N.M. at 548-49, 603 P.2d at 287-88.

grapple with the difficult problem of when and how the vagueness doctrine should apply to agency rules. Given the seriousness of the penalties involved,⁷⁰ the court readily accepted that the regulation was penal in nature, and concluded that the vagueness doctrine, developed in statutory cases,⁷¹ must apply with equal force to agency rules. The court then stated the appropriate due process test for determining vagueness to be whether "a penal statute or regulation which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application."⁷² The court pinpointed the gravamen of the vagueness problem to be that "regulations . . . [which] place a penalty upon completed acts . . . [must be] sufficiently definitive to give notice as to what conduct is necessary to trigger those penalties."⁷³ Noting that any doubt about the meaning of a penal statute must be construed against the state, the court had little difficulty in declaring the toxic pollution standard "unconstitutionally vague on its face."⁷⁴

Bokum, therefore, defines agency rules to include standards and any other agency formulations which have the force and effect of law. But *Bokum* also limits the enforceability of agency rules which are penal in nature by a full and forceful application of the vagueness doctrine to the interpretation of those rules.

C. The Process of Proof.

One of the most significant concerns in adjudicatory hearings is the process by which information is assembled to form the record upon which a final administrative decision must rest.⁷⁵ Whatever the

70. The statute subjects a discharger to a fee of not less than \$300 per day nor more than \$10,000 per day or imprisonment for a period not exceeding one year or both. N.M. Stat. Ann. § 74-6-5(P) (1978).

71. "Most of the cases dealing with the vagueness doctrine construe statutes rather than regulations. However, our courts and others apply the same legal principles to both." 93 N.M. 549, 603 P.2d at 288.

72. *Id.* The court reviewed a number of state and federal cases which have applied the vagueness doctrine, but none were more persuasive than *CPC International, Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975). The *Train* court struck down an EPA waste treatment standard found to be too vague to warn the industry or a plant operator of the scope of prohibited conduct.

73. 93 N.M. at 551, 603 P.2d at 290. See generally *Amsterdam, The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. L. Rev. 67 (1960); Note, 62 Harv. L. Rev. 77 (1948).

74. 93 N.M. at 552, 603 P.2d at 291.

75. As might be expected there is much debate among the experts over when, and under what circumstances, agencies' adjudications ought to be bound by the protective devices of court-like trials, as opposed to less formal procedures. See, e.g., Westwood, *Administrative Proceedings: Techniques of Presiding*, 50 A.B.A.J. 659 (1964); Boyer, *Alternatives to Administrative Trial-type Hearings for Resolving Complex Scientific, Economic and Social Issues*, 71 Mich. L. Rev. 111 (1972).

ultimate limits of due process or particular statutory requirements may be, one basic premise is that the decision must be based on the evidence adduced at the hearing.⁷⁶ While such a requirement does not preclude the use of expert or other reports developed outside the hearing, it does necessitate that such reports be subject to review and contest by the opposing party.⁷⁷

In *Hillman v. Health & Social Services Department*,⁷⁸ the court of appeals had occasion to deal with the use of extensive medical reports as a basis for determining eligibility for temporary disability payments under the state's General Assistance Program.⁷⁹ The case arose when the recipient's benefits were terminated because of her refusal to submit to further medical examinations.⁸⁰ The court found Hillman's refusal to be justified because the Department had failed to inform her of her right to review and contest any medical reports which would be considered by the hearing examiner.⁸¹ The court therefore held the Department's action invalid.⁸²

Central to the court's decision were the following conclusions:

- 1) termination of benefits "must be based on a hearing which fully protects the claimant's opportunity to present his case"⁸³;
- 2) termination of benefits "can't be based upon any information other than that contained in the record"⁸⁴; and

76. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970): "[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing."

77. See, e.g., *Richardson v. Perales*, 402 U.S. 389 (1971). The Federal APA provides for such review only inferentially. 5 U.S.C. § 556(d) (1970); see N.M. Stat. Ann. § 12-8-11(C) (1978).

78. 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979).

79. N.M. Stat. Ann. §§ 27-2-1 to -40 (1978 & Supp. 1980).

80. The initial notice of termination was based upon a statement by a doctor that appellant was no longer disabled. At the end of the fair hearing at which the evidence admitted included the medical statement, the hearing officer referred everything to the Department's Incapacity Review Unit for a recommendation. That Unit concluded that the submitted information was insufficient and recommended additional medical examinations. "Acting upon the belief that the decision . . . was to be made on evidence introduced outside the fair hearing, appellant refused to consent to the requested examinations." 92 N.M. at 481, 590 P.2d at 180.

81. *Id.* at 481-82, 590 P.2d at 180-81. The court found support for the placement of this duty on the Department in the general language of the Department's own regulations: "The right to a fair hearing includes the right to be advised of the nature and availability of such a hearing. . . ." New Mexico Department of Human Services Manual § 275.31. This burden may in fact be placed on the Department as a matter of constitutional compulsion. See *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970): "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."

82. The court set aside the termination, ordered appellant reinstated to General Assistance Benefits retroactively, directed the Department to inform appellant of her right to examine any medical reports, and ordered the Department to continue her benefits until terminated in accordance with the law. 92 N.M. at 484, 590 P.2d at 183.

83. *Id.* at 482, 590 P.2d at 181.

84. *Id.*

- 3) written information can only be made part of the record if it is available to the claimant or his representative, because failure to do so would violate the claimant's right "to know, prepare or meet . . . [the] issues or matters considered,"⁸⁵ which are essential to a claimant's opportunity to present his case.

While based solely on a reading of the Department's regulations,⁸⁶ this reasoning comports with general administrative law principles which are well established as matters of statutory⁸⁷ and constitutional⁸⁸ law.

D. The Decision-making Process.

Fundamental to the decision-making process in the adjudicatory context is the concept, implicit in due process, that the case must be heard by an impartial decision-maker.⁸⁹ After *Goldberg v. Kelly*⁹⁰ elevated the matter of an independent hearing examiner to an explicit matter of due process, the question was inevitably raised whether a hearing examiner employed by the department would satisfy the due process test. In an earlier case, *Seidenberg v. New Mexico Board of Medical Examiners*,⁹¹ the supreme court had held that medical license revocation hearings could be held before the same board which brought the charge.⁹² This year, in *C & D Trailer Sales v. Taxation & Revenue Department*,⁹³ the court of appeals was confronted with a claim that having a tax protest heard before an employee of the Taxation and Revenue Department violated due pro-

85. *Id.* at 482-83, 590 P.2d at 181-182 (quoting *Transcontinental Bus System v. State Corp. Comm'n*, 56 N.M. 158, 162, 241 P.2d 829, 831 (1952)).

86. The court expressly declined to rule on Appellants' statutory and due process claims 92 N.M. at 481, 590 P.2d at 180.

87. *See, e.g.*, *Richardson v. Perales*, 402 U.S. 389 (1971) (Social Security Act).

88. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292 (1937) (Cardozo, J.).

89. *E.g.*, *In re Murchison*, 349 U.S. 133 (1955); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Reid v. New Mexico Bd. of Examiners*, 92 N.M. 414, 589 P.2d 198 (1979).

90. 397 U.S. 254 (1970). In the context of its due process discussion the Court concluded, "[a] nd of course an independent decision maker is essential." *Id.* at 271; *see Morrissey v. Brewer*, 408 U.S. 471 (1972).

91. 80 N.M. 135, 452 P.2d 469 (1969).

92. *Seidenberg* involved the revocation of a professional license under the Uniform Licensing Act. N.M. Stat. Ann. §§ 61-1-1 to -32 (1978) (former version at N.M. Stat. Ann. §§ 67-26-1 to -31 (Repl. 1974)). The Act provides that the licensing board which brings charges under N.M. Stat. Ann. § 61-1-4 (1978) may hold hearings under the Act, *id.* § 61-1-7, and render disciplinary decisions, *id.* § 61-1-13. Applying the doctrine of necessity—disqualification will not be permitted to destroy the only tribunal with the power to make the decision—the *Seidenberg* court held "[t]he fact that the changes are made by the same body which tries the issues does not, in itself, operate as a disqualification." 80 N.M. at 139, 452 P.2d at 473.

93. 93 N.M. 697, 604 P.2d 835 (1979).

cess because the hearing officer was not neutral. Relying on limiting language in *Goldberg*⁹⁴ and subsequent case law from another jurisdiction,⁹⁵ the court held that the mere fact that the hearing officer was employed by the agency does not, standing alone, violate due process.⁹⁶

Equally essential to due process in the adjudicatory context is the notion that "the decision-maker should state the reasons for his determination and indicate the evidence he relied on."⁹⁷ Similarly, in the rule-making area, while not constitutionally required,⁹⁸ reasons for the rule need be stated.⁹⁹ The requirement that in rule-making reasons for the rule must be stated is found either in specific statutes,¹⁰⁰ or as an extension of the judicial power to review agency rule-making.¹⁰¹

In *Bokum Resources Corp. v. New Mexico Water Control Commission*,¹⁰² the court affirmed an earlier position taken by the court of appeals that, while formal findings are not required, "the record

94. *Id.* at 700, 604 P.2d at 838. The Court in *Goldberg* stated: "We agree with the district court that prior involvement in some aspects of the case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review." 397 U.S. 254, 271 (1970).

95. See *Matthew v. Juras*, 519 P.2d 402 (Or. App. 1974).

96. The doctrine of necessity relied on in *Seidenberg* did not apply in *C & D Trailer Sales* because unlike the licensing charge, the tax assessment is not brought by the person hearing the protest. Some state statutes do provide for an independent hearing examiner from outside the agency. Under the Liquor Control Act, for example, disciplinary proceedings are conducted by independent hearing examiners appointed by the Governor. N.M. Stat. Ann. § 60-8-6(F) (1978).

Under the Federal APA every effort has been made to insulate administrative law judges from their agencies in an effort to insure independence. See 5 U.S.C. § 3105, 5362, 7521 (1976). This modern development toward hearing examiners totally independent of the agencies is not, however, uniformly applauded. See W. Gelhorn, C. Byse & P. Strauss, *supra* note 1, at 758-59. See generally Davis, *Judicialization of Administrative Law: The Trial-type Hearing and the Changing Status of the Hearing Office*, 1977 Duke L.J. 389.

97. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). As *Goldberg* makes clear this requirement is essential to insure that the decision maker's conclusion "rests solely on the legal rules and evidence adduced at the hearing." *Id.*

98. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

99. The Court in *Overton Park* noted that where the record does not "disclose the factors that were considered . . . it may be necessary . . . to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard." 401 U.S. at 420.

100. The Federal APA requires that rules shall incorporate "a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1976).

101. "The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdiction." 2 K. Davis, *Administrative Law Treatise* § 16.05 (1958). See generally H. R. Wade, *Administrative Law* 463-65 (4th ed. 1977).

102. 93 N.M. 546, 603 P.2d 285 (1979).

must indicate the reasoning of the commission and the basis on which it adopted the regulations."¹⁰³ The court in *Bokum* found that the Commission's reasons complied with this requirement and affirmed the court of appeals on that point.

After *Bokum* was decided, the court of appeals in *Kennecott Copper Corp. v. New Mexico Environmental Improvement Board*,¹⁰⁴ found the reasons given for amending the Air Quality Control regulations sufficient, even though the regulations did not specifically mention compliance with its state statutory mandate. It was sufficient for the court that "the message is clear from a reading of the amended regulation itself, together with the reasons given for its adoption."¹⁰⁵ Therefore, while the agency decision must contain some statement of its reasons, it need not be formal and, so long as the court can fairly determine the reasons from the record, the court will find reasonable compliance¹⁰⁶ with this requirement.

One further question of decision-making process was implicitly decided in *Hillman v. Health & Social Services Department*.¹⁰⁷ *Hillman* primarily involved the use of extrinsic medical reports as part of the record in an adjudicatory hearing.¹⁰⁸ The court also ruled that a benefit claimant must be given access to extrinsic reports intended to be used at the hearing on his entitlement to benefits.¹⁰⁹ The *Hillman* court recognized that if such access is not afforded, extrinsic evidence cannot be used as a basis for the decision.¹¹⁰

103. *Id.* at 553, 603 at 292 (quoting with approval *City of Roswell v. New Mexico Water Quality Control Comm'n*, 84 N.M. 561, 565, 505 P.2d 1237, 1241 (Ct. App.), *cert. denied*, 84 N.M. 560, 505 P.2d 1236 (1972).

The principle in *City of Roswell* follows the Davis suggestion, *see* note 101 *supra*, that without reasons the appellate court could not perform its essential function. Since the statute required the Commission to "give weight it deems appropriate to all facts and circumstances," *see* N.M. Stat. Ann. § 74-6-4(D) (1978), the court concluded: "We cannot effectively perform the review authorized . . . unless the record indicates what facts and circumstances were considered and the weight given to those facts and circumstances." 84 N.M. at 565, 505 P.2d at 1241. *See* *Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy*, 86 N.M. 571, 576, 525 P.2d 931, 936 (1974) (only requirements are that public and reviewing court be informed as to reasoning).

104. 94 N.M. 106, 614 P.2d 22 (Ct. App.), *cert. denied*, _____ N.M. _____, 615 P.2d 992 (1980).

105. *Id.* at _____, 614 P.2d at 24.

106. *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n*, 93 N.M. 546, 553, 603 P.2d 285, 292 (1979).

107. 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979).

108. For a discussion of this point *see* text accompanying notes 78-88 *supra*.

109. 92 N.M. at 482, 590 P.2d at 181.

110. "Since medical reports are written information, they cannot be made 'a part of the hearing record or used in making a decision on the case' unless they have been made available for such examination." *Id.*

E. Enforcement of Agency Rulings.

In a previous section of this article dealing with the gathering and disseminating of agency information,¹¹¹ two cases involving the Governor's Organized Crime Prevention Commission were reviewed.¹¹² That section devoted some attention to the traditional method whereby agencies enforce their subpoenas,¹¹³ as well as to the newly sanctioned device of seeking a Rule 45 subpoena in district court when an agency refuses to release needed information.¹¹⁴

This year also saw an unusual case concerning the questionable effect of an otherwise valid administrative order when used as the basis of a criminal conviction. In *City of Albuquerque v. Juarez*,¹¹⁵ the defendant's driver's license was suspended¹¹⁶ and written notice was sent by certified mail to him at his last known address. The notice was returned to the Department of Motor Vehicles unclaimed. The defendant was subsequently arrested on a traffic offense, and was convicted of driving with a suspended license despite the lack of actual notice that his license had been suspended. The court held that the City had failed to meet its burden of proving notice and reversed the conviction because "defendant stands convicted for driving an automobile . . . while in the possession of a driver's license which, so far as he knew, was a valid license."¹¹⁷

In *Juarez* the court acknowledged that, under administrative law principles, actual notice is not necessary for an administrative suspension "so long as the notice given is 'appropriate to the nature of the case.'"¹¹⁸ The heightened notice considerations which the court applied became necessary only because criminal sanctions were involved.¹¹⁹ Therefore, *Juarez* is really an exception to the administra-

111. See text accompanying notes 36-57 *supra*.

112. *In re* Motion for Subpoena Duces Tecum to the Governor's Organized Crime Prevention Comm'n, 94 N.M. 1, 606 P.2d 539 (1980); *In re* Investigation No. 2 of the Governor's Organized Crime Prevention Comm'n 93 N.M. 525, 602 P.2d 622 (1979).

113. See text accompanying notes 38-43 *supra*.

114. See text accompanying notes 52-57 *supra*.

115. 93 N.M. 188, 598 P.2d 650 (1979).

116. The suspension resulted from the accumulation of traffic violation "points" *Id.* at 189, 598 P.2d at 651.

117. *Id.* at 191, 598 P.2d at 653. The court did not require actual notice to the defendant in order to withstand a due process attack. The court only found, in the absence of some proof that defendant was voluntarily avoiding notice, that the presumption of notice from mailing could not be relied on when the unclaimed envelope containing the notice was returned. *Id.*

118. *Id.* at 190, 598 P.2d at 652 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

119. In criminal cases the prosecutor has the burden of proof, and although mailing may have created a presumption of notice, "there can be no conclusive presumptions in criminal cases, even if unrebutted." 93 N.M. at 190-91, 598 P.2d 652-53.

tive notice requirement. When the real enforcement of an administrative order finds its expression in criminal sanctions, then a higher duty of notice is compelled by due process.

III. JUDICIAL CONTROL OF ADMINISTRATIVE POWER

A. *Scope of Review.*

Invariably the most commonly litigated question in administrative law in New Mexico is the extent of the review afforded on appeals from administrative decisions.^{1 20} Indeed, most of the administrative cases decided during the year dealt with the particular standard of review to be applied, and of those cases the most significant continued to consider the meaning and effect of the "substantial evidence" standard.

1. Standard of Review.

Considerations involving the scope of review of administrative decisions are founded on the notion that reviewing courts should "decide questions of law but should limit themselves to determining whether findings of fact are reasonable and whether discretion has been abused."^{1 21} While initially a matter of judge-made law, the specific standards of review have often been incorporated into statutes.^{1 22} Indeed, in New Mexico a multiplicity of constitutional and statutory standards of review are applied,^{1 23} and this year the courts dealt with a number of them.^{1 24} Generally, administrative decisions will not be set aside on appeal unless found to be 1) arbitrary and capricious, 2) not supported by substantial evidence, or 3) otherwise

120. Although the scope of judicial review of administrative action ranges from zero to one hundred per cent, that is, from complete unreviewability to complete substitution of judicial judgment on all questions, the dominant tendency in both state courts and federal courts is toward the middle position known as the substantial-evidence rule.

K. Davis, *supra* note 1, at 525 (footnote omitted).

121. *Id.*

122. *Id.* The modern concepts of judicial review are most systematically codified in the Federal APA. See 5 U.S.C. § 706 (1970). The scope of review section of the New Mexico Administrative Procedures Act [hereinafter referred to as New Mexico APA] in many ways tracks the federal Act. See N.M. Stat. Ann. § 12-8-22 (1978). There are, however, some significant differences between the Federal APA and the New Mexico APA. See Utton, *How to Stand Still Without Really Trying: A Critique of the New Mexico Administrative Procedures Act*, 10 Nat. Resources J. 840, 855-59 (1970) [hereinafter cited as Utton, *NMAPA*]. It must also be kept in mind that the New Mexico APA, unlike its federal counterpart, is not generally applicable to the agencies of state government. See note 266 *infra*.

123. Utton, *NMAPA*, *supra* note 122, at 855-56.

124. For a list of these cases see Appendix C *infra*.

not in accordance with the law.¹²⁵ There are also, however, standards providing for some form of de novo review on appeal,¹²⁶ and in some instances standards are nonexistent.¹²⁷

Two cases of particular note on the standard of review were decided this year. *In re Missouri Pacific Railroad*¹²⁸ involved a unique standard of review contained in the New Mexico Constitution, and *New Mexico Human Services Department v. Garcia*¹²⁹ confused an otherwise clear and unambiguous statutory standard.

In *Missouri Pacific Railroad* the company petitioned the State Corporation Commission seeking permission to remove a local agent from Hobbs, claiming that a new computer system accessible by toll free telephone rendered the local agent's job redundant.¹³⁰ The case was "removed" (appealed directly) to the supreme court pursuant to the New Mexico Constitution.¹³¹ The constitutional provision allowing court review also requires that the supreme court shall "decide such cases on their merits,"¹³² thereby imposing a constitutionally compelled, if somewhat ambiguous, standard of review.¹³³ In *Missouri Pacific Railroad* the court made clear that, pursuant to this constitutional mandate, the standard of review "is not one of the substantiality of the evidence presented . . . but rather a weighing of such evidence and arriving at a result in accordance with a preponderance thereof."¹³⁴ This standard of review, formulated pursuant to article

125. See, e.g., N.M. Stat. Ann. § 27-3-4(F) (1978) (Public Assistance Appeals Act); N.M. Stat. Ann. § 7-1-25 (1978) (appeals from Bureau of Revenue); N.M. Stat. Ann. § 74-6-7 (1978) (appeals from Water Quality Control Commission).

126. See, e.g., N.M. Stat. Ann. § 72-7-1(E) (1978) (appeals from decision of State Engineer).

127. N.M. Stat. Ann. § 3-21-25 (1978) (appeal from county zoning commission decisions—no standard).

128. 93 N.M. 753; 605 P.2d 1152 (1980).

129. 94 N.M. 175; 608 P.2d 151 (1980).

130. The court concluded that "a balancing of the inconvenience to the shipper and benefit to the public . . . compared to the economic waste to the railroad" required a reversal of the Commission's decision refusing permission to discontinue the agent. 93 N.M. at 754, 605 P.2d at 1153.

131. "Any company, corporation or common carrier which does not comply with the order of the Commission . . . may file . . . a petition to remove such cause to the Supreme Court." N.M. Const. art. 11, § 7.

132. *Id.* The section also precludes the taking of additional evidence in the supreme court. See *In re Atchison, T. & S.F. R.R.*, 44 N.M. 608, 107 P.2d 123 (1940).

133. In an early case the supreme court had ruled that this standard requires that the court "shall do justice irrespective of informal, technical or dilatory objections." *Seward v. Denver & R.G.R.R.*, 17 N.M. 557, 131 P.2d 980 (1913). This formulation at least suggests independent judgment.

134. 93 N.M. at 754, 605 P.2d at 1153. Earlier Corporation Commission cases had considered the standard of review under N.M. Const. art. 11, § 7. In the first of those, *Seward v. Denver & R.G.R.R.*, 17 N.M. 558, 583, 131 P. 980, 989 (1913), the court held that its duty was to review the evidence and based thereon to make an independent judgment concerning the "reasonableness and lawfulness" of the Commission's order.

11, section 7 of the constitution, is the standard applied by a trial court fact-finder in an ordinary civil case.¹³⁵ This standard, if consistently applied, ignores the expertise of the Corporation Commission in rendering its initial decision, and renders the Commission nothing more than a hearing officer and gatherer of evidence for substitutional decision-making by the supreme court.

*New Mexico Human Services Department v. Garcia*¹³⁶ is particularly interesting in comparison with *Missouri Pacific Railroad*. If the latter helped clarify an ambiguous constitutional standard of review, the former confused what was a perfectly clear and most acceptable statutory standard. Mrs. Garcia had been denied public assistance benefits by the Department on the ground that the father of her children was not "continually absent from the home" within the meaning of the applicable eligibility regulation.¹³⁷ On appeal, the court of appeals reversed on two of the three grounds for reversal set forth in the statute,¹³⁸ holding that the decision of the Department "was both arbitrary and capricious and not supported by substantial evidence."¹³⁹ On certiorari,¹⁴⁰ the supreme court reversed the court of appeals and reinstated the Department's denial, holding that because the decision of the Department was supported by substantial

This "reasonableness and lawfulness" standard, which had such obvious independent review markings, was later wrapped in a substantial evidence package in a way which suggested the more narrow appellate review with its concomitant deference to the agency. See *San Juan Coal & Coke Co. v. Santa Fe, S.J. & N. Ry.*, 35 N.M. 512, 519, 2 P.2d 305, 308 (1931). See also *State Corporation Commission v. Mountain States Tel. & Tel. Co.*, 58 N.M. 260, 270 P.2d 685 (1954). For a discussion of this historical development of the standard of review under N.M. Const. art. 11, § 7, see Utton, *The Use of the Substantial Evidence Rule to Review Administrative Findings of Fact in New Mexico*, 10 N.M.L. Rev. 103, 105-107 (1979-80) [hereinafter cited as Utton, *Substantial Evidence*].

135. That standard is one of weighing the evidence to determine where the preponderance of evidence lies. See N.M.U.J.I. Civ. 3.6.

136. 94 N.M. 175, 608 P.2d 151 (1980).

137. 221.722 Continued Absence From the Home of One or Both Parents.

Deprivation of parental supports exists because of the continued absence from the home of one or both parents when the following factual circumstances are established:

- A. the parent is out of the home; and
- B. the nature of the absence either interrupts or terminates the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
- C. the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

New Mexico Department of Human Services Manual § 221.722.

138. See N.M. Stat. Ann. § 27-3-4(F) (1978).

139. 94 N.M. at _____, 608 P.2d at 154. The substantial evidence aspect of this case is treated in more depth below. See text accompanying notes 192-200 *infra*. The court of appeals clearly found that the decision was so unsupported by the evidence and so overt an "attempt at justification" that it rose to the level of an arbitrary and capricious decision.

140. N.M.R. App. P. 28.

evidence, it was not arbitrary and capricious.¹⁴¹ In framing the issue, however, the supreme court suggested that any decision not supported by substantial evidence is therefore arbitrary and capricious.¹⁴² This confusion of two clearly separate and distinct standards for appellate review is certainly unjustified. While evidence supporting a given decision may be lacking to such an extent that the decision is demonstrably arbitrary and capricious, failure to meet the substantial evidence test cannot be said always to have this result.¹⁴³

Another problem which surfaced during the year involves a system of review which incorporates both a substantial evidence and a substituted judgment standard. In two Employment Security Commission cases, the court made clear that different standards apply to the review of unemployment compensation decisions depending on whether the appellate court is affirming or reversing the agency decision. In *Ribera v. Employment Security Commission*,¹⁴⁴ the court again stated that the substantial evidence test is applied when the court affirms a decision of the Commission.¹⁴⁵ However, in *Abernathy v. Employment Security Commission*,¹⁴⁶ the court read the standard of review¹⁴⁷ to allow the district court to substitute its judgment for that of the Commission when a decision is found *not* to

141. 94 N.M. at _____, 608 P.2d at 153.

142. "One question is presented here: whether the decision by HSD is supported by substantial evidence in the record as a whole, and therefore whether or not the decision by HSD was arbitrary, capricious or an abuse of discretion." *Id.* at _____, 608 P.2d at 153.

This is not the first time that such a confusion has crept into the cases. *E.g.*, *McWood Corp. v. State Corp. Comm'n*, 78 N.M. 319, 322, 431 P.2d 52, 55 (1967): "Where the findings are not supported by substantial evidence, the order is neither lawful nor reasonable. . . ." This formulation suggests a confusion between the substantial evidence test and the lawfulness standard. Failure to satisfy the substantial evidence test requires reversal, and in that sense is unlawful. The better approach, however, which would avoid any confusion of the standards would be to reverse on that ground alone, reserving the lawfulness standard for its intended purpose—the reversal of agency action which, irrespective of the evidence, is violative of other requirements of law.

143. Clearly a finding without any evidence is arbitrary and an order based on such a finding violates a fundamental tenant of our law. *See ICC v. Louisville & N.R.R.*, 227 U.S. 88 (1913). However, lack of *substantial* evidence does not, in and of itself rise to such a fundamental level of abuse.

144. 92 N.M. 694, 594 P.2d 742 (1979).

145. The court found that the findings of the Commission were supported by substantial evidence and therefore concluded that the district court had erred in refusing to adopt the Commission's findings and conclusions. *Id.* at 696, 594 P.2d at 744. For a discussion of *Ribera* in the substantial evidence context *see* text accompanying notes 187-191 *infra*.

146. 93 N.M. 71, 596 P.2d 514 (1979).

147. The applicable statute recites only that "[t]he district court shall render its judgment after hearing" and the case "shall be heard in a summary manner." N.M. Stat. Ann. § 51-1-8 (1978). The rule governing district court review of Commission decisions by way of certiorari limits the evidence to the record before the Commission and provides that "the court shall make findings of fact and conclusions of law and enter judgment therein upon the merits." N.M.R. Civ. P. 81(c)(4).

be supported by substantial evidence.¹⁴⁸ Finding the decision of the agency to be unsupported by the evidence, the court affirmed the decision of the district court and upheld the right of the district court to make its own findings from the evidence presented to the Commission.¹⁴⁹

Ribera and *Abernathy* demonstrate that review of questions of substantial evidence may yield different review standards depending on the results. While application of the standard in the unemployment compensation area may appear less than consistent, its duality can foster efficiency. By allowing full review on reversal, the court precludes the necessity for remand and agency reconsideration. Reliance on agency expertise, however, certainly suffers as a result.

2. Questions of Law.

Scope of review problems concerning questions of law and mixed questions of law and fact can be just as complex as scope of review problems arising when only questions of fact are involved.¹⁵⁰ Indeed, the fact-law distinction is often not helpful.¹⁵¹ One extreme position on the scope of review of law questions is that the determination of "the meaning of [a statute] . . . is a judicial and not an administrative question."¹⁵² Under this view, the court would, of course, apply its independent judgment in determining what a statutory term means and how it ought to be applied.¹⁵³ At the other end of the spectrum is the view that "so long as the agency's application or interpretation is 'rational' or 'reasonable' the reviewing court will accept the agency's determination and will affirm the agency's determination

148. The judicial interpretation of the standard contemplated by the statute and rule was presaged in *Prestridge Lumber Co. v. Employment Security Comm'n*, 50 N.M. 309, 176 P.2d 190 (1946), and fully developed in *Wilson v. Employment Security Comm'n*, 74 N.M. 3, 6-8, 389 P.2d 855, 857-58 (1963). The duality of the standard is dramatically illustrated by its application in *Ribera* and *Abernathy*.

149. 93 N.M. at 73, 596 P.2d at 516.

150. For a discussion of the latter, see text accompanying notes 169-200 *infra*.

151. I submit that the phrases "questions of fact" and "questions of law" are not only misleading, but also tend to invite focus on the wrong factors. The inquiry, when deciding what is the appropriate scope of review, of course, should be not into the nature of the issue to be decided, e.g., fact or law, but rather should focus upon how much of the resolution of the issue is to be by the judge, how much by the agency.

Shutland, *Scope of Review of Administrative Action—Remarks before the D.C. Circuit Judicial Conference*, 34 Fed. B.J. 54, 58 (1975).

152. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 136 (1944) (Roberts, J., dissenting).

153. See, e.g., *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951).

even though it believes that the determination is or may be erroneous or incorrect."¹⁵⁴

The New Mexico courts, primarily in tax cases, seem to have taken a middle ground. In two cases decided this year, *Strebeck Properties, Inc. v. Bureau of Revenue*¹⁵⁵ and *Miller v. Bureau of Revenue*,¹⁵⁶ the court took the rational basis test as a starting point, stating that great weight should be given to the agency's interpretation of its own statute.¹⁵⁷ The court in both cases, however, finally applied its independent judgment because it found the statute unambiguous and the agency's construction of it clearly erroneous: "The Courts may not give legal sanction to the agency's incorrect construction of unambiguous statutory language."¹⁵⁸ Rather than being a true middle ground, however, the New Mexico position is merely another way of preserving discretionary judicial power.¹⁵⁹ The court can uphold the agency's interpretation by resorting to the deference and rational basis approach demonstrated in *Bokum*, or it can find the statute unambiguous as it did in *Miller* and *Strebeck* and then revert to an independent judgment standard.

Indeed, in one case decided this year, the court appears to have recognized the agency's view of the statute without deference to the agency's interpretation of that statute. In *Lloyd McKee Motors, Inc. v. New Mexico Corporation Commission*,¹⁶⁰ the court concluded that the Commission did have authority to regulate the motor company's wrecker service as a service "for hire" within the meaning of the applicable statute.¹⁶¹ While the agency must have found that it

154. W. Gelhorn, C. Byse & P. Strauss, *supra* note 1, at 297. See, e.g., *Gray v. Powell*, 314 U.S. 402 (1941); *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939).

The discretionary determination of scope of review of application of legal concepts to undisputed or established facts probably depends upon comparative qualifications of courts and of agencies, the quality of the particular agency, judicial impressions of the thoroughness and expertness of the administrative handling of the particular case, the extent to which the agency is exercising power that has been especially delegated to it and withheld or withdrawn from the courts, and whether or not lawmaking by the court is needed or appropriate in the particular case.

K. Davis, *supra* note 1, at 552.

155. 93 N.M. 262, 599 P.2d 1059 (1980).

156. 93 N.M. 252, 599 P.2d 1049 (1979).

157. *Strebeck Properties, Inc. v. Bureau of Revenue*, 93 N.M. at 268, 599 P.2d at 1065; *Miller v. Bureau of Revenue*, 93 N.M. at 254, 599 P.2d at 1051.

158. *Strebeck Properties, Inc. v. Bureau of Revenue*, 93 N.M. at 268, 599 P.2d at 1065; see *Miller v. Bureau of Revenue*, 93 N.M. at 254, 599 P.2d at 1051 (quoting *California Drive-In Restaurant Ass'n v. Clark*, 22 Cal. 2d 287, 294, 140 P.2d 657, 661 (1943)).

159. K. Davis, *supra* note 1, at 551.

160. 93 N.M. 539, 602 P.2d 1026 (1979).

161. N.M. Stat. Ann. § 65-2-1 (1978).

had authority to regulate the wrecking service when it was first confronted with the application for a certificate, the court made no mention of the agency's position and went on to exercise its independent judgment on the matter.

In *Fiber v. New Mexico Board of Medical Examiners*,¹⁶² the court considered the review of another type of "law" question. Fiber was refused a New Mexico license when the Board found that his New York license was not based on "qualifications and requirements equivalent to those required in New Mexico. . . ."¹⁶³ The district court disagreed and ordered the license issued and the supreme court affirmed. In so doing, the court interpreted the statutory term "equivalent" to include requirements "of equal value, significance or import, in relation to a common standard."¹⁶⁴ Applying that interpretation to the facts, the court concluded that the Board's denial was arbitrary and properly reversed by the district court. The court acknowledged that decisions within the expertise of the Board should be given great weight,¹⁶⁵ but concluded that this case presented a "legal" matter¹⁶⁶ such that the court "will not hesitate to overrule the decision of the licensing board."¹⁶⁷

As suggested by one eminent body commenting on this problem: "Under existing standards, then, the courts may narrow their review to satisfy the demands for administrative discretion, and they may broaden it close to the point of substituting their judgment for that of the administrative agency."¹⁶⁸ The same surely can be said about the status of current New Mexico law on this subject.

162. 93 N.M. 67, 596 P.2d 510 (1979).

163. N.M. Stat. Ann. § 61-6-12 (1978). This provision of the statute authorizes the Board the power to grant licenses without examination.

164. 93 N.M. at 69, 596 P.2d at 512.

165. "The court may give special weight to the decision of the Board where the issue before the Board is essentially one of a scientific or medical nature." *Id.* (citing *McDaniel v. New Mexico Bd. of Medical Examiners*, 86 N.M. 447, 525 P.2d 374 (1974)). Indeed, it is precisely this kind of circumstance—where the issue, whether legal or factual or mixed, falls within the special purview of agency expertise—that ought to trigger deference to the agency interpretation or decision. "This may be particularly significant when the legislation deals with complex matters calling for expert knowledge and judgment." Report of the Attorney General's Committee on Administrative Procedure 90-91 (1941).

166. Given the substantive nature of the equivalency decision in this case—performance on a national medical licensing test—it is questionable whether the court was in fact interfering with the Board's exercise of "scientific or medical" judgment, rather than resolving a purely "legal" question as the court would have it. 93 N.M. at 69, 596 P.2d at 512.

167. *Id.*

168. Report of the Attorney General's Committee on Administrative Procedure 91 (1941); see K. Davis, *supra* note 1, at 551-52.

3. Questions of Fact—Substantial Evidence.¹⁶⁹

A recent article¹⁷⁰ has indicated just how confused the use of the substantial evidence standard has been in New Mexico. It must be kept in mind that the particular standard to be applied is to be found either in a constitutional or statutory directive¹⁷¹ and that those pronouncements are often less than clear¹⁷² and consistent.¹⁷³ While variously formulated, two substantial evidence standards are currently authorized under New Mexico law. The first is the traditional test¹⁷⁴ which would sustain agency action unless it is "not supported by substantial evidence."¹⁷⁵ The second, more modern, formulation¹⁷⁶ would reverse agency action "not sup-

169. By far the greatest number of administrative law cases in any given year involve the application of the appropriate substantial evidence standard. Most of the cases decided this year in this area represent traditional and mundane applications of the substantial evidence standard. See Appendix C *infra*.

One interesting collateral issue arose this year over the power of the district court to remand a case to the Public Service Commission for the taking of additional evidence after a reversal based upon the lack of substantial evidence. *Public Service Co. v. Public Servs. Comm'n*, 92 N.M. 721, 594 P.2d 1177 (1979). While the applicable statute did not specifically provide for remand power, N.M. Stat. Ann. § 62-1-16 (1978), the court concluded that once the decision had been vacated, the "Agency has an affirmative duty to exercise its statutory powers [and] . . . [t]he commission may hold additional hearings and take additional testimony just as if the vacated order had never been entered." 92 N.M. at 724-25, 594 P.2d at 1180-81.

The court did not allow the remand to toll the ten-month limit within which a final decision had to be made, N.M. Stat. Ann. § 62-8-7 (1978), and therefore allowed the increased rate to take effect. The case does point out, however, that vacation of an agency ruling on substantial evidence grounds can allow the agency to take more evidence, when the statute does not preclude it from doing so.

170. Utton, *Substantial Evidence*, *supra* note 134.

171. See notes 5-10 *supra*.

172. For example, some statutes provide for review but articulate no standard whatsoever. See text accompanying notes 122-27 *supra*.

173. For example, different actions of the State Corporation Commission are subject to different standards of review. See Utton, *NMAPA*, *supra* note 122, at 856.

174. The traditional substantial evidence test was formulated by the Supreme Court in *ICC v. Louisville & N.R.R.*, 227 U.S. 88 (1913), as a means of determining the scope of review which should be given to findings of fact rather than conclusions of law. Since then the fact-law distinction has played an important role in scope of review problems. *K. Davis*, *supra* note 1, § 29.01, at 525.

The early cases were followed by federal and state statutes which incorporated the substantial evidence standard, and it is to the cases construing those early statutes (which predate the enactment of the Federal APA in 1946) that one turns to discover the meaning of the traditional standard. See, e.g., *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

175. *Wilson v. Employment Sec. Comm'n*, 74 N.M. 3, 8, 389 P.2d 855, 858 (1963); see *Wickerstam v. New Mexico State Bd. of Educ.*, 81 N.M. 188, 190, 464 P.2d 918, 920 (Ct. App. 1970).

176. The whole record standard found its first clear expression in the Federal APA, and sought to give effect to a clear congressional desire for more rigorous court review: "The re-

ported by substantial evidence based on the record as a whole."¹⁷⁷

The traditional standard is somewhat less intrusive than a "rule of reasonableness."¹⁷⁸ It contemplates that the evidence must be viewed in the light most favorable to the agency's action,¹⁷⁹ requires that contrary evidence be ignored,¹⁸⁰ and considers such relevant evidence "as a reasonable person might accept as sufficient to support a conclusion."¹⁸¹ The newer standard,¹⁸² which requires a review of the whole record, calls for more rigorous review by the courts.¹⁸³ It expressly requires consideration of contrary evidence, implicitly rejects the notion that the evidence should be viewed in the light most favorable to the agency, and requires that all the evidence be reviewed

quirement of review upon the whole record means that the court may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." S. Doc. No. 248, 79th Cong., 2d Sess. 214, 280 (1946).

177. *E.g.*, N.M. Stat. Ann. § 27-3-4(F) (1978) (Public Assistance Appeals Act); *see* N.M. Stat. Ann. § 61-1-20 (1978) (Uniform Licensing Act).

178. Professor Utton has argued that the application of the traditional substantial evidence test in New Mexico is merely an extension of the reasonableness standard. Utton, *Substantial Evidence*, *supra* note 134, at 107. A reasonableness test at least suggests, however, that the reviewing court can substitute its own judgment for that of the agency, while the substantial evidence tests clearly requires that the court not do so. *Compare* Seward v. Denver & R.G.R.R., 17 N.M. 557, 131 P. 980 (1930) *and* State Corp. Comm'n v. Mountain States Tel. & Tel. Co., 58 N.M. 260, 270 P.2d 685 (1954) (reasonableness) *with* Ferguson-Steere Motor Co. v. State Corp. Comm'n, 63 N.M. 137, 314 P.2d 894 (1957) *and* Rinker v. New Mexico State Corp. Comm'n, 84 N.M. 626, 506 P.2d 783 (1973) (substantial evidence).

It is also interesting to note that the substantial evidence standard is more rigorous than the "clearly erroneous" standard which is generally used to review the findings of a trial court sitting without a jury. *See, e.g.*, *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607 (1966). Therefore a finding may be "clearly erroneous" even if there is sufficient evidence to sustain the finding under the substantial evidence test. *See* United States v. United States Gypsum Co., 333 U.S. 364 (1948); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 652-53 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Apparently the courts of New Mexico follow a different rule and subject findings of courts sitting without juries to the substantial evidence standard. *See* Grott v. Stringer, 82 N.M. 180, 181, 477 P.2d 814, 815 (1970).

179. *See, e.g.*, *Rinker v. New Mexico State Corp. Comm'n*, 84 N.M. 626, 627, 506 P.2d 783, 784 (1973).

180. *Id.* The substantial evidence test is not unlike the test to be applied in a defense motion for a directed verdict. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939); *Wilkerson v. McCarthy*, 336 U.S. 53, 58 (1949) (requiring the Court to "look only to the evidence and reasonable inferences which tend to support the case of a litigant").

181. *Wilson v. Employment Sec. Comm'n*, 74 N.M. 3, 8, 389 P.2d 855, 858 (1963); *Wickerstam v. New Mexico State Bd. of Educ.*, 81 N.M. 188, 190, 464 P.2d 918, 920 (Ct. App. 1970). The evidence at a minimum must afford "a substantial basis of fact from which the fact at issue can be inferred." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939).

182. State administrative statutes, passed subsequent to the Federal APA, generally incorporate the whole record standard. *See, e.g.*, statutes cited at note 177 *supra*.

183. Clearly a higher level of review was intended by Congress in adopting the whole record standard. *See* note 176 *supra*. *See also* *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *see generally* Utton, *Substantial Evidence*, *supra* note 134, at 104.

to see if, on balance, the agency's decision is supported by substantial evidence.¹⁸⁴

The New Mexico courts have on occasion confused the old reasonableness standard with the traditional substantial evidence standard,¹⁸⁵ and some cases have seemed to apply the modern whole record standard under the guise of the traditional substantial evidence test.¹⁸⁶ Again this year the court seemingly applied a whole record standard in an area in which the substantial evidence standard traditionally has been applied. In *Ribera v. Employment Security Commission*,¹⁸⁷ the court upheld the Commission's denial of unemployment benefits. Employment Security Commission decisions are reviewable by way of certiorari to the district court, review is limited to evidence introduced at the hearing,¹⁸⁸ and the scope of review has been judicially determined to be the traditional substantial evidence standard.¹⁸⁹ The court in *Ribera*, however, clearly applied the whole record standard: "Based upon all of the evidence, we find that there is substantial evidence to support the findings and conclusions made by the Commission . . ."¹⁹⁰

Given the modern approach to substantial evidence, which favors the whole record standard, this judicial reading of the whole record in the application of the traditional standard ought to be applauded. The only real complaint lies in the implicit and sporadic nature of such judicial action. Judicial adoption of the whole record standard has been advocated¹⁹¹ and would be a welcome, progressive step; it should, however, come from clear and unambiguous action by the court.

Unfortunately, this year the confusion of the earlier cases seems to have come full circle. In *New Mexico Department of Human Services*

184. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489-91 (1951). Professor Jaffee had long argued that the traditional substantial evidence standard required a similar balancing because in his view "rationality or substantiality of a conclusion can only be evaluated in the light of the whole fact situation." Jaffee, *Administrative Procedure Re-examined: the Bergan Report*, 56 Harv. L. Rev. 704, 733 (1943).

185. See note 178 *supra*. See generally Utton, *Substantial Evidence*, *supra* note 134, at 106-07.

186. The classic demonstration of this confusion arose in *Rinker v. New Mexico State Corp.* Comm'n, 84 N.M. 626, 627, 506 P.2d 783, 784 (1973), where the court stated the traditional formulation which allowed acceptance of all inferences in support of the decision and the disregard of all evidence to the contrary. Nonetheless, the court went on to consider the evidence from both sides, thus applying a whole record standard. See generally Utton, *Substantial Evidence*, *supra* note 134, at 118-119, and cases reviewed therein.

187. 92 N.M. 694, 594 P.2d 742 (1979).

188. N.M.R. Civ. P. 81(c)(4).

189. See, e.g., *Wilson v. Employment Sec. Comm'n*, 74 N.M. 3, 389 P.2d 855 (1963).

190. 92 N.M. at 696, 594 P.2d at 744.

191. See Utton, *Substantial Evidence*, *supra* note 134, at 120.

v. Garcia,¹⁹² the court, while giving lip service to the whole record standard required by the applicable statute,¹⁹³ in effect applied the traditional substantial evidence standard. The court first suggested that the whole record standard does not require the weighing of evidence and characterized the standard as but a "minor departure from the customary substantial evidence rule."¹⁹⁴ The court then relied for its formulation of the applicable standard on cases that involve only the traditional standard.¹⁹⁵ Most remarkably the court, again while giving lip service to "consideration of all relevant evidence in the record as a whole,"¹⁹⁶ considered the record "in the light most favorable to HSD."¹⁹⁷ This enabled the court to conclude that there was substantial evidence to support the agency's decision.¹⁹⁸

While attempting to reconcile the two substantial evidence standards, the *Garcia* court ignores the significant differences between the two. It ends up with an approach which, when stripped of verbiage, amounts to the application of the traditional standard in violation of the statute being applied. In upholding the agency, the court had to reject or ignore the substantial evidence in the record relied on by the court of appeals, and the only way to do that was to view the record in the "light most favorable to HSD." In so doing, the court reverted to traditional substantial evidence as certainly as if it had said so.¹⁹⁹ *Garcia* only makes clear what Professor Davis has said about the substantial evidence rule: "It is made of rubber, not of wood. It can be stretched . . . [a]nd the courts are both willing and able to do the stretching, in accordance with what they deem to be the needs of justice."²⁰⁰

192. 94 N.M. 175, 608 P.2d 151 (1980).

193. "Whether the decision by HSD is supported by substantial evidence in the [record as a] whole is . . . the standard . . . for judicial review as required by Section 27-3-4(F), N.M.S.A. (1978)." *Id.* at _____, 608 P.2d at 152.

194. *Id.* at 177, 608 P.2d at 153.

195. *See, e.g.*, *Quinlan v. Board of Educ.*, 73 N.J. Super. 40, 179 A.2d 161 (1962); *United Veteran's Org. v. New Mexico Property Appraisal Dep't*, 84 N.M. 114, 500 P.2d 199 (Ct. App. 1972).

196. 94 N.M. at 177, 608 P.2d at 153.

197. *Id.*

198. *Garcia* also involved the arbitrary and capricious standard, but that aspect of the decision is discussed at text accompanying notes 136-43 *supra*.

199. The court could have reached the same result under the whole record standard, but only if it could have weighed all the evidence in the record and found that on balance the evidence adduced at the hearing substantially supported the decision of the Department.

200. K. Davis, *supra* note 1, at 530.

The substantial evidence test is complicated by the legal residuum rule which requires that within the evidence deemed substantial there must be "at least a residuum of evidence competent under the exclusory rules." *Young v. Board of Pharmacy*, 81 N.M. 5, 8, 462 P.2d 139, 142 (1969). As pointed out by Professor Utton, the legal residuum rule undercuts administrative flexibility to consider all relevant evidence and conflicts to some degree with

B. *Res Judicata and Estoppel.*

Historically, it was accepted doctrine that the government could not be estopped.²⁰¹ The landmark case is *Federal Crop Insurance Corp. v. Merrill*,²⁰² in which the United States Supreme Court held that estoppel could not bind the federal government.²⁰³ The no-estoppel rule seeks to protect against rampant ultra vires acts by government officials.²⁰⁴ Despite its salutary purpose, it has been criticized as having "all the beauty of logic and all the ugliness of injustice."²⁰⁵ However, *Merrill* to the contrary notwithstanding, the federal government has long been estopped with respect to its business dealings,²⁰⁶ and since 1960 federal courts, though reluctantly, have been more liberal in estopping the government when justice so requires.²⁰⁷ One classic distinction found in the federal cases allows the government

notions of substantial evidence. See Utton, *Substantial Evidence*, *supra* note 134, at 109-17.

Just after the close of the year being covered by this *Survey* the New Mexico Supreme Court decided an important legal residuum rule case. *Trujillo v. Employment Sec. Comm'n*, 94 N.M. 343, 610 P.2d 747 (1980). It is anticipated that *Trujillo* will merit major consideration in next year's *Survey*.

201. Professor Davis concedes that the government ought not be hamstrung to prevent alteration in governmental policies by the doctrine of estoppel. He argues, however, that this policy-based principle ought not control in other contexts when government policy is not at issue. K. Davis, *supra* note 1, at § 17.01.

202. 332 U.S. 380 (1947).

203. *Id.* at 383. In *Merrill* the government-owned corporation had issued regulations precluding insurance of certain spring wheat. Despite the regulations, a local agent had advised plaintiff that his crop was insurable. His application for insurance was accepted by the corporation, and yet when the crop was subsequently destroyed, recovery was denied: "It is too late in the day to argue that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business. . . . Men must turn square corners when they deal with the Government." *Id.* at 383, 385.

204. The effect of *Merrill* was to deny plaintiff the right to rely on the *apparent* authority of the local agent. *Merrill* clearly indicates that estoppel will not protect an individual who has changed his position in reliance on administrative advice. See generally Newman, *Should Official Advice be Reliable? Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 Colum. L. Rev. 374 (1953). But as Professor Schwartz suggests, the no-estoppel principle is necessary to ensure that administrative officials do not act beyond the bounds of their actual authority. Otherwise, estoppel could be used to give de facto validity to ultra vires administrative acts. B. Schwartz, *supra* note 1, at 133.

205. B. Schwartz, *supra* note 1, at 134. As aptly put by one court: "Something is wrong when the citizen can recover for a dented fender caused by a postal employee at the wheel of a government truck and one cannot when he is boobytrapped by an employee of Federal Crop Insurance." *McFarlin v. Federal Crop Ins. Corp.*, 438 F.2d 1237 (9th Cir. 1971).

206. *E.g.*, *Lindsey v. Nawes*, 67 U.S. 554 (1862) (reliance on government survey); *United States v. Center Parcels of Land*, 131 F. Supp. 65 (S.D. Cal. 1955) (condemnation of land).

207. *E.g.*, *United States v. Fox Lake State Bank*, 366 F.2d 962, 965-66 (7th Cir. 1966) (estoppel against the government must be applied with great caution).

Needless to say governmental attorneys are as bound by their statements and actions in litigation as private attorneys, and they cannot avoid being so bound by claiming estoppel does not apply to them. See K. Davis, *supra* note 1, at 348 & n. 10.

to be estopped when acting in its proprietary, rather than its governmental, capacity.²⁰⁸

In *Spray v. City of Albuquerque*²⁰⁹ the proprietary-governmental distinction played a significant part in the court's ruling that the City had to honor an agreement made with a group of resident homeowners concerning the height of a golf course fence built within view of plaintiffs' houses. The City claimed that the contract was void as against the public policy of prohibiting a municipality from bargaining "away the sovereign powers delegated to it by the State."²¹⁰ The court held, however, that since only "proprietary" and not "governmental" functions were involved, the City's sovereign powers were not implicated and, therefore, the contract violated no public policy.²¹¹ The City also argued that its decision to raise the height of the fence was an "administrative" decision subject only to review for arbitrariness or abuse of discretion. The court gave this argument the short shrift it deserved, noting that "[o]nce the contract was entered into, the City's administrative discretion was replaced by a legal commitment."²¹²

Both aspects of *Spray* have estoppel overtones. Just as estoppel does not run against the government when policy matters are involved, contracts cannot bind the government to violate strong public policies. When policy matters are not implicated, however, the court as evidenced by *Spray*, will treat the government like a private litigant.

A divergence of views on estoppel can be found in the state administrative law cases,²¹³ although there is a "strong trend towards the application of equitable principles of estoppel against public bodies where the interests of justice, morality and common fairness clearly dictate that course."²¹⁴ New Mexico follows the view that equitable estoppel will lie against the state and its subdivisions. The earlier cases

208. *E.g.*, *Nager Co. v. United States*, 184 Ct. Cl. 390, 396 F.2d 977 (1968); *Roberts v. United States*, 174 Ct. Cl. 940, 357 F.2d 938 (1966).

209. 94 N.M. 199, 608 P.2d 511 (1980).

210. *Id.* at 201, 608 P.2d at 513.

211. *Id.*

212. *Id.*

213. *Compare* *Claiburne Sales Co. v. Collector*, 233 La. 1061, 99 So. 2d 345 (1958) and *Forseth v. City of Tacoma*, 28 Wash. 2d 284, 178 P.2d 357 (1947) (no estoppel against the government) with *Rand v. Andreatta*, 60 Cal. 2d 846, 389 P.2d 382, 36 Cal. Rptr. 846 (1964) and *Planet Constr. Corp. v. Board of Educ.*, 7 N.Y.2d 381, 165 N.E.2d 758, 198 N.Y.S.2d 68 (1960) (estoppel allowed against the government).

214. *Gruber v. Township of Raritan*, 3 N.J. 1, 186 A.2d 489 (1962). The case contains a good collection of authorities on this proposition.

implicitly decided the question,²¹⁵ so that today the only estoppel issue remaining is how the doctrine is to be applied.

This year in *Stuckey's Stores, Inc. v. O'Cheskey*,²¹⁶ the court again applied equitable estoppel against a department of state government. Stuckey's brought suit challenging the provisions of the New Mexico Highway Beautification Act²¹⁷ under which the Highway Department sought to destroy Stuckey's outdoor advertising signs. While upholding the validity of the statute and Department regulations against constitutional attack,²¹⁸ the court held "that the Department is equitably estopped from claiming that plaintiffs' . . . signs were 'newly erected' and . . . subject to removal without just compensation."²¹⁹

Stuckey's Stores also relied on a corollary of the equitable estoppel doctrine, holding that, by accepting late payment of the permit fee, the Department "waived its right to claim that the permit fees were untimely paid and therefore that it could acquire the signs without paying just compensation."²²⁰ In so doing the Court brushed aside an *ultra vires* defense²²¹ reminiscent of *Merrill*,²²² and reversed the district court's conclusion that there was no waiver. Without any discussion of the argument that the Department employees could not "waive" the mandatory provisions of the Act, we can only speculate about the court's reasoning. It is clear, however, from the conclusions on both waiver and estoppel, that the supreme court, when faced

215. In *Westerman v. City of Carlsbad*, 55 N.M. 550, 237 P.2d 356 (1951), the court denied an estoppel claim made against the city only because the complaint failed to allege one of the essential elements. The court thereby assumed without deciding that estoppel may under some circumstances run against the government. For a discussion of this implicit holding and its application in later New Mexico cases see 10 N.M.L. Rev. 501, 502-05 (1980).

216. 93 N.M. 312, 600 P.2d 258 (1979); see 10 N.M.L. Rev. 501 (1980).

217. N.M. Stat. Ann. § 67-12-1 to -14 (1978).

218. The court concluded that the Act and regulations violated neither the first amendment nor the due process rights of plaintiffs.

219. 93 N.M. at 323-24, 600 P.2d 269-70. The court again implicitly acknowledged that the doctrine of equitable estoppel could run against the government by laying out the estoppel test from *Westermann*. The court then applied that test to the facts before it to find the requisite conduct by the Department and reliance by the plaintiffs sufficient to conclude that the government should be estopped.

220. 93 N.M. at 323, 600 P.2d at 269. The statute in question specifically provided that "[a]ny permit fee payable for the years 1966 through 1971 inclusive shall be deemed timely paid if, *but only if*, the fee is received . . . prior to July 1, 1971." N.M. Stat. Ann. § 67-12-5 (D) (1978) (emphasis added). The fees paid by plaintiff were not tendered and accepted by the Department until November 18, 1971.

221. Clearly, the statute precluded the acceptance of the fee in November, 1971, more than five months beyond the statutory deadline. The act of accepting the fee by the Department employee in question was clearly *ultra vires*, giving rise to the defense that "there was no waiver because a State Highway Department [could not] waive the provisions of the Act." 93 N.M. at 323, 600 P.2d at 269. See note 204 *supra*.

222. See notes 202-08 *supra*.

with equitable estoppel in the administrative context, is more concerned with the equities of the particular case than with the potential for ultra vires action.²²³ On this issue, then, the court tends to view governmental agencies no differently than it does private litigants.²²⁴

C. Limitations on Judicial Review.²²⁵

In any direct action²²⁶ brought by a private party against a state administrative agency, the private litigant is faced with a venue problem.²²⁷ Because this problem does not exist in normal appeals from administrative agencies,²²⁸ venue is not, technically speaking, a limitation on judicial review. Since, however, much litigation in New Mexico involves direct challenges to state agency action, rather than normal appellate review of that action, venue serves as a practical limitation on a significant amount of administrative litigation.

Venue refers to proper place or places for the bringing of the action.²²⁹ In determining proper venue resort must be had to the particulars of state law. In New Mexico the applicable statute provides that "[s]uits against any state official as such shall be brought in the

223. Professor Schwartz suggests that [t]he no-estoppel principle should be limited to cases where the acts performed in reliance are contrary to statute. In such cases the fact that the government is involved is really not a determining factor, "for no person can be estopped into a position contrary to a law." B. Schwartz, *supra* note 1, at 135. Unfortunately the result in *Stuckey's Stores* cannot be rationalized by resort to Professor Schwartz' limitation. The unavoidable fact is that the Department was "estopped into a position" contrary not to a regulation or directive of its own, but rather to an express, unequivocal provision of state law. If the no-estoppel doctrine has any utility, surely it ought to bar such clear ultra vires administrative action.

224. There is at least some support for this position in the language of other cases. See *Ritter v. United States*, 28 F.2d 265, 267 (3rd Cir. 1928).

225. Venue is not traditionally treated as a limitation on judicial review. However, the widespread use of direct action litigation to challenge administrative agency action necessarily implicates the venue statute, N.M. Stat. Ann. § 38-3-1(G) (1978), transforming venue into a very real limitation.

226. Direct action litigation against administrative agencies, denominated as non-statutory review, is considered in a following section of this *Survey*. See text accompanying notes 242-83 *infra*.

227. The venue problems considered here relate to state agencies, and these problems arise because of the provisions of N.M. Stat. Ann. § 38-3-1(G) (1978). Suits against local agencies may be governed by other considerations provided for in the venue statute, such as where the plaintiff or defendant resides. *Id.* § 38-3-1(A). Furthermore, municipalities and county commissions are governed by a separate venue requirement. *Id.* § 38-3-2.

228. Appeal statutes usually vest jurisdiction for review on a specific court. See *Bokum Resources v. New Mexico Water Quality Control Comm'n*, 93 N.M. 546, 603 P.2d 285 (1979), and note 242 *infra*. Since venue implies more than one court with jurisdiction, normal appellate review does not generally raise venue problems.

229. Considerations which inform venue judgments are the nature of the claims, the subject matter of the action, the parties involved, or a combination of these factors. See Stevens, *Venue Statutes: Diagnosis and Proposed Care*, 49 Mich. L. Rev. 307, 307-15 (1951).

court of the county wherein their offices are located, at the capitol [capital] and not elsewhere."²³⁰

In a series of prior cases,²³¹ the supreme court had indicated that this provision is jurisdictional in nature.²³² This year, however, in *New Mexico Livestock Board v. Dose*,²³³ the court reversed that line of cases and held that "venue may not be equated with jurisdiction in suits against the state, its officers or employees."²³⁴ The court concluded that "where the vital interests of the state or the practical

230. N.M. Stat. Ann. § 38-3-1(G) (1978). This provision is part of the general venue statute which considers in other sections the residence of the parties, the location of business offices, and the nature of the claim. *Id.* § 38-3-1(A)-(F). The New Mexico statute is similar to venue laws in most other states. See generally Stevens, *supra* note 229.

The statute is also unclear (if not grammatically incorrect). It could be read to allow suits against state agencies only at their offices in Santa Fe. It could also be read to require suits away from the capital when agency offices are located out of Santa Fe. This year the court in *Jacobs v. Stratton*, ____ N.M. ____, 615 P.2d 982 (1980), rejected a narrow reading and made clear that the statute must be read disjunctively—suits may be brought *either* in Santa Fe *or*, where the offices are located when those offices are not located in Santa Fe.

This particular venue limitation on suits against governmental agencies is grounded in notions of convenience to the government. See Stevens, *supra* note 229, at 315. Since the vast majority of state governmental departments are located in Santa Fe, this provision minimizes the inconvenience to state officials and their attorneys (normally assistant attorneys general with offices in Santa Fe) when they become involved in litigation. A collateral benefit of the statute is to funnel the majority of civil litigation involving the state into one judicial district. As a result, that district, the First Judicial District, has developed a body of experience and expertise involving agency litigation in matters of important public policy.

231. See, e.g., *Bureau of Revenue v. MacPherson*, 79 N.M. 272, 442 P.2d 584 (1968); *Allen v. McClellan*, 77 N.M. 301, 427 P.2d 677 (1967).

232. Two implications would arise from jurisdictional treatment of the statute. First, if it were jurisdictional in subject matter terms, it could be raised at any time. See N.M.R. Civ. P. 12(h)(3). Second, jurisdictional treatment might present relation-back problems when a new action needs to be filed after dismissal for want of jurisdiction and the statute of limitations has run in the interim. See *Davis v. United States Fire Ins. Co.*, 35 N.M. 381, 298 P.2d 671 (1931). But see N.M. Stat. Ann. § 37-1-14 (1978) (second suit deemed continuation of first).

233. 94 N.M. 68, 607 P.2d 606 (1980). Dose sued the Board in Bernalillo County for conversion and loss of livestock. The case was fully litigated on its merits, and the judgment for plaintiffs affirmed by the court of appeals. Only on certiorari to the supreme court did the Board raise the venue-jurisdiction problem contained in N.M. Stat. Ann. § 38-3-1(G) (1978).

234. 94 N.M. at ____, 607 P.2d at 609. This wholesale reversal of a clear contrary line of authority was made easier by the earlier decision in *Kalosha v. Novick*, 84 N.M. 502, 505 P.2d 845 (1973). *Kalosha* involved the venue provision governing suits concerning real property, N.M. Stat. Ann. § 21-5-1(D) (1973) (current version at N.M. Stat. Ann. § 38-3-1(D) (1) (1980)). The court held the statute to be non-jurisdictional, overruling a line of cases to the contrary. The court therefore found that the defendant in the case had waived venue by not interposing the defense in her answer. 84 N.M. at 509, 505 P.2d at 849.

Earlier this year, in a case involving a related issue, the court had intimated that the holding in *Kalosha* would be extended to the venue provision affecting suits against state officers. The court in *Jones v. New Mexico State Highway Dep't*, 92 N.M. 671, 672, 593 P.2d 1074, 1074 (1979), citing *Kalosha* for the proposition that "this venue statute is not to be equated with jurisdiction." For a discussion of the main issue in *Jones*, see text accompanying notes 238-41 *infra*.

necessity to or convenience of the state dictate, that a suit to which it is a party be tried in Santa Fe County, such interests, necessities or convenience may be protected by challenging venue in any other county."²³⁵ Finding that the state had waived venue by failing to contest it, the court gently castigated the state, stating: "We know of no compelling requirement of state government that would command that we have different rules relating to waiver of venue for public and private parties litigant."²³⁶ Clearly then, after *Dose*, the governmental venue provision, if not properly raised, is waived by the government.

Also, this year the court clarified just what a district court must do when faced with a proper and timely defense based on improper venue.²³⁷ In *Jones v. New Mexico State Highway Department*,²³⁸ the Department moved for dismissal based upon improper venue,²³⁹ but the court instead transferred the case to Santa Fe County. The state appealed that order and the supreme court held that, in the absence of a statute "giving it such authority, a trial court has no power to change the venue of a misfiled lawsuit. . . . Venue is improper in this case and the District Court in San Miguel County could not properly issue an order for change of venue."²⁴⁰

235. 94 N.M. at _____, 607 P.2d at 609.

236. *Id.*

237. The appropriate way to challenge venue is by a Rule 12(b)(3) motion or if no Rule 12 motion is filed, then by raising the defense in the answer. *See* N.M.R. Civ. P. 12.

It is interesting to note that both *Kalosha* and *Dose* suggest that if N.M. Stat. Ann. § 38-3-1(G) (1978) were jurisdictional in nature, it would not be waived by the government's failure to raise it. This despite the fact that the statute on its face refers to "suits against state officers" thereby indicating that it involves the "person" of the defendant rather than the nature of the claim. *See, e.g.,* *Tudesque v. New Mexico State Bd. of Barber Examiners*, 65 N.M. 42, 331 P.2d 1104 (1958) (board and members are state officers within meaning of statute). If this statute were jurisdictional, then it would involve personal jurisdiction which is just as waivable under our rules by failure to object as is venue. *See* N.M.R. Civ. P. 12(b) (2) and 12(h).

238. 92 N.M. 671, 593 P.2d 1074 (1979).

239. The case was brought by the plaintiff in San Miguel County. In addition to the venue question, the defendant challenged the sufficiency of the service, but that question was not addressed on appeal.

240. 92 N.M. at 672, 593 P.2d at 1075. The court remanded the case to the San Miguel district court with instructions to dismiss. *But see* N.M. Stat. Ann. § 37-1-14 (1978). It is also interesting to note that the court in *Jones* relies solely on the federal rule, which prior to the enactment of Judicial Code of 1948, 28 U.S.C. § 1406(a) (1976), required that when venue within a district was improper, and timely raised, it resulted in dismissal rather than transfer for want of a legislatively created transfer mechanism. 1 Moore, *Federal Practice* ¶ 0.146[2], at 1660 (2d ed. 1980). It is ironic indeed that the New Mexico Supreme Court, which in contradistinction to the United States Supreme Court, has adamantly reserved matters of procedure to the exclusive province of the courts, *compare* *Amerman v. Hubbard Broadcasting*, 89 N.M. 307, 551 P.2d 1354 (1976) (testimonial privileges within exclusive rule-making power of courts) *with* *Sibbach v. Wilson Co.*, 312 U.S. 1 (1941) (validity of procedural rule governed by legislatively enacted standards of enabling act), should adopt federal deference to the need for legislative enactments when it comes to venue.

When *Dose* and *Jones* are read together, one striking anomaly appears. While *Jones* unequivocally rejects the notion that section 38-3-1(c) of the New Mexico statutes²⁴¹ is jurisdictional, the court in *Dose* nevertheless retains one of the jurisdictionally based accoutrements of the statute—that improper venue under it must result in dismissal rather than transfer to the court of proper venue. One might have thought that the New Mexico court, prepared to reject the jurisdictional view of the statute and firmly committed to judicial control over procedural matters, would also have exercised its superintending power and authorized the judicial transfer of cases filed when venue is improper.

D. Non-Statutory Review.²⁴²

1. The Prerogative Writs.

Historically, the prerogative writs²⁴³ were used by the King's Bench to control the actions of inferior governmental officers. Following that tradition, American state courts, as inheritors of that common law power, have used the writs as one means of reviewing administrative decisions.²⁴⁴ In New Mexico, mandamus²⁴⁵ and prohibition²⁴⁶ have long operated in the administrative field and common law certiorari power has been suggested as appropriate when no

241. N.M. Stat. Ann. § 38-3-1(C) (1978).

242. Authority for judicial review of administrative action is usually found in one of three formats. First, the specific statute which creates the agency often provides for judicial review. Second a general statute may provide for review from all agencies. Third, review can be had by way of the general jurisdiction conferred by constitution, state statute, or the common law. It is this third category of review which is referred to by the commentators as "non-statutory review." See K. Davis, *supra* note 1, at 443.

243. The state constitution confers concurrent jurisdiction to issue extraordinary writs on the supreme court, N.M. Const. art. 6, § 3; and the district courts, *id.* at art. 6, § 13. Statutes also control district court issuance of mandamus, N.M. Stat. Ann. §§ 44-2-1 to -14 (1978); and quo warranto. *Id.* §§ 44-3-1 to -16 (1978). Prohibition is issued under principles developed through the common law. In New Mexico prohibition will issue from the district court to restrain a governmental body for the exercise of unauthorized "quasi-judicial" power. See, e.g., *Lincoln-Lucky & Lee Mining Co. v. District Court*, 7 N.M. 486, 38 P. 580 (1894); *Bosson & Sanders, Prohibition in New Mexico*, 5 N.M.L. Rev. 91, 93 n. 12, 94 (1974).

244. The development of extraordinary remedies has been described as a "complex and tortuous tale, embodying not so much a continuous narrative as a collection of dicta and incidents." deSmith, *The Prerogative Writs*, 11 Cambridge L.J. 40, 55 (1951). See W. Gelhorn, C. Byse and P. Strauss, *supra* note 1, at 923-37; K. Davis, *supra* note 1, at 458.

245. See generally DuMars & Browde, *Mandamus in New Mexico*, 4 N.M.L. Rev. 155 (1974).

246. See generally Bosson & Sanders, *Prohibition in New Mexico*, 5 N.M.L. Rev. 91 (1974).

other review is available.²⁴⁷ Quo warranto, on the other hand, is of only limited use.²⁴⁸

Two of the problems flowing from the use of extraordinary remedies to challenge administrative actions are well illustrated by two cases decided this year. The first, *Huning v. Los Chavez Zoning Commission*,²⁴⁹ illustrates Professor Davis' concern that the use of the old writs leads away from the merits and concentrates judges' and lawyers' time "on the solution of false problems."²⁵⁰ The second, *City of Albuquerque v. New Mexico State Corporation Commission*,²⁵¹ by demonstrating one proper use of a writ, helps illustrate how improper resort to extraordinary remedies can undercut the normal processes of review from decisions of administrative agencies.

In *Huning*, the plaintiffs sought quo warranto against the Zoning Commission, claiming that the Commission was invalidly created. The district court entered judgment for the plaintiffs²⁵² and the Commission appealed. Finding that the Commission is a "public office" within the meaning of the quo warranto statute,²⁵³ and that quo warranto is an appropriate procedure to contest the validity of the Commission election, the court nonetheless felt compelled to reverse. Plaintiffs had failed to show, as required by the statute,²⁵⁴ that the attorney general had refused to bring the action; "Since the statutory requirement of quo warranto has not been met in this respect, there is no authority in the plaintiffs to file this application in quo warranto."²⁵⁵ While the court has, on occasion, broken free

247. For example, the Department of Human Services suggests in its manual that food stamp overpayment cases, which are not included within the jurisdiction of the court of appeals under the Welfare Appeals Act, can be reviewed by certiorari in the district court. See New Mexico Department of Human Services Manual § 425.4.

248. Under the quo warranto statute, the remedy is used only to determine legal title to hold office. See N.M. Stat. Ann. §§ 44-3-4, -6 (1978).

249. 93 N.M. 655, 604 P.2d 121 (1979).

250. K. Davis, *supra* note 1, at 458-59.

251. 93 N.M. 719, 605 P.2d 227 (1979).

252. 93 N.M. at 655, 604 P.2d at 121. In proper quo warranto fashion the district court "decreed that the . . . District never existed as a legal entity, and order[ed] that the . . . Commission cease and desist from acting in such capacity." *Id.*

253. N.M. Stat. Ann. § 44-3-4 (1978).

254. The statute reads in pertinent part: "When the attorney general or district attorney refuses to act . . . such action may be brought in the name of the state by a private person on his own complaint." *Id.* The court properly acknowledged that the district attorney "may be considered to refuse to act since he must represent the . . . Commission." 93 N.M. at 657, 604 P.2d at 123.

255. 93 N.M. at 657, 604 P.2d at 123. The court also reversed because the Board of County Commissioners which called and conducted the election was an indispensable party and had not been joined. *Id.*

of the strictures of the ancient forms of extraordinary writs,²⁵⁶ *Huning* makes clear that in challenging agency action by way of extraordinary writs the litigant must be prepared to negotiate the intricacies presented by the particular writ in addition to establishing the substantive claim against the agency action.²⁵⁷

In *City of Albuquerque v. New Mexico State Corporation Commission*,²⁵⁸ the court affirmed the district court's granting of a writ of prohibition which prevented the Commission from asserting jurisdiction over the City's contract with a motor carrier to provide service to and from the airport.²⁵⁹ The court had to resolve an apparent conflict between the power of the Commission to regulate common carriers under one section of the constitution,²⁶⁰ and the home rule power of the City to exercise legislature power under another section.²⁶¹ The court found that the sections were equally specific²⁶² and that in such situations the latter provision in time (home rule) governs "as the latest expression of the sovereign will of the people, and as an implied modification . . . of the . . . provision . . . in conflict therewith."²⁶³

In this case, prohibition was an expeditious and appropriate way to

256. See, e.g., *Montoya v. Blackhurst*, 84 N.M. 91, 500 P.2d 176 (1972) (mandamus joined with declaratory and injunctive relief); *Burg v. City of Albuquerque*, 31 N.M. 576, 249 P. 242 (1926) (allegations in petition treated as contained in the writ of mandamus).

257. The mechanical application of the extraordinary writ system brings to mind the observation of Justice Holmes in another context:

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past.

Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897); see also, K. Davis, *supra* note 1, at 458.

258. 93 N.M. 719, 605 P.2d 227 (1979).

259. The Commission had ordered the City to refrain from providing the service because no certificate of public convenience and necessity had been obtained from the Commission. Presumably, the City had or could have litigated the question of Commission authority before the Commission and then sought judicial review on appeal. The City chose, however, to seek direct review by way of a petition for writ of prohibition in the district court.

260. "The commission shall have power and be charged with the duty of fixing, determining, supervising, regulating and controlling all charges and rates of . . . common carriers within the state and of determining any matters of public convenience and necessity relating to such facilities. . . ." N.M. Const. art. 11, § 7.

261. D. A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter. . . .

E. The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities.

N.M. Const. art. 10, § 6.

262. 93 N.M. at 721, 605 P.2d at 229.

263. *Id.* (quoting *Asplund v. Alarid*, 29 N.M. 129, 135, 219 P. 786, 788 (1923)).

resolve the matter which avoided the dual shibboleths of inappropriate judicial intermeddling with agency processes on the one hand,²⁶⁴ and, on the other, the total bar of judicial inquiry into agency processes which have not run their full course.²⁶⁵ *City of Albuquerque* fails to give any guidance, however, on the question of when non-statutory review is proper and when resort to such review is inappropriate. While such guidance could come from a generally applicable statute, in the absence of such a law it is certainly not inappropriate to look to the court to fashion guidelines.

In *City of Albuquerque* the court also used the state Administrative Procedures Act (although the Act did not apply to the agency involved)²⁶⁶ to support its conclusion that the trial court had original jurisdiction over the matter involved. The Commission argued that the district court action was, in essence, an appeal and that the district court lacked authority to try the case anew with the admission of additional evidence.²⁶⁷ The court recognized that the district court

264. For example, the New Mexico APA is replete with allowances of judicial intervention at numerous stages of the administrative process. N.M. Stat. Ann. § 12-8-8 (1978) (declaratory challenge to rules and application of rules); *id.* § 12-8-16(B) (judicial review prior to final order or decree); *id.* § 12-8-16(C) (any person suffering legal wrong because of agency action is entitled to judicial review); *id.* § 12-8-16(E) (all forms of legal action available). Such wholesale allowance of judicial intervention bespeaks a fundamental distrust of administrative agencies, and thoroughly destroys the efficiency of the New Mexico APA. Certainly, the allowance of such extensive judicial intervention represents no improvement on the present system, and for this reason it is well that the New Mexico APA does not apply generally to state agencies. See note 266 *infra*. See generally Utton, *NMAPA*, *supra* note 122, at 855-59.

265. The Liquor Control Act, for example, has a provision which seeks to preclude "injunction or writ of mandamus or other legal or equitable process . . . to prevent or enjoin any finding of guilt or order of suspension or revocation" of a liquor license made by a department hearing officer. N.M. Stat. Ann. § 60-8-8 (1978). Surely such a provision could not be used to defeat the constitutionally based power of the courts to issue extraordinary writs, see N.M. Const. art. 6, § 3, 13, or appropriate federal relief sought under 42 U.S.C. § 1983 (1970). See *Damico v. California*, 389 U.S. 416 (1967).

266. It must also be kept in mind that although there is a New Mexico APA on the books, it only applies to "agencies made subject to its coverage by law, or by agency rule or regulation if permitted by law." N.M. Stat. Ann. § 12-8-23 (1980). The only state agency to which the entire law currently applies is the Human Rights Commission. The Commission became subject to the APA "by agency rule" but only after the legislature compelled the rule-making as a condition precedent to receipt of funds, 1970 N.M. Laws, ch. 89, leading one commentator to remark:

We are, in New Mexico, in danger of having something akin to a road that leads to nowhere—a law that applies to no one. Recent experience with the Human Rights Commission indicates that perhaps the only time the legislature will want to put an agency under the Administrative Procedures Act is when it is displeased with the agency and punishes it by placing it under the Administrative Procedures Act; the legislative equivalent of banishment to the penalty box.

Utton, *NMAPA*, *supra* note 124, at 841; See also N.M. Stat. Ann. § 61-18-66 (Supp. 1979).

267. See *Transcontinental Bus System v. State Corp. Comm'n*, 56 N.M. 158, 241 P.2d 829 (1953).

action was not an appeal, but rather an independent exercise of the district court's prohibition jurisdiction. In so doing, it referred to the state APA for two propositions: 1) that administrative review of agency action must be confined to the record, and 2) that the APA does not "prohibit the receipt and consideration of otherwise admissible evidence by a court of general jurisdiction in the exercise of its original jurisdiction."²⁶⁸

One surprising feature of this reference is that the court stated in its discussion of the APA that "[a]ppeals from orders of administrative agencies are brought under and are subject to the Administrative Procedures Act,"²⁶⁹ as if our state APA were generally applicable, when in fact it is not. This aspect of the case, however, does demonstrate how resort to the extraordinary writs can result in bypassing otherwise available channels of appellate review.

2. Declaratory and Injunctive Relief.

Injunctions and declaratory judgments have long been used as vehicles for the review of federal administrative decisions.²⁷⁰ Less burdened than the prerogative writs with formal, procedural requirements,²⁷¹ the declaratory/injunctive route²⁷² has been taken increasingly in the courts of New Mexico as a means of challenging state administrative action either where there is no statutory avenue for review or where such an avenue is inappropriate or ineffective.²⁷³ Two federal cases decided this year demonstrate these two uses of declaratory and injunctive actions.

In *Nolan v. C. de Baca*,²⁷⁴ plaintiff forewent a statutory hearing and appeal in favor of declaratory and injunctive review.²⁷⁵ Since the agency action was challenged on federal statutory and constitu-

268. 93 N.M. at 723, 605 P.2d at 231.

269. *Id.*

270. K. Davis, *supra* note 1, at 444.

271. *Id.* at 445.

272. W. Gelhorn, C. Byse & P. Strauss, *supra* note 1, at 919-20. Requests for injunctive relief are typically joined with declaratory relief as a means of determining what the law is and how it is to be applied to the parties. See generally Gifford, *Declaratory Judgments Under the Model State Administrative Procedure Act*, 13 Hous. L. Rev. 825 (1976).

273. K. Davis, *supra* note 1, at 444.

274. 603 F.2d 810 (10th Cir. 1979), *cert. denied*, 444 U.S. 1068 (1980).

275. Because of a change in the regulations of the defendant, Human Services Department, plaintiff's benefits under the Aid to Families with Dependent Children program (AFDC) were reduced. Such an action by the department entitled plaintiff to an administrative hearing from which direct appeal to the court of appeals is provided. N.M. Stat. Ann. § 27-3-3, -4 (1978). In lieu thereof, plaintiff initiated a declaratory and injunctive action in the federal district court.

tional grounds,²⁷⁶ resort to administrative review was at least unnecessary.²⁷⁷ In *New Mexico Association for Retarded Citizens v. New Mexico*,²⁷⁸ the plaintiffs sought to compel the state Department of Education to act.²⁷⁹ Since the gravamen of the complaint was agency inaction, there was no agency action to challenge on appeal, making resort to declaratory and injunctive relief the only real avenue for relief available against the agency.²⁸⁰

In both cases, plaintiffs resorted to federal court for the vindication of federally protected rights. *Jacobs v. Stratton*²⁸¹ demonstrates, however, that suits against agencies based on federal law can be filed in state court.²⁸² Furthermore, such judicial review in state court can extend to compel or restrain state agency action required by state law. What is noteworthy about these cases is the absence of argument concerning the propriety of the delcaratory/injunctive mechanism. Indeed, it is now beyond serious contention that in New Mexico dec-

276. Plaintiff, on behalf of herself and her AFDC eligible children, attacked the Department regulation which imputed one-half of her husband's (step-father of the children) income as available to plaintiff to meet the needs of the children. Plaintiff's claim was that the regulation violated the Constitution, the Social Security Act, and applicable federal regulations. The court of appeals upheld a district court judgment in favor of plaintiff on the statutory and regulatory claim.

277. Where the *sole* claim against the defendant is a legal claim against the validity of its regulation, no purpose would be served by requiring resort to the agency decision-making process. Further, where the vindication of federal rights are involved, exhaustion of state administrative procedures is not required. *E.g.*, *Barry v. Barchi*, 443 U.S. 55 (1979); *Damico v. California*, 389 U.S. 416 (1967); *but see Patsy v. Florida Int'l University*, _____ F.2d _____, 49 U.S.L.W. 2481 (5th Cir. 1981) (en banc).

278. 495 F. Supp. 391 (D.N.M.), *appeal docketed*, No. 80-1876 (10th Cir. Aug. 15, 1980). The Tenth Circuit Court of Appeals granted a stay of the district court judgment on October 4, 1980.

279. Plaintiffs in *New Mexico Association for Retarded Citizens* sought to compel the State Department of Education and local school districts to increase and improve programs for handicapped children. They claimed violations of federal law. The court found discrimination against the handicapped, and the presence of inadequate educational programs for the handicapped. The court, therefore, entered injunctive relief for the plaintiffs.

280. Having chosen the federal forum, mandamus would not lie because federal mandamus only runs against federal officials. 28 U.S.C. § 1361 (1976).

281. _____ N.M. _____, 615 P.2d 982 (1980).

282. *Jacobs* involved suit by a non-tenured assistant professor at Eastern New Mexico University whose contract was not renewed. *Jacobs* appealed the decision to the Board of Regents. After an adverse decision by the Board, he brought a federal civil rights action *in state court*. From a ruling in favor of plaintiff the Board appealed, and the supreme court (on writ of certiorari to the court of appeals) reversed and remanded because of an erroneous jury instruction. As pointed out by the supreme court, the claim brought in state court was essentially federal in nature: "[plaintiff based his claim] upon an alleged deprivation of rights under the First Amendment and a deprivation of due process and equal protection under the Fourteenth Amendment in violation of 42 U.S.C. § 1983." *Id.* at _____, 615 P.2d at 984.

laratory and injunctive relief are appropriate vehicles by which to challenge or compel agency conduct.²⁸³

E. Immunity from Suit.

Individual suits against administrative agencies often involve claims for damages.²⁸⁴ While actions for damages against state agencies may raise questions of sovereign immunity, prerogative writs and suits for declaratory and injunctive relief are clear exceptions²⁸⁵ to the sovereign immunity doctrine.²⁸⁶

In *Jacobs v. Stratton*,²⁸⁷ an interesting immunity question with significant implications was raised, although it did not play a part in the eventual supreme court decision. The plaintiff obtained a judgment against various university officials²⁸⁸ for wrongfully refusing to renew his contract. On appeal the court of appeals reversed.²⁸⁹ Judge Hernandez, writing only for himself,²⁹⁰ would have based the reversal on the doctrine of quasi-judicial immunity.²⁹¹ In his view,

283. In another case decided this year, *Parker v. Board of County Comm'rs*, 93 N.M. 641, 603 P.2d 1098 (1979), plaintiffs sought to challenge a county subdivision regulation by way of an action for declaratory judgment. While plaintiff did not prevail on the merits, the declaratory judgment procedure was not contested.

For a discussion on some of the practical and theoretical considerations in choosing whether to posture a particular case in prerogative writ terms or in declaratory and injunctive terms, see *DuMars & Browde*, *supra* note 245, at 119 n. 74, 174 n. 100, 185-87.

284. See note 242 *supra*. Such actions repeatedly arise against administrative agencies in the context of employment disputes. See *Jacobs v. Stratton*, ___ N.M. ___, 615 P.2d 982 (1980). These cases rarely implicate the administrative processes the particular agency exists to carry out. Actions for damages also arise when benefit program recipients sue for alleged wrongful withholding of benefits. Those actions clearly implicate sovereign immunity. See *Edelman v. Jordan*, 415 U.S. 651 (1974).

285. The prerogative writs are clear exceptions to the sovereign immunity doctrine because they are deemed not to be suits against the state as such, but rather "to enforce a duty owed by a public officer to his principal—the state." *DuMars & Browde*, *supra* note 245, at 184 and cases cited therein. A similar analysis has been applied to suits for declaratory and injunctive relief against state officials. Rather than acts against the state, they are viewed as acts to compel enforcement of the law. See *Harriet v. Lusk*, 63 N.M. 383, 386, 320 P.2d 738, 740-41 (1958).

286. In *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1976), the supreme court abolished the defense of sovereign immunity in tort cases, but made its ruling prospective, from and after July 1, 1976.

287. 18 N.M. St. B. Bull. 800 (Ct. App. Nov. 1, 1979), *aff'd on other grounds*, ___ N.M. ___, 615 P.2d 982 (1980). *Jacobs* involved a suit by an untenured assistant professor whose contract was not renewed by Eastern New Mexico University. See note 282 *supra*.

288. The trial court had granted summary judgment for the Board and for all the regents except Stratton. Judgment was entered against Stratton, the University President, the Vice President and the Dean of the College. 18 N.M. St. B. Bull. at 801.

289. *Id.* at 804.

290. Chief Judge Wood concurred specially, and Judge Walters joined Judge Wood's special concurrence while concurring in the result. *Id.*

291. Judge Hernandez raised the question *sua sponte* as a question, "of a general public nature affecting the interests of the state at large." *Id.* at 803 (quoting *Des Deurles v. Grainer*, 76 N.M. 52, 59, 412 P.2d 6, 11 (1966)).

Judge Hernandez's protective attitude toward the Board is rooted in his belief that mem-

the university officials were engaged in quasi-judicial functions,²⁹² and therefore were immune from suit under the judicial immunity doctrine.²⁹³ On certiorari, the supreme court reversed on other grounds,²⁹⁴ although the Hernandez view perhaps was implicitly rejected by the supreme court's reversal.²⁹⁵ Indeed, it is hard to imagine that the New Mexico court, having recently rejected sovereign immunity in one context,²⁹⁶ would, by way of quasi-judicial immunity, allow its resurrection in another.²⁹⁷

APPENDIX A

ADMINISTRATIVE LAW CASES, 1979-80—BY CASE NAME

- Aamco Transmissions, Inc. v. Taxation & Revenue Dep't, 93 N.M. 389, 600 P.2d 841 (Ct. App. 1979).
 Abernathy v. Employment Sec. Comm'n, 93 N.M. 71, 596 P.2d 514 (1979).
 Ambell v. County of Bernalillo, 94 N.M. 395, 611 P.2d 218 (Ct. App. 1979).
 American Dairy Queen v. Taxation & Revenue Dep't, 93 N.M. 743, 605 P.2d 251 (Ct. App. 1979).
 Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979).

bers who perform essential services to the state, with little or no pay, deserve protection. He therefore concluded:

[t]he doctrine of judicial immunity should apply to the members of the boards and commissions when acting in a quasi-judicial capacity. All of the policy considerations underlying that doctrine apply with the same persuasiveness to such hearings as they do to those of the courts, and their errors can also be corrected on appeal to the courts.

18 N.M. St. B. Bull. at 804.

292. Judge Hernandez adopted the definition of "quasi-judicial" from *Thompson v. Amis*, 493 P.2d 1259, 1263 (Kan. 1972): "[Q]uasi-judicial is a term applied to administrative boards or officers empowered to investigate facts, weigh evidence, draw conclusions as basis for official actions, and exercise discretion of judicial nature," and the judge concluded that in "[a]pplying the definition to the regents hearings and to the conciliatory hearing, there is no question but that both were quasi-judicial in nature." 18 N.M. St. B. Bull. at 804.

293. Judge Hernandez would have applied a qualified judicial immunity: "[j]udicial officers are not liable for erroneously exercising their judicial powers. They are, however, liable for acting wholly in excess of their jurisdiction." 18 N.M. St. B. Bull. at 803 (quoting *Galildo v. Western States Collection Co.*, 82 N.M. 149, 152, 477 P.2d 325, 328 (Ct. App. 1970)). Since the university officials were clearly acting within their authority, Judge Hernandez would have allowed the doctrine to protect them from an action for damages.

294. The supreme court found error in a jury instruction and remanded to the trial court for further proceedings. ____ N.M. at ____, 615 P.2d at 985.

295. The court stated that "[w]e do not decide other issues raised by the parties because they are not necessary to our disposition." *Id.* The court went on to further state that "the trial court may rule differently on those issues on remand." *Id.* This offer to the trial court is at least a tacit indication that the supreme court was not favorably disposed to Judge Hernandez' view of the case.

296. See note 286 *supra*.

297. Clearly, if Judge Hernandez' view were to prevail, the doctrine of sovereign immunity would be revived in all adjudicatory matters handled by administrative agencies. In those instances agencies would be clothed with the quasi-judicial mantle.

- Anaya v. Jaramillo, 92 N.M. 617, 593 P.2d 58 (1979).
- Andrews v. Stearns-Rogers, Inc., 93 N.M. 527, 602 P.2d 624 (1979).
- Appelman v. Beach, 94 N.M. 237, 608 P.2d 1119 (1980).
- Barela v. New Mexico Dep't of Human Servs., 94 N.M. 288, 609 P.2d 1244 (Ct. App.), *cert. denied*, 94 N.M. 629, 614 P.2d 546 (1979).
- Baskin-Robbins Ice Cream Co. v. Revenue Div., 93 N.M. 301, 599 P.2d 1098 (Ct. App. 1979).
- Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).
- C & D Trailer Sales v. Taxation & Revenue Dep't, 93 N.M. 697, 604 P.2d 835 (1979).
- City of Alamogordo v. Walker Motor Co., ____ N.M. ____, 616 P.2d 403 (1980).
- City of Albuquerque v. Juarez, 93 N.M. 188, 598 P.2d 650 (Ct. App. 1979).
- City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 605 P.2d 227 (1979).
- Duran v. New Mexico Dep't of Human Servs., 19 N.M. St. B. Bull. 340 (Ct. App. Apr. 17, 1980), *rev'd*, ____ N.M. ____, 619 P.2d 1240 (1980).
- F. W. Woolworth Co. v. Bureau of Revenue, 19 N.M. St. Bar Bull. 99 (Ct. App. Jan. 31, 1980).
- Fiber v. New Mexico Bd. of Medical Examiners, 93 N.M. 67, 596 P.2d 510 (1979).
- Four Hills Country Club v. Bernalillo County Assessor, ____ N.M. ____, 616 P.2d 422 (Ct. App. 1979).
- Getty Oil Co. v. Taxation & Revenue Dep't, 93 N.M. 589, 603 P.2d 328 (Ct. App. 1979).
- Hillman v. Health & Social Servs. Dep't, 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979).
- Hobbs Gas Co. v. New Mexico Public Serv. Comm'n, ____ N.M. ____, 616 P.2d 1116 (1980).
- Huning v. Los Chavez Zoning Comm'n, 93 N.M. 655, 604 P.2d 121 (1979).
- In re* Investigation No. 2 of the Governor's Organized Crime Prevention Comm'n, 93 N.M. 525, 602 P.2d 622 (1979).
- In re* Missouri Pacific R.R., 93 N.M. 753, 605 P.2d 1152 (1980).
- In re* Subpoena Duces Tecum to the Governor's Organized Crime Prevention Comm'n, 94 N.M. 1, 606 P.2d 539 (1980).
- Jacobs v. Stratton, 18 N.M. St. B. Bull. 800 (Ct. App. Nov. 1, 1979), *aff'd on other grounds*, ____ N.M. ____, 615 P.2d 982 (1980).
- Jones v. New Mexico State Highway Dep't, 92 N.M. 671, 593 P.2d 1074 (1979).
- J. W. Jones Construction Co. v. Revenue Div., 94 N.M. 39, 607 P.2d 126 (Ct. App. 1979).
- Kennecott Copper Corp. v. New Mexico Environmental Improvement Bd., 94 N.M. 106, 614 P.2d 22 (Ct. App.), *cert. denied*, ____ N.M. ____, 615 P.2d 992 (1980).
- Kiehne v. Atwood, 93 N.M. 657, 604 P.2d 123 (1979).
- Lloyd McKee Motors, Inc. v. New Mexico State Corp. Comm'n, 93 N.M. 539, 602 P.2d 1026 (1979).

- Local 2238, American Federation of State, County & Municipal Employees v. New Mexico Highway Dep't, 93 N.M. 195, 598 P.2d 1155 (1979).
- Lovelace Center for Health Servs. v. Beach, 93 N.M. 793, 606 P.2d 203 (Ct. App. 1980).
- Miller v. Bureau of Revenue, 93 N.M. 252, 599 P.2d 1049 (Ct. App.), *cert. denied*, 92 N.M. 532, 591 P.2d 286 (1979).
- New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (D. N.M.), *appeal docketed*, No. 80-1876 (10th Cir. Aug. 15, 1980).
- New Mexico Baptist Foundation v. Bernalillo County, 93 N.M. 363, 600 P.2d 309 (Ct. App. 1979).
- New Mexico Hospital Ass'n v. Employment Sec. Comm'n, 92 N.M. 725, 594 P.2d 1181 (1979).
- New Mexico Human Servs. Dep't v. Garcia, 94 N.M. 175, 608 P.2d 151 (1980).
- New Mexico Life Ins. Guar. Ass'n v. Moore, 93 N.M. 47, 596 P.2d 260 (1979).
- New Mexico Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).
- Nolan v. C. de Baca, 603 F.2d 810 (10th Cir. 1979), *cert. denied*, 444 U.S. 1038 (1980).
- Parker v. Board of County Comm'rs, 93 N.M. 641, 603 P.2d 1098 (1979).
- Public Serv. Co. v. Public Serv. Comm'n, 92 N.M. 721, 594 P.2d 1177 (1979).
- Ribera v. Employment Sec. Comm'n, 92 N.M. 694, 594 P.2d 742 (1979).
- Robnett v. New Mexico Dep't of Human Servs., 93 N.M. 245, 599 P.2d 398 (Ct. App. 1979).
- Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979).
- Spray v. City of Albuquerque, 94 N.M. 199, 608 P.2d 511 (1980).
- State Highway Dep't v. Hidalgo Area Dev. Corp., 94 N.M. 63, 607 P.2d 601 (1980).
- Strebeck Properties, Inc. v. New Mexico Bureau of Revenue, 93 N.M. 262, 599 P.2d 1059 (Ct. App.), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979).
- Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979).
- Tipperary Corp. v. New Mexico Bureau of Revenue, 93 N.M. 22, 595 P.2d 1212 (Ct. App.), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979).
- U. V. Industries, Inc. v. Property Tax Div., 93 N.M. 651, 603 P.2d 1108 (Ct. App. 1979).

APPENDIX B

ADMINISTRATIVE LAW CASES, 1979-80—BY AGENCY

Bernalillo County.

- Ambell v. County of Bernalillo, 94 N.M. 395, 611 P.2d 218 (Ct. App. 1979).
- Appelman v. Beach, 94 N.M. 237, 608 P.2d 1119 (1980).
- Four Hills Country Club v. Bernalillo County Assessor, ____ N.M. ____, 616 P.2d 422 (Ct. App. 1979).
- Lovelace Center for Health Servs. v. Beach, 93 N.M. 793, 606 P.2d 203 (Ct. App. 1980).
- New Mexico Baptist Foundation v. Bernalillo County, 93 N.M. 363, 600 P.2d 309 (Ct. App. 1979).
- Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979).

Board of Medical Examiners.

Fiber v. New Mexico Bd. of Medical Examiners, 93 N.M. 67, 596 P.2d 510 (1979).

Board of Regents.

Jacob v. Stratton, 18 N.M. St. B. Bull. 800 (Ct. App. 1979), *aff'd on other grounds*, ____ N.M. ____, 615 P.2d 982 (1980).

City of Alamogordo.

City of Alamogordo v. Walker Motor Co., ____ N.M. ____, 616 P.2d 403 (1980).

City of Albuquerque.

City of Albuquerque v. Juarez, 93 N.M. 188, 598 P.2d 650 (Ct. App. 1979).
Spray v. City of Albuquerque, 94 N.M. 199, 608 P.2d 511 (1980).

Department of Education.

New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (D. N.M.), *appeal docketed*, No. 80-1876 (10th Cir. Aug. 15, 1980).

Department of Human Services.

Barela v. New Mexico Dep't of Human Servs., 94 N.M. 288, 609 P.2d 1244 (Ct. App.), *cert. denied*, 94 N.M. 629, 614 P.2d 546 (1979).
Duran v. New Mexico Dep't of Human Servs., ____ N.M. ____, 619 P.2d 1240 (Ct. App.), *rev'd*, ____ N.M. ____, 619 P.2d 1232 (1980).
Hillman v. Health & Social Servs. Dep't, 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979).
New Mexico Human Servs. Dep't v. Garcia, 94 N.M. 175, 608 P.2d 151 (1980).
Nolan v. C. de Baca, 603 F.2d 810 (10th Cir. 1979), *cert. denied*, 444 U.S. 1038 (1980).
Robnett v. New Mexico Dep't of Human Servs., 93 N.M. 245, 599 P.2d 398 (Ct. App. 1979).

Department of Taxation and Revenue.

Aamco Transmissions, Inc. v. Taxation & Revenue Dep't, 93 N.M. 389, 600 P.2d 841 (Ct. App. 1979).
American Dairy Queen v. Taxation & Revenue Dep't, 93 N.M. 743, 605 P.2d 251 (Ct. App. 1979).
Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979).
Baskin-Robbins Ice Cream Co. v. Revenue Div., 93 N.M. 301, 599 P.2d 1098 (Ct. App. 1979).
C & D Trailer Sales v. Taxation & Revenue Dep't, 93 N.M. 697, 604 P.2d 835 (1979).
F. W. Woolworth Co. v. Bureau of Revenue, 19 N.M. St. Bar Bull. 99 (Ct. App. Jan. 31, 1980).

- Getty Oil Co. v. Taxation & Revenue Dep't, 93 N.M. 589, 603 P.2d 328 (Ct. App. 1979).
- J. W. Jones Construction Co. v. Revenue Div., 94 N.M. 39, 607 P.2d 126 (Ct. App. 1979).
- Miller v. Bureau of Revenue, 93 N.M. 252, 599 P.2d 1049 (Ct. App.), *cert. denied*, 92 N.M. 532, 591 P.2d 286 (1979).
- Strebeck Properties, Inc. v. New Mexico Bureau of Revenue, 93 N.M. 262, 599 P.2d 1059 (Ct. App.), *cert. denied*, 92 N.M. 675, 593 P.2d 1978 (1979).
- Tipperary Corp. v. New Mexico Bureau of Revenue, 93 N.M. 22, 595 P.2d 1212 (Ct. App.), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979).
- U. V. Industries v. Property Tax Div., 93 N.M. 651, 603 P.2d 1108 (Ct. App. 1979).

Dona Ana County.

- Parker v. Board of County Comm'rs, 93 N.M. 641, 603 P.2d 1098 (1979).

Employment Security Commission.

- Abernathy v. Employment Sec. Comm'n, 93 N.M. 71, 596 P.2d 514 (1979).
- New Mexico Hospital Ass'n v. Employment Sec. Comm'n, 92 N.M. 725, 594 P.2d 1181 (1979).
- Ribera v. Employment Sec. Comm'n, 92 N.M. 694, 594 P.2d 742 (1979).

Environmental Improvement Board.

- Kennecott Copper Corp. v. New Mexico Environmental Improvement Bd., 94 N.M. 106, 614 P.2d 22 (Ct. App.), *cert. denied*, ____ N.M. ____, 615 P.2d 992 (1980).

Governor's Organized Crime Prevention Commission.

- In re* Investigation No. 2 of the Governor's Organized Crime Prevention Comm'n, 93 N.M. 525, 602 P.2d 622 (1979).
- In re* Subpoena Duces Tecum to the Governor's Organized Crime Prevention Comm'n, 94 N.M. 1, 606 P.2d 539 (1980).

Livestock Board.

- New Mexico Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

Public Service Commission.

- Hobbs Gas Co. v. New Mexico Public Serv. Comm'n, ____ N.M. ____, 616 P.2d 1116 (1980).
- Public Serv. Co. v. Public Serv. Comm'n, 92 N.M. 721, 594 P.2d 1177 (1979).

State Corporation Commission.

- City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 605 P.2d 227 (1979).
- In re* Missouri Pacific R.R., 93 N.M. 753, 605 P.2d 1152 (1980).

Lloyd McKee Motors, Inc. v. New Mexico State Corp. Comm'n, 93 N.M. 539, 602 P.2d 1026 (1979).

State Highway Department.

Jones v. New Mexico State Highway Dep't, 92 N.M. 671, 593 P.2d 1074 (1979).

Local 2238, American Federation of State, County & Municipal Employees v. New Mexico Highway Dep't, 93 N.M. 195, 598 P.2d 1155 (1979).

State Highway Dep't v. Hidalgo Area Dev. Corp., 94 N.M. 63, 607 P.2d 601 (1980).

Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979).

Superintendent of Insurance.

New Mexico Life Ins. Guar. Ass'n v. Moore, 93 N.M. 47, 596 P.2d 260 (1979).

Water Quality Control Commission.

Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

APPENDIX C

ADMINISTRATIVE LAW CASES, 1979-80—BY TOPIC

I. AUTHORITY OF AGENCY TO ACT

A. Statutory Authority.

Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

Kennecott Copper Corp. v. New Mexico Environmental Improvement Bd., 94 N.M. 106, 614 P.2d 22 (Ct. App.), *cert. denied*, ____ N.M. ____, 615 P.2d 992 (1980).

Lloyd McKee Motors, Inc. v. New Mexico State Corp. Comm'n, 93 N.M. 539, 602 P.2d 1026 (1979).

Miller v. Bureau of Revenue, 93 N.M. 252, 599 P.2d 1049 (Ct. App.), *cert. denied*, 92 N.M. 532, 591 P.2d 286 (1979).

Parker v. Board of County Comm'rs, 93 N.M. 641, 603 P.2d 1098 (1979).

Strebeck Properties, Inc. v. New Mexico Bureau of Revenue, 93 N.M. 262, 599 P.2d 1059 (Ct. App.), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979).

B. Federal Authority in State Administered Federal Programs.

Barela v. New Mexico Dep't of Human Servs., 94 N.M. 288, 609 P.2d 1244 (Ct. App.), *cert. denied*, 94 N.M. 629, 614 P.2d 546 (1979).

C. The Non-Delegation Doctrine.

II. EXERCISE OF ADMINISTRATIVE POWER

A. Gathering and Disseminating Information.

In re Investigation No. 2 of the Governor's Organized Crime Prevention Comm'n, 93 N.M. 525, 602 P.2d 622 (1979).

In re Subpoena Duces Tecum to the Governor's Organized Crime Prevention Comm'n, 94 N.M. 1, 606 P.2d 539 (1980).

B. Rules and Rule-Making.

Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

Kennecott Copper Corp. v. New Mexico Environmental Improvement Bd., 94 N.M. 106, 614 P.2d 22 (Ct. App.), *cert. denied*, ____ N.M. ____, 615 P.2d 992 (1980).

C. Orders and Adjudications

D. The Process of Proof.

Hillman v. Health & Social Servs. Dep't, 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979).

E. The Decisional Process.

Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

C & D Trailer Sales v. Taxation & Revenue Dep't, 93 N.M. 697, 604 P.2d 835 (1979).

Hillman v. Health & Social Servs. Dep't, 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979).

Kennecott Copper Corp. v. New Mexico Environmental Improvement Bd., 94 N.M. 106, 614 P.2d 22 (Ct. App.), *cert. denied*, ____ N.M. ____, 615 P.2d 992 (1980).

F. Enforcement.

City of Albuquerque v. Juarez, 93 N.M. 188, 598 P.2d 650 (Ct. App. 1979).

In re Investigation No. 2 of the Governor's Organized Crime Prevention Comm'n, 93 N.M. 525, 602 P.2d 622 (1979).

In re Subpoena Duces Tecum to the Governor's Organized Crime Prevention Comm'n, 94 N.M. 1, 606 P.2d 539 (1980).

III. JUDICIAL CONTROL OF ADMINISTRATIVE POWER

A. Scope of Review.

1. Standards.

Abernathy v. Employment Sec. Comm'n, 93 N.M. 71, 596 P.2d 514 (1979).

City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 605 P.2d 227 (1979).

In re Missouri Pacific R.R., 93 N.M. 753, 605 P.2d 1152 (1980).

New Mexico Human Servs. Dep't v. Garcia, 94 N.M. 175, 608 P.2d 151 (1980).

2. Questions of Law.

- Fiber v. New Mexico Bd. of Medical Examiners, 93 N.M. 67, 596 P.2d 510 (1979).
- Lloyd McKee Motors, Inc. v. New Mexico Corp. Comm'n, 93 N.M. 539, 602 P.2d 1026 (1979).
- Miller v. Bureau of Revenue, 93 N.M. 252, 599 P.2d 1049 (Ct. App.), *cert. denied*, 92 N.M. 532, 519 P.2d 86 (1979).
- Strebeck Properties, Inc. v. Bureau of Revenue, 93 N.M. 262, 599 P.2d 1059 (Ct. App.), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979).

3. Questions of Fact—Substantial Evidence.

- C & D Trailer Sales v. Taxation & Revenue Dep't, 93 N.M. 697, 604 P.2d 835 (1979).
- Fiber v. New Mexico Bd. of Medical Examiners, 93 N.M. 67, 596 P.2d 510 (1979).
- Hobbs Gas Co. v. New Mexico Public Serv. Comm'n, _____ N.M. _____, 616 P.2d 1116 (1980).
- In re* Missouri Pacific R.R., 93 N.M. 753, 605 P.2d 1152 (1980).
- New Mexico Baptist Foundation v. Bernalillo County, 93 N.M. 363, 600 P.2d 309 (Ct. App. 1979).
- New Mexico Human Servs. Dep't v. Garcia, 94 N.M. 175, 608 P.2d 151 (1980).
- Ribera v. Employment Sec. Comm'n, 92 N.M. 694, 594 P.2d 742 (1979).
- Robnett v. New Mexico Dep't of Human Servs. 93 N.M. 245, 599 P.2d 398 (Ct. App. 1979).

B. *Res Judicata and Estoppel*

- Spray v. City of Albuquerque, 94 N.M. 199, 608 P.2d 511 (1980).
- Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979).

C. *Limitations on Judicial Review.*

1. Primary Jurisdiction.
2. Exhaustion.
3. Mootness.
4. Ripeness.
5. Standing.
6. Venue.

- Jacobs v. Stratton, 18 N.M. St. B. Bull. 800 (Ct. App. Nov. 1, 1979), *aff'd on other grounds*, _____ N.M. _____, 615 P.2d 982 (1980).
- Jones v. New Mexico State Highway Dep't, 92 N.M. 671, 593 P.2d 1074 (1979).
- New Mexico Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

D. *Non-Statutory Judicial Review.*

1. The Prerogative Writs.
- City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 605 P.2d 227 (1979).
- Huning v. Los Chavez Zoning Comm'n, 93 N.M. 655, 604 P.2d 121 (1979).

2. Declarative and Injunctive Relief.

New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (D.N.M.), *appeal docketed*, No. 80-1876 (10th Cir. Aug. 15, 1980).

Jacobs v. Stratton, 18 N.M. St. B. Bull. 800 (Ct. App. Nov. 1, 1979), *aff'd on other grounds*, _____ N.M. _____, 615 P.2d 982 (1980).

E. Immunity from Suit.

Jacobs v. Stratton, 18 N.M. St. B. Bull. 800 (Ct. App. Nov. 1, 1979), *aff'd on other grounds*, _____ N.M. _____, 615 P.2d 982 (1980).

New Mexico Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).