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ADMINISTRATIVE LAW

This survey article focuses on the exercise of governmental functions by state agencies. The discussion is divided into three parts, following the pattern established in the past six surveys of administrative law,¹ and examines significant appellate decisions during the period from February 1, 1988 to July 31, 1989 that address the authority of state agencies to act, their exercise of that authority, and judicial review of their decisions.

This survey period has seen a significant legislative development in the area of administrative law. In March of 1989, the New Mexico Legislature amended the Public Rules Act to institute an official registry for state agency rules and decisions.² The registry, published twice a month, should help to extend notice of proposed rulemakings and ease the process of locating agency rules. Part II of this article discusses the importance of the registry in the development of state administrative law.³

Appellate cases decided during the survey period provide a fruitful source for analysis of developments in New Mexico's administrative law. Part I of this article, addressing the authority of agencies to act, examines a group of cases in which the courts upheld agencies' delegated authority to make and apply administrative law.⁴ In particular, Part I discusses the New Mexico Supreme Court's decision in *Local 2238 of the American Federation of State, County and Municipal Employees v. Stratton*,⁵ in which the court recognized implicit legislative approval for the state's public employees to engage in collective bargaining, allowing the State Personnel Board to promulgate and apply rules for labor-management relations even in the absence of an express delegation of authority from the legislature.⁶

Part II focuses on the application of a whole record review to an agency rulemaking action, a less deferential form of judicial review generally reserved for agency adjudicatory actions.⁷ The increasing use of whole record review demands that agencies pay closer attention to building a complete record of their administrative proceedings. Other cases discussed in this section focus on recent developments in specific procedural issues in agency rulemakings and adjudications, including the continuing confusion about when an agency must act in order to retain jurisdiction over a case.⁸

1. See Kelly & Gilmore, *Administrative Law*, 19 N.M.L. REV. 575 (1989); Browde & Schultz, *Administrative Law*, 15 N.M.L. REV. 119 (1985); Kelly & O'Leary, *Administrative Law*, 14 N.M.L. REV. 1 (1984); Shapiro & Jacobvitz, *Administrative Law*, 13 N.M.L. REV. 235 (1983); Browde, *Administrative Law*, 12 N.M.L. REV. 1 (1982); Browde, *Administrative Law*, 11 N.M.L. REV. 1 (1980-81).

2. 1989 N.M. Laws 241-42 (codified at N.M. STAT. ANN. § 14-4-7.1 (Supp. 1989)).

3. See *infra* text accompanying notes 122-33.

4. See *infra* text accompanying notes 11-82.

5. 108 N.M. 163, 769 P.2d 76 (1989).

6. See *infra* text accompanying notes 36-51.

7. See *infra* text accompanying notes 83-133.

8. See *infra* text accompanying notes 134-244.

Part III of this article takes a close look at the increasing use of whole record judicial review, particularly the progeny of *Duke City Lumber Co. v. Environmental Improvement Board*.⁹ In *Duke City*, the supreme court first applied the whole record standard of review to an agency rulemaking, but it did not articulate how that standard should be applied in subsequent cases.¹⁰

I. AUTHORITY OF AGENCY TO ACT

State agencies are unique governmental actors in that they can play different types of governmental roles at the same time. State agencies can have the authority both to make new rules and regulations and to render decisions in specific cases.¹¹ In other words, they can perform legislative as well as judicial functions, and they do so as members of the executive branch of our state government.¹² This flexibility allows state agencies to perform complex governmental tasks such as licensing health care providers, administering welfare programs, enforcing environmental standards, and collecting taxes.

The overlap of legislative and judicial power in agencies of the executive branch might threaten the principle of separation of powers embedded in our state constitution¹³ were it not for two fundamental limitations on the power of state agencies. First, agencies may exercise only the power that is delegated to them by the legislature or the constitution.¹⁴ Second, the judiciary retains the power to review and overrule agency decisions in the courts.¹⁵

Because limitations on agency power are mandated by the constitutional doctrine of separation of powers, a large body of administrative law tests whether an agency has acted *ultra vires*, that is, beyond the scope of its authority.¹⁶ An agency action may be beyond its authority in two ways. It may be performing activities that could not have been delegated to it under the constitutional separation of powers. Or, if the delegation was acceptable, the agency may be acting beyond the scope of the powers delegated.

9. 101 N.M. 291, 681 P.2d 717 (1984); see *infra* text accompanying notes 245-301.

10. *Duke City*, 101 N.M. at 294-95, 681 P.2d at 720-21. For further discussion of this case, see Browde, *Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution*, 18 N.M.L. REV. 525 (1988).

11. See Kelly & Gilmore, *supra* note 1, at 576.

12. *Id.*

13. See N.M. CONST. art. III, § 1. That section of the New Mexico Constitution states: The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

Id.

14. For a discussion of the non-delegation doctrine in New Mexico, see *infra* text accompanying notes 19-52.

15. See *infra* text accompanying notes 52-82 for analysis of judicial review of agency decisions.

16. See Kelly & Gilmore, *supra* note 1, at 583.

To test whether an agency has acted *ultra vires*, the courts look to the statutes or constitutional provisions giving the agency power.¹⁷ Express statutory circumscriptions of an agency's authority serve both to limit the agency's power and to give the courts clear guidelines by which to measure an agency's actions. Where the boundaries of an agency's power are not so clear, construing the statute can be tantamount to defining the scope of an agency's authority.¹⁸

During this survey period, the supreme court reviewed the statutory and constitutional bases for several agency rulemakings and adjudications and found ample authority for the agencies' actions. In most of these cases, the courts found the delegations of power to be clear and unambiguous and upheld the agencies' decisions as clearly within the scope of their authority.

In other examples discussed in this article, the courts examined agency actions that were not explicitly addressed in the statutes. In these instances, the courts explored the intent of the legislature in making the delegations and concluded that the agencies had acted within the scope of delegated discretionary authority.

A. Regulatory Authority

*Mountain States Telephone & Telegraph Co. v. State Corporation Commission*¹⁹ presents a classic example of judicial analysis in an *ultra vires* challenge to agency authority. This suit was brought by the telephone company after a decision by the State Corporation Commission ("SCC") to begin regulating the company's third-party billing and collection services.²⁰ The telephone company questioned whether the SCC had juris-

17. The construction of statutes is clearly the job of the courts. *Madrid v. University of Cal.*, 105 N.M. 715, 718, 737 P.2d 74, 77 (1987).

18. For a discussion of the methods of statutory construction, see Kelly & Gilmore, *supra* note 1, at 583-93. New Mexico courts will not necessarily defer to an agency interpretation when a statute is unclear, but will seek to bring into effect the intent of the legislative body. An agency's interpretation may be treated as persuasive, but not binding, evidence of the legislature's intent. *Molycorp, Inc. v. State Corp. Comm'n*, 95 N.M. 613, 624 P.2d 1010 (1981); *New Mexico Pharmaceutical Ass'n v. State*, 106 N.M. 73, 738 P.2d 1318 (1987). An agency's interpretation may be accepted when the legislature clearly sought to delegate such policymaking authority to the agency. *Public Serv. Co. of N.M. v. Public Serv. Comm'n*, 106 N.M. 622, 747 P.2d 917 (1987).

The federal rule is more explicit. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the United States Supreme Court established that, where the law is unclear, the court is to seek the intent of Congress and *must* defer to the agency's interpretation of the law if it reasonably fulfills that intent.

19. 107 N.M. 745, 764 P.2d 876 (1988).

20. *Id.* at 746, 764 P.2d at 877. The SCC had conducted hearings to explore whether it had jurisdiction to regulate in this area. *Id.* The agency made several findings in support of jurisdiction; specifically, the agency found that the telephone company's billing service was an integral component of telecommunications service as a whole, that Mountain Bell had a monopoly over billing, and that the third-party service included recording the transmission of telephone signals and transmitting data. *Id.* The SCC had previously regulated one aspect of the telephone company's collection services. *Id.* Third-party service involves recording and billing customers for their use of long-distance lines belonging to other phone companies. *Id.*

diction to regulate services provided by the telephone company on behalf of other carriers.²¹

The supreme court examined the delegations of authority granted to the SCC by both the New Mexico Constitution and the New Mexico Telecommunications Act.²² In a brief analysis, the court found that the SCC had "broad, plenary authority"²³ to regulate New Mexico's transportation and transmission industries and common carriers under article XI, section 7, of the state constitution.²⁴ In fact, the court quoted from prior litigation between the parties that it was "difficult to conceive of a more clear and all-inclusive grant of power for a governmental agency."²⁵ The court also found statutory authority within the New Mexico Telecommunications Act for the SCC to certify public telecommunications providers and regulate rates for the transmission of interstate signals.²⁶ Finding ample constitutional and statutory grounds for the SCC to regulate, the court upheld the agency's decision to extend its activities into this arena.²⁷

In *National Council on Compensation Insurance v. State Corporation Commission*,²⁸ the supreme court construed the New Mexico Insurance Rate Regulation Law²⁹ to decide who has authority to review and reject insurance rate increases.³⁰ Here, the National Council on Compensation Insurance ("NCCI") appealed a decision of the state Insurance Board³¹ to disapprove a workers' compensation insurance premium increase.³² NCCI argued that section 59A-17-14(B) of the state law conferred authority to disapprove a rate filing only upon the Superintendent of

21. Seeking reversal of the agency decision on both statutory and constitutional grounds, the telephone company sought to remove the case directly to the supreme court. The court undertook the review in accordance with the removal procedure, finding the constitutional question to be "the sole issue for consideration." *Id.*

22. N.M. STAT. ANN. §§ 63-9A-1 to -20 (Repl. Pamp. 1989).

23. *Mountain States*, 107 N.M. at 747, 764 P.2d at 878.

24. The section begins:

The commission shall have power and be charged with the duty of fixing, determining, supervising, regulating and controlling all charges and rates of railway, express, telegraph, telephone, sleeping-car and other transportation and transmission companies and common carriers within the state and of determining any matters of public convenience and necessity relating to such facilities as expressed herein in the manner which has been or shall be provided by law.

N.M. CONST. art. XI, § 7.

25. *Mountain States*, 107 N.M. at 747, 764 P.2d at 878 (quoting *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n*, 90 N.M. 325, 331, 563 P.2d 588, 594 (1977)).

26. *Id.*; see New Mexico Telecommunications Act, N.M. STAT. ANN. §§ 63-9A-1 to -20 (Repl. Pamp. 1989). The court added a third element to its opinion. Noting that customer billings can lead to the denial of telecommunications services for non-payment, the court found a distinct public policy interest in SCC regulation of actions involving delinquent accounts. *Mountain States*, 107 N.M. at 747, 764 P.2d at 878.

27. *Mountain States*, 107 N.M. at 747, 764 P.2d at 878.

28. 107 N.M. 278, 756 P.2d 558 (1988).

29. N.M. STAT. ANN. §§ 59A-17-1 to -35 (Repl. Pamp. 1988).

30. 107 N.M. at 283, 756 P.2d at 563 (citing N.M. STAT. ANN. § 59A-17-14(B) (Repl. Pamp. 1988)).

31. *Id.* at 280, 756 P.2d at 560. The Corporation Commission was purportedly acting as the Insurance Board and was named as a co-defendant in this suit. *Id.*

32. *Id.*

Insurance and not upon the board as a body.³³ This provision provides that "[i]f . . . the superintendent finds that a filing does not meet the applicable requirements . . . he shall, after a hearing upon written notice . . . issue an order"³⁴ The court, however, looked to the code as a whole. The court reasoned that because the statutes conferred exclusive jurisdiction over rate regulation law onto the board, the provision in question had to be construed to give authority over rate filings to the board as well as the superintendent.³⁵

In *Local 2238 of the American Federation of State, County and Municipal Employees v. Stratton*,³⁶ the supreme court construed a state statute to find implied legislative authority for an entire regulatory scheme. The court found that the legislature had, by implied consent, authorized the state Personnel Board to regulate collective bargaining.³⁷ In recognizing implicit authority to regulate in this area, the court relied on the broad delegation of discretionary authority conferred upon the board in the Personnel Act³⁸ and on the board's own actions to limit and define that power.³⁹

The conflict in *Local 2238* arose with a challenge from Attorney General Hal Stratton that, although public employees have engaged in collective bargaining for many years, they do so without express legislative consent.⁴⁰

33. *Id.* at 282-83, 756 P.2d at 562-63. The applicable provision reads:

If at any time subsequent to the applicable review period provided for as to a workmen's compensation insurance filing the superintendent finds that a filing does not meet the applicable requirements of Chapter 59A, Article 17 NMSA 1978, he shall, after a hearing upon written notice specifying the matters to be considered at the hearing to every insurer and rate service organization which made such filing, issue an order specifying the respects in which he finds that the filing fails to meet such requirements and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. The superintendent shall send copies of such order to every such insurer and rate service organization. The order shall not affect any contract or policy made or issued prior to expiration of the period stated in the order.

N.M. STAT. ANN. § 59A-17-14(B) (Repl. Pamp. 1988).

34. N.M. STAT. ANN. § 59A-17-14(B) (Repl. Pamp. 1988).

35. *NCCI*, 107 N.M. at 283, 756 P.2d at 563. The court stated: "Unless any intent of the legislature to the contrary be expressly stated, we cannot infer that powers authorized under Section 59A-17-14(B) for the Superintendent could be exercised only by him to the exclusion of the Board." *Id.* Appellant in this case also asserted procedural defects in the SCC's adjudicatory hearing. *Id.* at 283-87, 756 P.2d at 563-67. These issues are discussed in Part II of this article. See *infra* text accompanying notes 138-54. This case is also included in our analysis of whole record review. See *infra* text accompanying notes 243-47.

36. 108 N.M. 163, 769 P.2d 76 (1989).

37. *Id.* at 171, 769 P.2d at 84.

38. N.M. STAT. ANN. §§ 10-9-1 to -25 (Repl. Pamp. 1987).

39. *Local 2238*, 108 N.M. at 170, 769 P.2d at 83.

40. *Id.* at 168, 769 P.2d at 81. This question had arisen before. In 1965, the supreme court allowed the Town of Farmington to renew a collectively bargained agreement with unionized workers at an electric utility that had previously been privately managed and had only recently been acquired by the town. *International Bd. of Elec. Workers v. Farmington*, 75 N.M. 393, 405 P.2d 233 (1965). Four years later, then Attorney General James Maloney cited the decision in *Farmington* to support an opinion that public employees had implicit legislative permission to bargain on issues not covered by existing municipal merit systems. 69 Op. Att'y Gen. 113 (1969). This opinion suggests that to bargain on issues already covered by municipal merit systems would represent an abdication of the

In *Local 2238*, the supreme court ruled that authority for public sector collective bargaining is incident to the express grant of authority conferred upon the Personnel Board in the Personnel Act.⁴¹

The court first addressed whether authority to allow and regulate collective bargaining could legitimately be delegated.⁴² The court held that this public duty could be delegated so long as the Personnel Board retained ultimate discretion and control over the collective bargaining process.⁴³

Finding the delegation acceptable, the court embarked upon a three-pronged analysis of the scope of the board's delegated powers. First, the court examined the language of the Personnel Act.⁴⁴ The court found that the Personnel Board has broad discretionary authority to "provide greater economy and efficiency in the management of state affairs,"⁴⁵ that language allowing the board to promulgate rules for employee-managerial relations "among other things" was sufficiently broad to encompass collective bargaining,⁴⁶ and that the board has a duty to "promulgate regulations to effectuate the Personnel Act."⁴⁷

legislative discretion imparted to municipalities. *Id.*

In 1972, the Personnel Board promulgated Rules for Labor-Management Relations, which define the scope of collective bargaining and establish procedures for negotiation. *Local 2238*, 108 N.M. at 166-67, 769 P.2d at 79-80. In intervening years, the legislature has voted on matters related to collective bargaining, but has stopped short of expressly affirming the Personnel Board's authority to promulgate and apply rules in this area. *Id.*

Since *Farmington*, the courts have addressed other questions relating to collective bargaining. See *AFSCME, Local 2183 v. State Personnel Bd.*, 81 L.R.R.M. (BNA) 2397 (1972); *City of Albuquerque v. Campos*, 86 N.M. 488, 525 P.2d 848 (1974).

The present dispute arose when the Attorney General refused to approve a proposed collective bargaining agreement between the American Federation of State, County and Municipal Employees (AFSCME) and the state highway department. *Local 2238*, 108 N.M. at 164, 769 P.2d at 77. Subsequently, the Personnel Board terminated the agreement. *Id.* AFSCME brought this action for writ of certiorari and declaratory judgment, asking that the existing collective bargaining agreement be extended and that the Attorney General's objections be invalidated. *Id.*

One month after the suit was brought, the Attorney General issued a lengthy analysis on the question, concluding that state agencies covered by the Personnel Act may not engage in collective bargaining. 87 Op. Att'y Gen. No. 41 (Aug. 10, 1987). The supreme court acknowledged this opinion in its decision in *Local 2238*, but found that it was not in accord with the case law or prior attorney general opinions. *Local 2238*, 108 N.M. at 169, 769 P.2d at 82.

41. *Local 2238*, 108 N.M. at 171, 769 P.2d at 84. In so doing, the court declined to follow the majority of jurisdictions which require express statutory authority for collective bargaining. *Id.* at 167, 769 P.2d at 80.

42. *Id.* at 170, 769 P.2d at 83.

43. *Id.*

44. *Id.* at 168-69, 769 P.2d at 81-82.

45. *Id.* at 168, 769 P.2d at 81; see N.M. STAT. ANN. § 10-9-2 (Repl. Pamp. 1987).

46. *Local 2238*, 108 N.M. at 169, 769 P.2d at 82; see N.M. STAT. ANN. § 10-9-13 (Repl. Pamp. 1987).

47. *Local 2238*, 108 N.M. at 168, 769 P.2d 81; see also N.M. STAT. ANN. § 10-9-10(A) (Repl. Pamp. 1987). The court also reviewed section 10-9-7 of the Personnel Act, which requires specific legislative approval for rules, policies or plans which would have significant financial impact. See *Local 2238*, 108 N.M. at 170-71, 769 P.2d at 83-84; see also N.M. STAT. ANN. § 10-9-7 (Repl. Pamp. 1987). The court noted that collective bargaining agreements can only commit funds that have already been appropriated and concluded that the strict procedures in the Rules for Labor Management Relations fully protect the legislature's appropriations power. *Local 2238*, 108 N.M. at 171, 769 P.2d at 84.

Second, the court listed legislative actions which suggest that the legislature is aware that collective bargaining exists in the public sector.⁴⁸ The court concluded that the legislature's failure to direct the board not to promulgate rules in this area represented "de facto" approval of collective bargaining.⁴⁹ Finally, the court examined the system of rules promulgated by the board and found that they operate fairly within the limits of the authority granted to the board.⁵⁰

There is a hint of irony in the court's analysis. It is possible that the existence of a regulatory framework for collective bargaining helped the court reach the conclusion that collective bargaining was valid under the authority granted to the Personnel Board. By assuming the authority to promulgate rules in this area, it may be that the board created the kind of defined regulatory environment which helps sustain the validity of delegations of legislative power.⁵¹

B. Adjudicatory Actions

In three cases dealing with license revocations,⁵² the courts construed the applicable statutes as a means of reviewing agencies' exercise of their adjudicatory power.

In *Molina v. McQuinn*,⁵³ the supreme court upheld the Board of Examiner's two-week suspension of an optometrist's license for prescribing a topical ocular agent without state certification to do so.⁵⁴ The district court had concluded that the board exceeded its authority in suspending the license.⁵⁵ On appeal, however, the supreme court held that the board had the authority to grant the optometrist a prehearing continuance.⁵⁶ Turning to the statute governing certification, the court found that the requirements for certification were unambiguous⁵⁷ and had clearly not been met by the optometrist.⁵⁸ The supreme court reversed the district

48. *Local 2238*, 108 N.M. at 166-67, 769 P.2d at 79-80.

49. *Id.* at 167, 769 P.2d at 80. The court stated: "Thus, it is quite apparent that the legislature has recognized and condoned collective bargaining without taking the positive step of official recognition. It has 'de facto' recognized collective bargaining in the public sector." *Id.*

50. *Id.* at 170, 769 P.2d at 83. The court also noted that collective bargaining in the public sector is quite different from private sector negotiations, as salaries, job classifications, and some benefits are not subject to bargaining. *Id.*

51. The court implied that delegation was proper so long as the board retained discretion and control. *Id.*

52. *Molina v. McQuinn*, 107 N.M. 384, 758 P.2d 798 (1988); *Cordova v. Mulholland*, 107 N.M. 659, 763 P.2d 368 (Ct. App.), *cert. denied*, 107 N.M. 546, 761 P.2d 424 (1988); *Claridge v. State Racing Comm'n*, 107 N.M. 632, 763 P.2d 66 (Ct. App.), *cert. denied*, 107 N.M. 413, 759 P.2d 200 (1988).

53. 107 N.M. 384, 758 P.2d 798 (1988).

54. *Id.* at 387, 758 P.2d at 801.

55. *Id.* at 385, 758 P.2d at 799.

56. *Id.* The court seemed to excuse the board certain flaws in its procedure, and it also noted that the record below was incomplete. *Id.*

57. *Id.* at 386, 758 P.2d at 800.

58. *Id.* In reading the applicable statute, the court concluded that the state is to certify qualified optometrists, but does not have the duty to seek out newly qualified optometrists. *Id.* Rather, newly

court judgment and upheld the penalty imposed by the board.⁵⁹

The court of appeals examined both the language and the intent of the controlling driver's license revocation statute in *Cordova v. Mulholland*.⁶⁰ The petitioner in this case was a New Mexico driver whose license was revoked for refusing to submit to a blood or breath test after being stopped by a police officer.⁶¹ The applicable statute requires three things: the police officer had reasonable grounds to believe that the driver was intoxicated; the driver refused to take the test although informed of the consequences of refusal; and the driver was arrested.⁶² The driver in *Cordova* argued that the last two requirements were exclusive, such that his arrest had to arise from some offense other than his refusal to comply with the alcohol testing.⁶³ The court found no statutory basis for concluding that the elements were mutually exclusive.⁶⁴ The court concluded that such a restrictive reading of the statute would "do violence both to the express language of the Act and to its purpose"⁶⁵ to deter drunk driving. The court upheld the one-year suspension of Cordova's driver's license.⁶⁶

In the third license revocation case, however, the courts were faced with an admittedly ambiguous statute.⁶⁷ The dispute in *Claridge v. State Racing Commission*⁶⁸ arose over new measures for the post-race testing of race horses.⁶⁹ The new tests had revealed the illegal use of synthetic

qualified optometrists have the responsibility to submit their credentials to the state. *Id.*

The applicable statute reads:

C. The board shall issue certification for the use of topical ocular pharmaceutical agents to optometrists who have successfully completed an examination and submitted proof of having satisfactorily completed a course in pharmacology as applied to optometry, with particular emphasis on the application of pharmaceutical agents for the purpose of examination of the human eye, analysis of ocular functions and treatment of visual defects or abnormal conditions of the human eye and its adnexa. The course shall constitute a minimum of one hundred five classroom-clinical hours of instruction in general and ocular pharmacology, including therapeutic pharmacology, as applied to optometry, and shall be taught by an accredited institution and approved by the board.

N.M. STAT. ANN. § 61-2-10(C) (Repl. Pamp. 1989).

59. *Molina*, 107 N.M. at 387, 758 P.2d at 801. The court also rejected the optometrist's argument that judicial construction of the statute would violate the separation of powers doctrine. *Id.* at 386-87, 758 P.2d at 800-01.

60. 107 N.M. 659, 763 P.2d 368 (Ct. App.), *cert. denied*, 107 N.M. 546, 761 P.2d 424 (1988).

61. *Id.*

62. *Id.* at 660, 763 P.2d at 369; see New Mexico Implied Consent Act, N.M. STAT. ANN. §§ 66-8-105 to -112 (Repl. Pamp. 1987).

63. *Cordova*, 107 N.M. at 659, 763 P.2d at 368.

64. *Id.* at 660, 763 P.2d at 369.

65. *Id.*

66. *Id.*

67. *Claridge v. State Racing Comm'n*, 107 N.M. 632, 639, 763 P.2d 66, 73 (Ct. App. 1988), *cert. denied sub nom. Hill v. New Mexico State Racing Comm'n*, 107 N.M. 413, 759 P.2d 200 (1988). Here, the court of appeals was faced with two conflicting district court decisions. The district court of Valencia County had issued a preliminary injunction restraining the commission from using test results derived in this new manner. The district court of Santa Fe County had upheld the commission's suspensions based on the new tests. *Claridge*, 107 N.M. at 633, 763 P.2d at 67.

68. 107 N.M. 632, 763 P.2d 66 (Ct. App.), *cert. denied*, 107 N.M. 413, 759 P.2d 200 (1988).

69. *Id.* at 634-35, 763 P.2d at 68-69.

narcotics and led the State Racing Commission ("SRC") to revoke the racing licenses of several New Mexico horsemen.⁷⁰

The horsemen argued that the New Mexico Horse Racing Act⁷¹ prohibited the kind of out-of-state and unofficial testing performed by the SRC.⁷² The court disagreed, finding that the statute was silent as to the particularities of testing⁷³ and that the law clearly conferred discretionary authority upon the SRC to implement new measures to test for illegal drugs because these actions would serve the legislative purpose of ensuring fair racing.⁷⁴

These cases reveal that when a state agency has been delegated authority to serve a legislative end, the courts may not require an express statutory basis for each agency action. The courts have repeatedly been willing to rely on express delegations of discretionary authority to uphold agency decisions.

To recall, in *National Council on Compensation Insurance v. State Corporation Commission*,⁷⁵ the court construed the New Mexico insurance statutes to enable the state Insurance Board to make decisions on ratemaking.⁷⁶ In *Claridge v. State Racing Commission*,⁷⁷ the court found that authority for implementing new drug testing procedures was implied within the discretionary authority conferred upon the Racing Commission.⁷⁸ In *Local 2238 of the American Federation of State, County and Municipal Employees v. Stratton*,⁷⁹ the court found implied legislative consent sufficient to justify an entire regulatory scheme.⁸⁰

The judicial acceptance of agency discretionary authority may bespeak an interest in administrative efficiency, such that an administrative board and not just a single individual may process insurance rate filings.⁸¹ Or the courts may have policy reasons for recognizing implied authority, preferring, for example, the status quo of implied legislative consent for collective bargaining to a state-wide disruption of labor-management relationships.⁸² It is also possible that increasing deference to agency gov-

70. *Id.* The commission had changed its usual practice of performing only in-state drug testing of the horses' urine. After participating in an out-of-state pilot program of testing for synthetic narcotics, the commission developed a priority system for post-race chemical testing and identified the group of drug-tainted specimens. *Id.*

71. N.M. STAT. ANN. §§ 60-1-1 to -23 (Repl. Pamph. 1988).

72. *Claridge*, 107 N.M. at 636, 763 P.2d at 70.

73. *Id.* at 637, 763 P.2d at 71.

74. *Id.* As construed by the court, the statute requires only that the commission's official chemist be employed by a New Mexico agency or laboratory and places no limitations on where the actual testing can take place. *Id.*

75. 107 N.M. 278, 756 P.2d 558 (1988).

76. See *supra* text accompanying notes 28-35.

77. 107 N.M. 632, 763 P.2d 66 (Ct. App.), cert. denied, 107 N.M. 413, 759 P.2d 200 (1988).

78. See *supra* text accompanying notes 67-74.

79. 108 N.M. 163, 769 P.2d 76 (1989).

80. See *supra* text accompanying notes 36-51.

81. See *supra* text accompanying notes 28-35.

82. See *supra* text accompanying notes 36-51. The court in *Local 2238* stated:

[W]e are aware that collective bargaining in the public sector has been in existence in New Mexico for approximately seventeen years without an express grant of

ernance is the *quid pro quo* for the courts' tendency to apply more stringent, less deferential forms of judicial review. Parts II and III of this article examine more closely the courts' increasing preference for whole record review of agency decisions.

II. EXERCISE OF ADMINISTRATIVE POWER

Administrative procedure is as important to the law as civil or criminal procedure because state agencies have broad and pervasive effects on the lives of state citizens. If the courts were to ignore how agencies do their job or simply assume that agencies act appropriately, agency power would be abandoned to its own devices.⁸³

Procedure is a large factor in both agency rulemakings and adjudications. The courts are well-equipped to review agency procedure and are properly less deferential to procedures developed by agencies than they would be to procedure mandated by the legislature. The following section examines judicial decisions concerning proper procedure in agency rulemaking, ratemaking, and adjudication.

A. Rules and Rulemaking

A state agency sits as a quasi-legislative body when it generates rules to guide prospective situations affecting more than one person or dispute.⁸⁴ Rulemaking is considered an efficient way to make law: it establishes the rules ahead of time and allows for policymaking on a broader scope than a case-by-case adjudicatory process.⁸⁵ Rulemaking dominates over adjudication as state agencies' primary means of making policy.⁸⁶ A rulemaker, however, may not foresee all of the prospective applications of a new rule and its effects on citizens' substantive rights. For this reason, and to avoid court challenges to agency rules whenever possible, state agencies apply rulemaking procedures to ensure that those affected by prospective rules are informed of the intent to make rules and have an opportunity to voice their concerns.

legislative authority. Thus, the challenge by the attorney general to its existence was not inappropriate. But we are also compelled to look at this issue realistically, and are mindful that we cannot, without grave injustice and harm, turn back the hands of time.

Local 2238, 108 N.M. at 168, 769 P.2d at 81.

83. Justice Felix Frankfurter simply asserted that "[t]he history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943).

84. See Browde, *Administrative Law*, 12 N.M.L. REV. 1, 21 (1982).

85. See H. LINDE, G. BUNN, F. PAFF & W. CHURCH, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* 829-30 (2d ed. 1981).

86. B. SCHWARTZ, *ADMINISTRATIVE LAW* § 4.3, at 149 (1976); see also E. GELLHORN & B. BOYER, *ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL* 237-39 (2d ed. 1981). The modern view preferring policy by rule rather than by adjudication is not blind to the disadvantages of using rulemaking to implement policy. Writing a general rule is no easy matter and is often more difficult than deciding a case. The likelihood of producing both unintended and undesirable results is greater. Proposing general rules may inspire concerted opposition. If complex rulemaking procedures are in place, promulgating a rule can be more costly in time, effort, and good will than deciding a group of cases. E. GALLHORN & B. BOYER, *supra*, at 237-39.

Procedures for agency rulemaking should put affected parties on notice and provide the opportunity to be heard before an agency position becomes law.⁸⁷ In general, agency procedure is subject to judicial review regardless of whether the procedures were strictly outlined by statute or left to agency discretion.⁸⁸ In the case of *Tenneco Oil Co. v. New Mexico Water Quality Control Commission*,⁸⁹ the New Mexico Court of Appeals examined and upheld the rulemaking procedure of the state's Water Quality Control Commission ("the Commission").⁹⁰

The dispute arose over new regulations setting standards for levels of certain pollutants in the state's groundwater.⁹¹ The regulations were promulgated under the state Water Quality Act,⁹² which created the Commission and delegated to it authority to protect groundwater. When these regulations were promulgated, the statute expressly directed the Commission to consider the practical and economic effects of new standards and the customary uses of the water.⁹³

Two gas production companies challenged the adoption of the pollution regulations.⁹⁴ They asserted that the Commission had failed to consider

87. E. GELLHORN & B. BOYER, *supra* note 86, at 237-39.

88. The federal Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706 (1976), authorizes a reviewing court to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and to set aside agency action found to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D) (1976). An agency rulemaking done outside of or without required procedure is logically an abuse of discretion. Proving procedural infirmity in a direct way proves an abuse of discretion and can invalidate the rule. The practical difference is the degree of judicial deference given the ultimate decision versus the deference given the procedure used to get there. The problem arises when the enabling statute requires consideration of particular facts or particular findings, gathered through an unspecified hearing process, with procedure, by omission, left to agency discretion. The general rule is that matters left to agency discretion by the legislature are less reviewable and can only be set aside if arbitrary, capricious, or an abuse of discretion. But, if the statute calls for a hearing and consideration of particular facts, courts appear to be confident enough to judge the difference between good and bad hearing procedure even absent specific legislative direction. See generally *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

89. *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1987), *cert. denied*, 106 N.M. 714, 749 P.2d 99 (1988).

90. *Id.* at 477, 760 P.2d at 169.

91. *Id.* at 471, 760 P.2d at 163. Earlier, *Tenneco Oil Company and Navajo Refining* lost a motion to stay enforcement of the new numerical standards while the issues in the case were under appeal. *Tenneco Oil Co. v. New Mexico Water Control Comm'n*, 105 N.M. 708, 736 P.2d 986 (Ct. App. 1986), *cert. denied*, 106 N.M. 714, 749 P. 2d 99 (1988). See Kelly & Gilmore, *Administrative Law*, 19 N.M.L. REV. 575 (1989), for a discussion of the standards to be applied in considering a stay of enforcement during such an appeal.

92. N.M. STAT. ANN. §§ 74-6-1 to -4, 74-6-6 to -13 (Repl. Pamp. 1989).

93. *Tenneco*, 107 N.M. at 471, 760 P.2d at 163 (citing N.M. STAT. ANN. § 74-6-7(D) (Repl. Pamp. 1986)). The statute required the Commission to examine six factors: (1) injury to or interference with health, welfare and property; (2) the public interest, including social and economic value of the sources of water contaminants; (3) technical practicability and economic reasonableness of reducing or eliminating the contaminants; (4) successive uses; (5) feasibility of a user or subsequent user treating the water; (6) property rights and accustomed uses. *Id.* at 472, 760 P.2d at 164. The gas production companies claimed the record did not contain evidence of the Commission's consideration of factors two through six. The Commission responded that all factors were considered and that the Commission gave each factor the weight deemed appropriate in reaching the final decision. *Id.* at 471, 760 P.2d at 163. There is no longer a requirement of consideration of these six factors by the Water Quality Control Commission. See N.M. STAT. ANN. § 74-6-4 (Repl. Pamp. 1989).

94. *Tenneco*, 107 N.M. at 470, 760 P.2d at 162.

all of the factors listed in the statute,⁹⁵ had failed to provide an adequate statement of reasons for the new standards or a scientific reference for the standards,⁹⁶ and had altered the public record of the agency rule-making.⁹⁷ In light of the alleged procedural deficiencies, the companies charged that the Commission's decision was arbitrary and capricious, an abuse of discretion, not in accordance with the law, and not supported by substantial evidence in the record.⁹⁸

Any such finding would provide a sufficient basis to invalidate the regulations.⁹⁹ However, the appellate court examined the entire administrative record of the rulemaking,¹⁰⁰ applying a whole record standard of review,¹⁰¹

95. *Id.* at 471, 760 P.2d at 163.

96. *Id.* at 474, 760 P.2d 166.

97. *Id.* at 475, 760 P.2d at 167.

98. *Id.* at 471, 760 P.2d at 163.

99. *Id.* at 473, 760 P.2d at 165. The Water Quality Act was codified at N.M. STAT. ANN. §§ 74-6-1 to -4, 74-6-6 to -13 (Repl. Pamp. 1986). Section 74-6-7(A) stated then and now that "appeals shall be upon the record made at the hearing" and that the regulation should be set aside under section 74-6-7(C) if "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record . . . or (3) otherwise not in accordance with law." *Id.* The court of appeals and the parties agreed that this language set forth the standard of review. There have been changes to the Water Quality Act since *Tenneco* was decided. See N.M. STAT. ANN. §§ 74-6-1 to -4, 74-6-6 to -13 (Repl. Pamp. 1989).

100. *Tenneco*, 107 N.M. at 471, 760 P.2d at 163. In this case, the record covered three days of public hearing and two days of public meeting on the proposed regulations in September and December of 1985. *Id.* at 470, 760 P.2d at 162.

101. *Id.* at 477, 760 P.2d at 169. The whole record substantial evidence standard has been described as "a less deferential standard than the 'traditional' substantial evidence standard." See Browde, *supra* note 10, at 527 n.17, 549-52; see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-91 (1951). For a further discussion of the scope and standards of judicial review, see *infra* text accompanying notes 240-97. The term "whole record" as used by the court of appeals in *Tenneco* refers more to the sources of the information that make up the record under review than to the standard of judicial review and deference applied to agency rulemaking. *Tenneco*, 107 N.M. at 477, 760 P.2d at 169.

The "traditional" substantial evidence test was less exhaustive than a whole record review because evidence was viewed in the light most favorable to the agency action. See *Rinker v. State Corp. Comm'n*, 84 N.M. 626, 627, 506 P.2d 783, 784 (1973). Furthermore, the court would not weigh conflicting evidence or judge the credibility of witnesses. *Lujan v. Pendaries Properties, Inc.*, 96 N.M. 771, 774, 635 P.2d 580, 583 (1981). The court's deference under a substantial evidence test would go so far as to ignore contrary evidence against the agency decision. See *United Veterans Orgs. v. Property Appraisal Dep't*, 84 N.M. 114, 118, 500 P.2d 199, 203 (Ct. App. 1972). Each of these statements indicates that something less than all of the evidence in the record should be considered or given weight by a reviewing court. In *Tenneco*, the court of appeals sought to review the entire administrative record not for the purpose of considering evidence contrary to the decision, but to find evidence of all the factors required by statute to be considered. 107 N.M. at 477, 760 P.2d at 169.

The Water Quality Act, both at the time *Tenneco* was decided and now, provides for judicial review of regulations and states "appeals shall be upon the record made at the hearing." N.M. STAT. ANN. § 74-6-7(A) (Repl. Pamp. 1986). The court was compelled to decide what constituted the record because one party opposing the standards (Navajo Refining Company) argued that pursuant to the language above and the Open Meetings Act, N.M. STAT. ANN. §§ 10-15-1 to -4 (Repl. Pamp. 1987), a public body may deliberate and vote only at a public meeting. Therefore, only the transcript and minutes of the public meeting where the Commission voted to adopt the regulations constituted the record subject to review. *Tenneco*, 107 N.M. at 471, 760 P.2d at 163. The assumption was that not all statutory factors were considered at the two day public meeting and therefore the regulations were not properly adopted. The Commission and *Tenneco Oil* relied on the statute and *Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 101 N.M. 291, 681 P.2d 717 (1984), to support judicial review based on the entire administrative record, including

and found that the Commission had used the proper process to reach its decision.¹⁰²

The court's search of the entire record revealed that the Commission had considered all six statutory factors.¹⁰³ Then the court addressed the companies' allegation that the Commission's statement of reasons for adopting the new standards was untimely.¹⁰⁴ The plaintiffs asserted that the Commission's statement of reasons was simply a *post hoc* rationalization for its action because it was compiled after the Commission voted to adopt the numerical standards and because it contained "assertions that had not been articulated by the Commission."¹⁰⁵

In earlier cases involving the Water Quality Control Commission, New Mexico courts held that the Commission's record had to indicate its reasoning and basis for adopting regulations even though formal findings were not specifically required.¹⁰⁶ The United States Supreme Court has stated that such a statement of reasons is a simple but fundamental rule of administrative law and that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."¹⁰⁷

The court in *Tenneco* concluded that the Commission's statement of reasons was adequate because it had been "compiled, edited and adopted before the regulations were filed."¹⁰⁸ The court held that the statement of reasons prepared after the agency's vote was not procedural error so long as the statement was adopted prior to formal filing.¹⁰⁹

the three day public hearing and the two day public meeting. *Tenneco*, 107 N.M. at 471, 760 P.2d at 163.

The court recognized that *Duke City* involved an adjudication rather than a rulemaking and yet held that *Duke City*'s "express application of the whole record standard of judicial review to findings of fact made by administrative agencies in general controls where the Commission acts in its rule-making capacity." *Id.* The court found additional support for whole record judicial review of the Commission's rulemaking because of the same "appeal shall be upon the record made at the hearing" language in the Water Quality Act and the Air Quality Control Act, N.M. STAT. ANN. § 74-2-9 (Repl. Pamph. 1983), under which *Duke City* was decided. The New Mexico appellate court appears to be extending whole record substantial evidence review to the legislative-like function of agency rulemaking if the enabling statute contains the language "upon the record made at the hearing." See *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973) for a discussion of the federal applicability of "on the record" and "after hearing" language to trigger the need for more trial-type hearings rather than notice and comment procedure.

102. *Tenneco*, 107 N.M. at 477, 760 P.2d at 169.

103. *Id.* at 473, 760 P.2d at 165.

104. *Id.* at 474, 760 P.2d at 166.

105. *Id.* *Post hoc* rationalizations are considered explanations of counsel for administrative decisions not employed by the agency and subsequent to the occurrence of administrative action being reviewed. *Smith v. FTC*, 403 F. Supp. 1000, 1009 (D. Del. 1975). Rationalizations of this kind may not be accepted by the courts. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962).

106. *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n*, 93 N.M. 546, 552-53, 603 P.2d 285, 291-92 (1979) (while the Commission's reasoning and basis for adopting regulations should be indicated there is no requirement for formal findings); *City of Roswell v. New Mexico Water Quality Control Comm'n*, 84 N.M. 561, 563, 505 P.2d 1237, 1239 (Ct. App. 1972), *cert. denied*, 84 N.M. 560, 505 P.2d 1236 (1973) (there is no statutory requirement that the Commission make formal findings when rulemaking).

107. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

108. *Tenneco*, 107 N.M. at 474, 760 P.2d at 166.

109. *Id.* In respect to rulemaking, the federal APA requires that "[a]fter consideration of the

Another procedural issue raised in *Tenneco* was a claim that the Commission had failed to provide the parties with basic data, specifically a "single key reference" scientifically justifying the pollution standards.¹¹⁰ The Commission had apparently offered six scientific authorities for review by the parties and had argued that the water quality issues were too complicated to rely on just one key reference.¹¹¹ The court found that the parties had had ample opportunity to present evidence and question the data on which the Commission's decision was based.¹¹²

Finally, it was alleged that the Commission had illegally altered the minutes of one public meeting in order to obscure the public record as to whether the statutory mandate had been met.¹¹³ While the draft of minutes to an earlier meeting was under review, a Commissioner offered an alternate way to phrase a comment made by the chair of the Commission reflecting the amending Commissioner's understanding of the chairman's comment. The phrase was incorporated in the minutes as proposed by the Commissioner.¹¹⁴ Because both comments and the change to the minutes appeared verbatim in the transcript of record, the court found no alteration obscuring the public record.¹¹⁵

In *Tenneco*, the New Mexico Court of Appeals found the agency's fact gathering and comment procedure sufficient to provide affected parties with notice and an opportunity to be heard, as well as an opportunity to take evidence, on all the statutory factors required in a water quality rulemaking.¹¹⁶ *Tenneco* also reveals the willingness of the courts to apply a whole record standard of review to agency rulemakings, not just to agency adjudications.¹¹⁷ In this instance, the application of broad whole record review enabled the court to include in the scope of its analysis the evidence necessary to uphold the pollution regulations.¹¹⁸ In other words, the less deferential and more rigorous standard of judicial review employed in *Tenneco* had the result of sustaining an agency's action.¹¹⁹

Tenneco raises the question, however, as to whether an agency's failure to consider one factor mandated by statute would constitute an abuse

relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1976). Courts may imply a requirement that an agency provide an explanation from the enabling statute. *Dunlop v. Bachowski*, 421 U.S. 560, 571 (1975). In order to review an agency action, a court may require an explanation of what an agency has done and why. *Citizens Comm. of Georgetown v. Zoning Comm'n of D.C.*, 477 F.2d 402, 408 (D.C. Cir. 1973). The purpose of this requirement is to assure that the fact finder will carefully evaluate the evidence and consider the discretionary opinions, to give the courts a way to determine the basis of agency action, and to allow parties the necessary information to seek review. *Dunlop*, 421 U.S. at 573.

110. *Tenneco*, 107 N.M. at 476, 760 P.2d at 168.

111. *Id.*

112. *Id.*

113. *Id.* at 474, 760 P.2d at 166.

114. *Id.* at 474-75, 760 P.2d at 166-67.

115. *Id.* at 475, 760 P.2d at 167.

116. *Id.* at 477, 760 P.2d at 169.

117. *Id.* at 471, 760 P.2d at 163.

118. *Id.* at 476, 760 P.2d at 168.

119. *Id.* at 477, 760 P.2d at 169.

of discretion or a reversible procedural infirmity.¹²⁰ The court's application of whole record review, used in this instance to uphold an agency action, might in the future make agency regulations more vulnerable to challenge in the courts. The broader and more comprehensive review of agency rulemaking increases the risk of the court concentrating on contrary evidence brought in by outside parties and unearthing procedural flaws in the agency's effort to develop regulations.

Tenneco alerts rulemakers that the courts can examine the entire administrative record of their rulemakings. Agency procedures to hear evidence and build a substantial and clean record, then, take on greater significance.¹²¹

One device that may help agencies strengthen their rulemaking procedure is the new state registry for agency rules instituted by the state legislature in March of 1989 and currently being published twice a month.¹²² During the spring 1989 session, the New Mexico Legislature amended the State Rules Act¹²³ to institute an official registry for state agency rules and decisions.¹²⁴ The new section provides that "[t]he New Mexico register shall be the official publication for all notices of rule makings and filings of adopted rules, including emergency rules, by agencies."¹²⁵

120. *Id.* at 471-73, 760 P.2d at 163-65.

121. The holding may be limited to rulemaking under statutes containing language about review upon "the record made at the hearing" and authorization to set aside regulations "not supported by substantial evidence in the record." *Id.* at 471, 760 P.2d at 163. For a discussion of the difference between adjudicatory and rulemaking procedure and the importance of the administrative record, see *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978), *cert. denied*, 439 U.S. 824 (1978). The court in *Seacoast Anti-Pollution League* said:

The presumption in rule making cases is that formal adjudicatory procedures are not necessary. A hearing serves a very different function in the rule making context. Witnesses may bring in new information or different points of view, but the agency's final decision need not reflect the public input. The witnesses are not the only source of evidence on which the Administrator may base his factual findings. . . .

With respect to rule making . . . a statutory provision that rules be issued after a hearing, without more, should not be construed as requiring agency action "on the record," but rather as merely requiring an opportunity for expression of views. That conclusion was based on the legislative nature of rule making, from which it was inferred, unless a statute requires otherwise, that an agency hearing on proposed rules would be similar to a hearing before a legislative committee, with neither the legislature nor the agency being limited to the material adduced at the hearing.

Id. at 877-78 (quoting in part ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 42-43 (1947)).

Courts are generally not free to require additional procedure, such as oral argument or cross-examination, for fear that hearing requirements in informal rulemaking would be so uncertain as to cause agencies either to avoid rulemaking or to hold trial-type hearings in all cases and thereby stultify the administrative process. See *Vermont-Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). Trial-type procedure is contrasted with notice and comment procedure, which provides for interested parties to participate in the rulemaking process by submitting written data or arguments. See 5 U.S.C. § 553(c) (1976).

122. N.M. STAT. ANN. § 14-4-7.1 (Supp. 1989).

123. N.M. STAT. ANN. §§ 14-3-24 to -25, 14-4-1 to -9 (Repl. Pamph. 1988).

124. 1989 N.M. Laws 241-42.

125. N.M. STAT. ANN. § 14-4-7.1(B) (Supp. 1989).

The section emphasizes two things: that the publication of the register be economically feasible¹²⁶ and that editorial control remain with the agencies and the state records administrator.¹²⁷ In June of 1989, the State Records Center and Archives issued a request for proposals seeking a publisher for the register,¹²⁸ and in September it gained the Governor's approval for the publisher of *Capitol Government Reports* to publish the register.¹²⁹ The register will be funded by subscription fees, a column inch charge to the agencies, and advertising.¹³⁰

Approximately 875 rules are promulgated and adopted by some 125 New Mexico agencies every year.¹³¹ Rules are filed with and copies are held by the State Records Center and Archives,¹³² but information regarding new rules has not been broadly disseminated around the state.¹³³

The register represents a significant development in New Mexico administrative law. Beginning in January 1990, state agencies will have another avenue to provide notice of upcoming decisions and disseminate information about hearings. Even more important, New Mexicans will have access to a comprehensive publication of proposed and adopted state rules.

B. Ratemaking

State regulatory commissions can impose rates of payment for certain goods and services, like electric power and workers' compensation in-

126. *Id.* Paragraph (A) of § 14-4-7.1 states that "[t]he state records administrator shall provide, if economically feasible, for development and publication of a New Mexico register. . . ." The legislature appropriated no funds for the register, requiring that the publication pay for itself through sales, subscriptions, charges for notices, and advertising. Request for Proposals for Publication of the *New Mexico Register* 3 (June 30, 1989) (available at the New Mexico State Records Center and Archives) [hereinafter Request for Proposals].

127. N.M. STAT. ANN. § 14-4-7.1(B) (Supp. 1989). Paragraph (B) continues: "The register may include the text of any or all proposed rules and adopted rules, including emergency rules, in full or in part at the discretion and agreement of the issuing agency and the state records administrator." *Id.*

128. Request for Proposals, *supra* note 126.

129. The arrangement was discussed with the Governor and his Cabinet on September 25, 1989. At that meeting, the Governor pledged the participation of the agencies of the executive branch and expressed his intention to publish gubernatorial proclamations and appointments in the register. Telephone interview with John Muchmore, Special Project Analyst for the New Mexico State Records Center (Apr. 1990). There are approximately 54 executive orders and 342 gubernatorial appointments each year. Request for Proposals, *supra* note 126. At the September meeting, the Attorney General also agreed to use the register, as did the Public Service Commission. Telephone interview with John Muchmore, *supra*. Paragraph (D) of the new section provides the basis for the inclusion of gubernatorial and attorney general decisions. That paragraph states:

The New Mexico register may include a summary or the text of any governor's executive order, a summary, listing or the text of any attorney general's opinion, a calendar listing the date, time and place of all or selected agency rule-making hearings, a list of gubernatorial appointments of state officials and board and commission members or other material related to administrative law and practice.

N.M. STAT. ANN. § 14-4-7.1(D) (Supp. 1989).

130. The new rule authorizes the state records administrator to "provide for charges for subscriptions and for publication of notice and other items, including advertising. . . ." N.M. STAT. ANN. § 14-4-7.1(A) (Supp. 1989).

131. Request for Proposals, *supra* note 126.

132. N.M. STAT. ANN. § 14-4-3 (Repl. Pamp. 1988).

133. New Mexico has never published a register for agency decisions, although at least 40 other states publish one in some form. Request for Proposals, *supra* note 126.

surance, which are vital to many of the state's residents. Ratemaking so directly affects the profitability of the providers of these goods and services that procedural tension is the norm.¹³⁴ Procedural issues in ratemaking are commonly disputed, and such issues provided an early source of law in the administrative area.¹³⁵

Before the advent of regulatory commissions, rates were controlled more directly by legislatures through rate setting statutes.¹³⁶ Courts historically deferred to the legislature in this area, and courts continue to so defer, although to a much lesser extent, to the authority of administrative agencies to set rates.¹³⁷

134. In a case in which an agency took official notice of facts not in the record, Justice Cardozo described the rate setting and order of refunds by the commission as "condemnation without trial." *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 300 (1937).

135. The famous *Morgan* cases, *Morgan v. United States*, 298 U.S. 468 (1936), and *Morgan v. United States*, 304 U.S. 1 (1938), involved setting rates for the sale of livestock at a stockyard. The Court appeared to equate a judicial model of decisionmaking with statutory requirements of a full hearing and the fair procedure required by the due process clause. The drafters of the federal Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551-706 (1976), accepted the position of the *Morgan* cases that a judicial decisionmaking model provides the appropriate procedural norm in a wide area of administrative decisionmaking. Gifford, *The Morgan Cases: A Retrospective View*, 30 ADMIN. L. REV. 237, 241-42 (1978). After the *Morgan* decisions, however, it became apparent "that the pristine judicial model by which the Court seemed to be guided was inappropriate for ratemaking cases like the *Morgan* cases themselves, and perhaps was also inappropriate for other kinds of highly technical and complex cases." *Id.* The drafters of the APA addressed the *Morgan* Court's concerns that the decisionmaker be insulated from any official who had an adversary role in the case and its concern about *ex parte* communications. The APA was "carefully drawn to exempt rate and other economic regulatory decision-making from those provisions." *Id.* at 242. The procedural tensions are manifest in the irony that judicial norms and procedures set out in early ratemaking cases were widely accepted as proper for a host of administrative decisions, but eventually thought not particularly proper for ratemaking.

136. See W. GELLHORN, C. BYSE, & P. STRAUS, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 278 (7th ed. 1979). Once ratemaking moved into the regulatory arena, the courts became more interested with the procedure and results of fact finding. The legislative character of ratemaking has been noted in Supreme Court cases. See, e.g., *United States v. Florida East Coast Ry. Company*, 410 U.S. 224 (1973) (due process does not apply to an order raising rates charged by all railroads). Nonetheless, a complete review of the fact finding was the early standard. See, e.g., *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) (setting rates is a legislative function, but even if the legislature itself had set the rates, a reviewing court could determine whether the rate confiscated property). Under the premise that unreasonable rates of return would confiscate property, *Ben Avon* held that a reviewing court might exercise "independent judgment" with respect to the confiscation issue. 253 U.S. at 289. The *Ben Avon* Court declared that a reviewing court could come to an independent determination "as to both law and facts." *Id.* Later, the Supreme Court affirmed the judicial exercise of independent judgment with respect to constitutional facts, such as valuations of physical plants on which rates of return would be calculated, but would not require a trial *de novo* and instead allow an independent review of the record made by the ratemaking agency. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936). The more modern judicial approach to ratemaking is concerned with the end result rather than the method and procedure. See, e.g., *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (there is no need for courts to consider the methods used to set rates as long as the end result gave adequate compensation to the utility).

137. It would be illogical to claim that administrative bodies created to assure fair and equal rates can meet that obligation efficiently if their decisions are consistently delayed or left in limbo while the judicial process continues. It is also much more efficient, in respect to planning and the allocation of resources, for market participants to know what rates are currently in force and what rates are likely to prevail in the future.

The courts willingly review and provide instruction on proper procedure for ratemaking. In *American Automobile Association v. State Corporation Commission*, 95 N.M. 227, 620 P. 2d 881

In two cases decided during this survey period, New Mexico courts allowed state agencies discretionary flexibility in their ratemaking procedure. In the first case, the ratemakers were allowed to apply a less formal procedure for notice and hearing than petitioners argued the statute required.¹³⁸ In the second case, the ratemakers were permitted to apply a stricter review process than the statute might have mandated, assigning the burden of proof to an electric utility to defend its metering practice.¹³⁹

In *National Council on Compensation Insurance v. New Mexico State Corporation Commission*,¹⁴⁰ a divided supreme court affirmed the cancellation of an increase in workers' compensation insurance rates. The dispute involved the sequence of actions taken by the New Mexico State Corporation Commission ("Corporation Commission") to cancel the rate increase.¹⁴¹

The rate increase was proposed in a filing made to the state Superintendent of Insurance by the National Council on Compensation Insurance ("NCCI"), an official rate service organization.¹⁴² State law¹⁴³ provides for a period of time during which a rate filing may be disapproved by the Superintendent of Insurance in writing.¹⁴⁴ When no written notice was provided, the parties assumed that the filing had become effective.¹⁴⁵ Subsequently, the Corporation Commission, sitting as the Insurance Board,¹⁴⁶ held a hearing on the filing and canceled the increase.¹⁴⁷

NCCI alleged a due process violation in that the notice of the hearing lacked the specificity required by the Insurance Code.¹⁴⁸ The written notice to NCCI indicated that the hearing would be informal, "to receive written

(1980), the New Mexico Supreme Court reversed the Commission's rate setting for wrecker services as not based on substantial evidence because the Commission did not "take a statewide sample" to determine a "just and reasonable" rate. *Id.* at 229, 620 P.2d at 883. In effect, the court imposed on the Commission a particular procedure (taking a state-wide sample) for decisionmaking necessary to carry out the broad statutory duty to set reasonable rates. See Browde, *Administrative Law*, 12 N.M.L. REV. 73-74 (1982). Had the legislature set rates without taking a state-wide sample, it is less certain that the court would have attacked a legislative finding that the rates were just and reasonable.

138. *National Council on Compensation Ins. v. New Mexico Corp. Comm'n*, 107 N.M. 278, 756 P.2d 558 (1988).

139. *Otero County Elec. Co-op. v. Public Serv. Comm'n*, 108 N.M. 462, 774 P.2d 1050 (1988).

140. 107 N.M. 278, 756 P.2d 558 (1988).

141. *Id.* at 280-81, 756 P.2d at 560-61. The court also addressed who had the authority to reject proposed rate increases, the Insurance Board as a body, or the Superintendent alone. *Id.* at 282-83, 756 P.2d at 562-63. This issue is discussed in Part I of this article. See *supra* text accompanying notes 28-36.

The Insurance Rate Regulation Law is under the exclusive jurisdiction of the Insurance Board, composed of members of the State Corporation Commission and the appointed Superintendent of Insurance. N.M. STAT. ANN. §§ 59A-3-1 to -4, 59A-17-5 (Repl. Pamph. 1988).

142. *Id.* §§ 59A-17-4(B), -19.

143. *Id.* §§ 59A-17-1 to 59A-53-17.

144. *Id.* § 59A-17-14.

145. *NCCI*, 107 N.M. at 281 n.2, 756 P.2d at 561 n.2.

146. *Id.* at 281, 756 P.2d at 561.

147. *Id.* at 281-82, 756 P.2d at 561-62.

148. *Id.* at 282, 756 P.2d at 562. N.M. STAT. ANN. § 59A-17-14(B) provides that the superintendent shall only issue an order "after a hearing upon written notice specifying the matters to be considered."

and oral comments of interested persons concerning proposed . . . rate increases."¹⁴⁹ Furthermore, the record of the hearing contained dialogue between NCCI's attorney and one Commissioner in which the two agreed that the nature of the meeting would be informal.¹⁵⁰ After the meeting had commenced, however, the same Commissioner announced that the meeting would "proceed as if this is a formal rate hearing."¹⁵¹

A majority of the court was unconvinced by NCCI's due process argument. The court found that a statement of legal issues submitted by NCCI a week prior to the meeting "supports the reasonable inference that NCCI was aware that the hearing could culminate in the approval or disapproval of its rate filing."¹⁵² NCCI, then, had ample practical notice of the proceeding as indicated by its preparation and the evidence it offered.¹⁵³

The court in *NCCI* allowed the Corporation Commission to disapprove the rate filing with an order that was "sufficiently specific, if not quite explicit,"¹⁵⁴ and upheld a procedure that changed at the last minute from an informal information gathering to a formal rate hearing.¹⁵⁵ The court required only practical notice and a practical opportunity to participate in the process, allowing the Corporation Commission flexibility in performing its ratemaking duties.¹⁵⁶

In *In re Otero County Electric Co-Op. v. New Mexico Public Service Commission*,¹⁵⁷ the supreme court heard a challenge to the fairness of an electric utility's method of metering electricity use. Some of the utility's customers had lodged complaints about the utility's practice of charging customers surcharges for exceeding set peak usage amounts.¹⁵⁸ The Public Service Commission ("PSC") held a separate hearing to review the fairness of the practice.¹⁵⁹ The hearing examiner found that this demand metering was discriminatory and not in accord with the statute.¹⁶⁰ The PSC affirmed the hearing examiner's decision on administrative appeal.¹⁶¹

On direct appeal to the supreme court, the utility contended that the PSC erred in applying the strict process reserved for rate increase requests

149. *NCCI*, 107 N.M. at 281 n.1, 756 P.2d at 561 n.1.

150. *Id.* at 291, 756 P.2d at 571 (Scarborough, J., dissenting).

151. *Id.*

152. *Id.* at 285, 756 P.2d at 565.

153. *Id.* at 285-86, 756 P.2d at 565-66. The dissent clearly thought the notice given to NCCI was inadequate and deprived NCCI of due process of law. *Id.* at 291, 756 P.2d at 571 (Scarborough, J., dissenting).

154. *Id.* at 287, 756 P.2d at 567. NCCI alleged that four working days was not a reasonable period of time in which to cure the filing's defects or seek judicial review. The court noted that NCCI did have options that it did not pursue. *Id.* at 286, 756 P.2d at 566.

155. *Id.* at 284, 756 P.2d at 564.

156. *Id.* The notice identified the subject matter; therefore, the order disapproving the rate filing was "consonant" with the subject matter addressed at the hearing. *Id.*

157. 108 N.M. 462, 774 P.2d 1050 (1989).

158. *Id.* at 463, 774 P.2d at 1051. Demand metering involved installing meters to track a customer's usage and record that customer's peak demand. Should the customer's peak usage exceed a certain level, the utility would add a surcharge to the customer's bill. *Id.*

159. *Id.*

160. *Id.* at 464, 774 P.2d at 1052 (citing N.M. STAT. ANN. § 62-8-1 (Repl. Pamp. 1984)).

161. *Id.*

rather than general guidelines for reviewing issues concerning rate structure.¹⁶² The utility also charged that the PSC inappropriately severed the issue of fairness from the more general rate request¹⁶³ and placed the burden of proof to defend the metering practice on the utility.¹⁶⁴ The utility's asserted aim in demand metering was to cut individual customer peaks.¹⁶⁵

The court affirmed the PSC action, holding that the strict statutory procedure for rate increase requests embodied the general purpose of the act to establish reasonable and just rates and that the PSC was free to apply this procedure to the customers' complaints.¹⁶⁶ The court found the PSC's severing of the fairness issue to be reasonable under the statute,¹⁶⁷ and also found that the PSC had discretionary authority to place the burden of proof upon the utility.¹⁶⁸ The court reasoned that the utility was on notice that it bore the burden of proof and was in the best position to explain the fairness of the metering.¹⁶⁹ The utility had failed to demonstrate that there was a reasonable connection between individual electricity usage peaks and system-wide peaks, and it had also failed to counter testimony by customers about the "disproportionate and harsh" effects of demand metering.¹⁷⁰

Otero affirms that agencies possessing discretionary authority may apply stricter process than the statutes may require and develop rules governing procedures for review and burden of proof.¹⁷¹

C. Adjudications

Agency adjudications are quasi-judicial proceedings to "investigate, declare and enforce liabilities as they stand on present or past facts under laws supposed already to exist."¹⁷² State agencies hold hearings to decide the substantive rights and liabilities of individual New Mexicans under the law. Adjudications so directly affect the liberty and property interests

162. *Id.* at 464-65, 774 P.2d at 1052-53. The utility contended that demand metering was a rate structure issue and therefore was controlled by the statute section concerning rates in general and not the section dealing with rate increase requests. *Id.* at 464, 774 P.2d at 1052. The rate increase request section sets forth "detailed procedures to be adhered to in a rate case," N.M. STAT. ANN. § 62-8-7 (Supp. 1991), while the general rate section provides only that "[e]very rate made, demanded or received by any public utility shall be just and reasonable." N.M. STAT. ANN. § 62-8-1 (Repl. Pamp. 1984).

163. *Otero*, 108 N.M. at 464, 774 P.2d at 1052.

164. *Id.*

165. *Id.* at 463, 774 P.2d at 1051. The utility had to pay a premium for its peak demand and was trying to recover this cost from customers contributing to the system-wide peak demand. *Id.*

166. *Id.* at 464-65, 774 P.2d at 1052-53. N.M. STAT. ANN. § 62-8-1 (Supp. 1991) contains the general purpose of the utility rate statute, and N.M. STAT. ANN. § 62-8-7 (Repl. Pamp. 1984) contains the specific procedures for rate changes.

167. *Otero*, 108 N.M. at 465, 774 P.2d 1053.

168. *Id.*

169. *Id.*

170. *Id.* at 466, 774 P.2d at 1054.

171. *Id.* at 463, 774 P.2d at 1051.

172. *Browde*, *supra* note 84, at 33-34 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908) (Holmes, J.)).

of individuals that agencies are required to give parties trial-like procedural due process.¹⁷³ During this survey period, six appellate cases examined questions concerning parties' notice and opportunity to be heard, access to public information, and the need for a statement of reasons backing an adjudicatory decision.¹⁷⁴

1. Notice and Opportunity to Be Heard

The obligation to afford affected parties notice and the opportunity to be heard is rooted in the due process clauses of the fifth and fourteenth amendments to the United States Constitution.¹⁷⁵ The principle underlying due process is that a person's right and obligations under the law should not be determined in a proceeding about which he or she has no notice or say.¹⁷⁶ The specific procedural requirements, that is, exactly what and how much process is due, may vary.¹⁷⁷ Besides protecting substantive rights, procedural safeguards such as notice and hearing generate among the parties the feeling that justice was served.¹⁷⁸

To be constitutional, notice to potentially affected parties must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."¹⁷⁹ This standard was established in the United States Supreme Court decision in *Mullane v. Central Hanover Bank & Trust Co.*¹⁸⁰ and affirmed in *Mennonite Board of Missions v. Adams*,¹⁸¹

173. Kelly & Gilmore, *supra* note 1, at 575, 599 nn.171-73 and accompanying text. Trial-type hearing procedures essentially include: (1) an impartial and competent tribunal; (2) the right of parties to participate by entitlement to notice and opportunity to present proof and cross-examine opposing witnesses; (3) a decision based on the record, consistent with accepted principles and rationally explained; and (4) reviewability by an appellate court. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 588 (1972).

174. Kleinberg v. Albuquerque Pub. Schools, 107 N.M. 38, 751 P.2d 722 (Ct. App. 1988); State ex rel. Kline v. Blackhurst, 106 N.M. 732, 749 P.2d 1111 (1988); Fulton v. Cornelius, 107 N.M. 362, 758 P.2d 312 (Ct. App. 1988); Spadaro v. University of N.M. Bd. of Regents, 107 N.M. 402, 759 P.2d 189 (1988); State ex rel. Blanchard v. City Comm'rs, 106 N.M. 769, 750 P.2d 469 (Ct. App. 1988); Green v. New Mexico Human Servs. Dep't, 107 N.M. 628, 762 P.2d 915 (Ct. App. 1988).

175. U.S. CONST. amends. V, XIV.

176. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

177. Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 895 (1961). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.*

178. Justice Frankfurter's concurrence in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), suggested two reasons for notice and hearing:

No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss, notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling so important to a popular government, that justice has been done.

Id. at 171-72 (Frankfurter, J., concurring). Operationally, "[e]ven a totalitarian form of government might well provide for hearings in order to better implement the social policies that its laws reflect." Subrin & Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 454 (1974).

179. *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citing *Millken v. Meyer*, 311 U.S. 457 (1940)).

180. *Id.*

181. 462 U.S. 791 (1983).

which emphasized the importance of giving adequate notice in cases involving property sold in state tax sales.¹⁸²

In *Fulton v. Cornelius*¹⁸³ and *State ex rel. Kline v. Blackhurst*,¹⁸⁴ New Mexico courts addressed tax sale and notice issues. In *Fulton*, the court of appeals stated that a tax sale can only be valid if constitutional and statutory due process requirements are met.¹⁸⁵ The sale occurred in this instance when the grandson of a property owner failed to pay taxes on the property after the owner died.¹⁸⁶ The grandson had notified the county of his status as the decedent's personal representative.¹⁸⁷ Even so, notices of tax due and, eventually, of the tax sale, were sent to the decedent's out-of-state address, rather than to the grandson.¹⁸⁸ The trial court entered an order quieting title in favor of the purchaser, and the grandson appealed.¹⁸⁹

The court of appeals found the tax sale invalid for lack of notice, concluding that if tax officials have reason to know that a property owner has died, they must make reasonable efforts to locate and notify the decedent's personal representative.¹⁹⁰ Here, reasonable efforts to provide notice had not been made.¹⁹¹ The court also established that tax officials could be put on notice of such a change in ownership by their own records and records of the district court.¹⁹²

In *State ex rel. Kline v. Blackhurst*,¹⁹³ the supreme court declared that notice by publication and "red-[tagging]" of the residential property to be sold did not fulfill the statutory notice requirements.¹⁹⁴ The court did not decide whether such notice would comport with due process,¹⁹⁵ but declared that the tax sales statute was in substance a forfeiture statute and therefore was to be construed strictly against forfeiture.¹⁹⁶

In *Kline*, notice of the impending tax sale of a residential property was sent by certified letter to the home, but was destroyed and unheeded by the wife, who was mentally ill.¹⁹⁷ The return receipt was received by the state marked "unclaimed," and the state proceeded with the sale.¹⁹⁸

182. *Mullane*, 339 U.S. at 314.

183. 107 N.M. 362, 758 P.2d 312 (Ct. App. 1988).

184. 106 N.M. 732, 749 P.2d 1111 (1988).

185. *Fulton*, 107 N.M. at 366, 758 P.2d at 316.

186. *Id.* at 363, 758 P.2d at 313.

187. *Id.*

188. *Id.*

189. *Id.* at 364, 758 P.2d at 314.

190. *Id.* at 366, 758 P.2d at 316.

191. *Id.*

192. *Id.* at 367, 758 P.2d at 317.

193. 106 N.M. 732, 749 P.2d 1111 (1988).

194. *Id.* at 734, 749 P.2d at 1113. The statutory requirements for notice of sale are contained in N.M. STAT. ANN. § 7-38-66(D) (Repl. Pamph. 1990), which provides that failure of the Property Division to receive the return receipt shall invalidate the sale. A "red-tag" notice of delinquency attached to the residence is the procedure called for in the administrative procedures of the Property Tax Division. *Kline*, 106 N.M. at 734, 749 P.2d at 1113.

195. *Kline*, 106 N.M. at 734, 749 P.2d at 1113.

196. *Id.* at 735, 749 P.2d at 1114.

197. *Id.* at 734, 749 P.2d at 1113.

198. *Id.*

The supreme court held that the state had violated the notice statute, which requires proof of actual delivery to the taxpayer or someone authorized to accept delivery.¹⁹⁹ The receipt marked "unclaimed" did not fulfill the requirements of the statute, and thus the tax sale was held invalid.²⁰⁰

The third case involved a schoolteacher's right to an open public meeting prior to her discharge from employment. In *Kleinberg v. Board of Education of Albuquerque Public Schools*,²⁰¹ the school board voted to discharge the teacher and issued a written decision without first convening an open public meeting.²⁰² The board held a public hearing and publicly ratified its vote after the written decision had been submitted.²⁰³ The court of appeals held that any procedural error was cured by the hearing, at which the teacher was afforded an opportunity to be heard.²⁰⁴

2. Access to Information

The Inspection of Public Records Act²⁰⁵ entitles New Mexico citizens to inspect public records, subject to specific exceptions.²⁰⁶ More than a decade ago, the supreme court created another exception exempting from discovery information about which the public policy interest in confidentiality outweighs the policy favoring disclosure.²⁰⁷ Two cases decided during the survey period involved the right to inspect public records.

In *State ex. rel. Blanchard v. City Commissioners of Clovis*,²⁰⁸ the city sought to invoke the exception for confidential materials to protect applications, resumes, and references submitted to the city for the position of City Planner.²⁰⁹ An editor of the *Clovis New-Journal* was seeking

199. *Id.* at 736, 749 P.2d at 1115. N.M. STAT. ANN. § 7-38-66(D) (Repl. Pamp. 1990) provides that the sale should not be invalidated if the return receipt indicates that the taxpayer does not reside at the address shown.

200. *Klineline*, 106 N.M. at 736, 749 P.2d at 1115.

201. 107 N.M. 38, 751 P.2d 722 (Ct. App. 1988).

202. *Id.* at 41, 751 P.2d at 725. The purpose of the New Mexico Open Meetings Act, N.M. STAT. ANN. §§ 10-15-1 to -4 (Repl. Pamp. 1990), is "to open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret." *Gutierrez v. City of Albuquerque*, 96 N.M. 398, 400, 631 P.2d 304, 306 (1981).

203. *Kleinberg*, 107 N.M. at 41-42, 751 P.2d at 725-26.

204. *Id.* at 44, 751 P.2d at 728. The court also held that the board's exclusion of evidence concerning the teacher's collective bargaining agreement was harmless error. *Id.* at 46, 751 P.2d at 730.

205. N.M. STAT. ANN. §§ 14-2-1 to -3 (Repl. Pamp. 1988).

206. The statute contains explicit exceptions. The statutory exceptions include:

- A. records pertaining to physical or mental examinations and medical treatment of persons confined to any institutions;
- B. letters of reference concerning employment, licensing or permits;
- C. letters or memorandums which are matters of opinion in personnel files or students' cumulative files;
- D. as provided by the Confidential Materials Act; and
- E. as otherwise provided by law.

N.M. STAT. ANN. § 14-2-1 (Repl. Pamp. 1988) (citation omitted).

207. *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977); see also *Kelly & Gilmore*, *supra* note 1, at 594-95 nn.121-35 and accompanying text.

208. 106 N.M. 769, 750 P.2d 469 (Ct. App. 1988).

209. *Id.* at 772, 750 P.2d at 472.

disclosure of the materials and brought a mandamus suit in district court to compel disclosure.²¹⁰ The district court ordered disclosure and the city appealed, seeking an *in camera* inspection of the materials before disclosure and raising other procedural issues.²¹¹

On appeal, the court held that the city had failed to disprove that the materials were public records.²¹² Reviewing the evidence presented to the trial court, the court of appeals determined that the city had failed to present any evidence "that would show the records were not required to be kept by law or as part of a duty to be discharged by any city officer."²¹³ Further, the court held that the city had not shown that the applicants for the job "either had or claimed any right of privacy and confidentiality recognized at law."²¹⁴

Finally, the court examined the requirements for *in camera* examination and found that they had not been met by the city.²¹⁵ To gain a private *in camera* inspection of the materials by the judge, the person seeking review must: (1) be a citizen; (2) have a lawful purpose for seeking to prevent disclosure; and (3) provide some justification why the court should block disclosure.²¹⁶ The court concluded that the city failed to present a convincing justification for shielding the materials from disclosure.²¹⁷ The court affirmed the trial court's refusal to allow an *in camera* inspection and affirmed the peremptory writ of mandamus.²¹⁸

*Spadaro v. University of New Mexico Board of Regents*²¹⁹ examines the question of what documents are considered public records subject to disclosure. In *Spadaro*, an Albuquerque resident posted a job listing through the university's part-time student employment office to hire domestic help.²²⁰ Some of the students who interviewed for the job allegedly filed complaints about the resident, and he petitioned in court for a writ of mandamus against the custodian of records to obtain disclosure of the complaints.²²¹

The supreme court held that the student complaints were not public records and were therefore not subject to discovery under the inspection

210. *Id.* at 770, 750 P.2d at 470.

211. *Id.* at 772, 750 P.2d at 472. The city argued that the issue was moot because the city had rejected all of the initial applicants, advertised the position a second time, and hired a new city planner. *Id.* at 770, 750 P.2d at 470. The city also argued that joinder of the applicants as indispensable parties was essential to protect their interests and provide for a just adjudication of the mandamus petition. *Id.* at 770-71, 750 P.2d at 470-71. The court rejected both assertions, finding that the original applicants' materials were a matter of public record and presumably that the city had failed to show how the applicants' interests would be affected by the trial court judgment. *Id.*

212. *Id.*

213. *Id.* at 771, 750 P.2d at 471.

214. *Id.*

215. *Id.*

216. *Id.* at 772-73, 750 P.2d 472-73.

217. *Id.*

218. *Id.* at 773, 750 P.2d at 473.

219. 107 N.M. 402, 759 P.2d 189 (1988).

220. *Id.* at 403, 759 P.2d at 190.

221. *Id.*

act.²²² In addition, the court declared that because the university was not required by statute or policy to operate the employment office, and neither the office nor its employees were identified, on the record, as a public office or public employees, the inspection act did not apply.²²³

3. Statement of Reasons

Requiring administrative agencies to publish findings following adjudicatory hearings facilitates review of their actions in the courts and helps to ensure that the agencies had jurisdiction over the dispute and acted with care.²²⁴ In *Cibola Energy Corporation v. Roselli*,²²⁵ the New Mexico Court of Appeals emphasized that an agency must "indicate [its] reasoning . . . and the basis on which it acted."²²⁶

In *Green v. New Mexico Human Services Department, Income Support Division*,²²⁷ a recipient of federal benefits under Aid to Families with Dependent Children ("AFDC")²²⁸ appealed from an adjudicatory decision of the Human Services Department ("HSD") regarding past eligibility for the benefits.²²⁹ According to the applicable statute, the HSD director is required to notify the recipient "in writing of the director's decision [concerning the recipient's eligibility] and the reasons for the decision."²³⁰ In this case, the written notice consisted of a signed form letter with a check mark in the box indicating that the final decision was in favor of HSD.²³¹

The court held that the signature and check mark were insufficient under the statute to inform the recipient of the reasons for the department's decision.²³² The statement of reasons must "adequately reflect the basis for [the director's] . . . determination and the reasoning used in arriving at such determination."²³³

4. Timeliness of the Agency Hearing and Final Order

According to New Mexico law, agencies must render a decision on a dispute within the statutorily prescribed time limit or risk losing juris-

222. *Id.* at 405, 759 P.2d at 192.

223. *Id.*

224. See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 16.05, at 444-49 (1958); Kelly & Gilmore, *supra* note 1, at 585 nn.248-55 and accompanying text.

225. 105 N.M. 774, 737 P.2d 555 (Ct. App. 1987).

226. *Id.* at 778, 737 P.2d at 559 (quoting *First Nat'l Bank v. Bernalillo County Valuation Protest Bd.*, 90 N.M. 110, 115, 560 P.2d 174, 179 (Ct. App. 1977)).

227. 107 N.M. 628, 762 P.2d 915 (Ct. App. 1988).

228. See 42 U.S.C. § 601 (1968).

229. *Green*, 107 N.M. at 629, 762 P.2d at 916. HSD sought to impose a period of ineligibility upon the recipient to make up for the time when she received benefits even though she was ineligible. *Id.* The recipient argued that HSD was equitably estopped from imposing a new period of ineligibility on her because she had relied on HSD's determination of her eligibility when she received the benefits during that period. *Id.* The court remanded on the equitable estoppel issue, ordering the hearing officer to make specific findings of fact concerning the elements of equitable estoppel and whether it was applicable to this case. *Id.* at 631, 762 P.2d at 918.

230. *Id.* at 631, 762 P.2d at 918 (citing N.M. STAT. ANN. § 27-3-3(D) (Supp. 1990)).

231. *Id.*

232. *Id.*

233. *Id.*

diction over the dispute to the courts.²³⁴ In *Armijo v. Save 'N Gain*,²³⁵ the court of appeals was faced with the question of whether its previous holdings regarding time limits and jurisdiction applied to the Workers' Compensation Division ("WCD"). The New Mexico Workers' Compensation Act requires that a claimant submit to an informal recommendation process, from which a recommended solution must be issued within sixty days.²³⁶

The claimant in *Armijo* argued that the adverse decision issued 101 days after submission to informal proceedings was void for lack of jurisdiction.²³⁷ The court of appeals disagreed, holding that although the legislative intent was to provide for expeditious resolution of claims, there was "no legislative intent that the sixty-day time limit stated in Section 52-5-5-(C) preclude further administrative action."²³⁸ The court reasoned that previous cases resulted from a balancing of public and private rights, while, by contrast, the statute in question was to provide expeditious resolution of a claim on its merits.²³⁹ The court gave no explanation of how it reached this conclusion, but instead held that the failure of the WCD to issue a recommendation within sixty days gave the claimant the right to demand a formal hearing on the merits.²⁴⁰

In *Molina v. McQuinn*,²⁴¹ the appellee attempted to argue that the statutory restrictions for disposition of a case applied equally to the commencement of a case.²⁴² The supreme court rejected this notion, holding that "[t]he scheme provided for the commencement of a case is quite different than that provided for its disposition."²⁴³ Although agencies lose jurisdiction for failure to dispose of a case within the

234. See, e.g., *Lopez v. Medical Examiners*, 107 N.M. 145, 754 P.2d 522 (1988); *Foster v. Board of Dentistry*, 103 N.M. 776, 714 P.2d 580 (1986); *Varoz v. New Mexico Bd. of Podiatry*, 104 N.M. 454, 722 P.2d 1176 (1986).

235. 108 N.M. 281, 771 P.2d 989 (Ct. App. 1989).

236. The applicable section of the statute requires that:

Upon receipt, every claim shall be evaluated by the director or his designee, who shall then contact all parties and attempt to informally resolve the dispute. Within sixty days after receipt of the claim, the director shall issue his recommendation for resolution

N.M. STAT. ANN. § 52-5-5(C) (Repl. Pamph. 1990).

237. *Armijo*, 108 N.M. at 282, 771 P.2d at 990.

238. *Id.* at 283, 771 P.2d at 991.

239. *Id.* The court also explained that previous cases all concerned professional licensing, a private right which may be lost. Workers' compensation claims do not involve licensing; therefore, a claimant's rights are not subject to being lost by the agency's failure to act. *Id.*

240. *Id.*

241. 107 N.M. 384, 758 P.2d 798 (1988).

242. Here, the New Mexico Board of Examiners in Optometry charged an optometrist with prescribing a topical ocular agent without state certification to do so. The defendant argued that the board failed to provide the defendant with discovery within 10 days of his request and failed to provide him with a hearing within 60 days of service of notice, both of which are required by statute. *Id.* at 385, 758 P.2d at 799.

Defendant also asserted that the board lacked the authority to suspend his optometry license for two weeks as a penalty. *Id.* at 384-86, 758 P.2d at 798-800. The challenge to the board's authority is discussed in Part I of this article. See *supra* text accompanying notes 53-59.

243. *Id.* at 385, 758 P.2d at 799.

prescribed ninety-day period, agencies do not lose jurisdiction for failure to commence an action within ninety days.²⁴⁴

III. JUDICIAL CONTROL OF ADMINISTRATIVE POWER

The New Mexico Supreme Court, in *Duke City Lumber Co. v. New Mexico Environmental Improvement Board*,²⁴⁵ modified the standard of review for administrative agencies from "substantial evidence" to "whole record," but failed to articulate how the new standard was to operate.²⁴⁶ The whole record standard of review²⁴⁷ has been a fertile source of dispute since that time, and cases decided during the survey year were no exception.

In *National Council on Compensation Insurance v. State Corporation Commission*,²⁴⁸ an appeal from the Corporation Commission's denial of workers' compensation rate increases, the supreme court repeated its earlier holdings regarding whole record review. The court noted that it "views the evidence in the light most favorable to the agency decision,"²⁴⁹ but the court may not do so "with total disregard to contravening evidence."²⁵⁰ At the same time, the court introduced a reasonableness test for whole record review: "No part of the evidence may be exclusively relied upon if it would be unreasonable to do so."²⁵¹ But whether an agency's consideration of evidence is reasonable implicitly requires reweighing evidence, something courts traditionally have been loathe to do.²⁵²

In *Tallman v. Arkansas Best Freight*,²⁵³ the court of appeals initially decided that the whole record standard of review applies to review of

244. *Id.* The rationale for this distinction, however, is not explained.

245. 101 N.M. 291, 681 P.2d 717 (1984).

246. The traditional substantial evidence standard has been applied by virtue of specific statutory reference, *see, e.g.*, *Rinker v. State Corp. Comm'n*, 84 N.M. 626, 506 P.2d 783 (1973), and also through general principles of common law, *see, e.g.*, *Toltec Int'l Inc. v. City of Ruidoso*, 95 N.M. 82, 619 P.2d 186 (1980). This highly deferential substantial evidence standard of review has been described as "such evidence as a reasonable mind might accept as adequate to support a conclusion." *See, e.g.*, *Wickerstein v. New Mexico State Bd. of Educ.*, 81 N.M. 188, 190, 646 P.2d 918, 920 (Ct. App. 1970). Under this standard, a reviewing court ignores evidence contrary to the agency's decision and views all evidence in the light most favorable to the agency. *See, e.g.*, *Ricker v. State Corp. Comm'n*, 84 N.M. 626, 506 P.2d 783 (1973); *United Veterans Orgs. v. New Mexico Property Appraisal Dep't*, 84 N.M. 114, 500 P.2d 199 (1973).

247. For an excellent discussion of the development of the whole record standard of review in general and in New Mexico specifically, *see generally* Browde, *supra* note 10. The authors of this survey are greatly indebted to Professor Browde for his scholarly work, which is the foundation of this section of the Administrative Law Survey.

248. 107 N.M. 278, 756 P.2d 558 (1988).

249. *Id.* at 282, 756 P.2d at 562 (citing *Wolfey v. Real Estate Comm'n*, 100 N.M. 187, 668 P.2d 303 (1983)).

250. *Id.* (citing *Human Servs. Dep't v. Garcia*, 84 N.M. 176, 608 P.2d 151 (1980)).

251. *Id.*

252. *See, e.g.*, *Lujan v. Pendaries Properties, Inc.*, 96 N.M. 721, 635 P.2d 580 (1981); *Worthey v. Sedillo Title Guar., Inc.*, 85 N.M. 339, 512 P.2d 667 (1973).

253. 108 N.M. 124, 767 P.2d 363 (Ct. App.), *cert. denied*, 107 N.M. 785, 781 P.2d 305 (1988).

Workers' Compensation Division determinations.²⁵⁴ The *Tallman* court described the substantial evidence standard as viewing all evidence in the light most favorable to the agency and disregarding all evidence contrary to the challenged decision.²⁵⁵ The court described substantial evidence review as "an examination of the evidence through a small aperture."²⁵⁶ The court compared this to whole record review, stating that whole record review does not involve the reweighing of evidence,²⁵⁷ and had *Duke City* intended such a departure from previous cases, it would have so stated.²⁵⁸ Although evidence is to be viewed in the light most favorable to an agency,²⁵⁹ the reviewing court must nevertheless canvass all evidence "favorable and unfavorable, in order to determine if there is substantial evidence to support the result."²⁶⁰ After canvassing the evidence, the court then determines if "there is evidence for a reasonable mind to accept as adequate to support the conclusion reached."²⁶¹ *Tallman* provides us with the theoretical process by which a court examines the whole record without reweighing the evidence.²⁶²

This tension was again displayed in *Sanchez v. Wohl Shoe Company*.²⁶³ In *Sanchez*, the claimant appealed the termination of workers' compensation benefits. A medical specialist recommended that the claimant could return to work if she wore a special shoe, but her disability continued.²⁶⁴ The hearing officer relied on the fact that the claimant could return to work and terminated benefits; the claimant relied on her continuing disability for the proposition that the benefits should continue. The court noted that it "may not reweigh evidence or retry a disputed issue for a different result where there is evidence to support the decision of the fact finder."²⁶⁵

254. *Id.* at 126, 767 P.2d at 365. Prior to 1985, compensation determinations were made by the district court. In 1985, the legislature passed a new Workers' Compensation Act, which created an administrative agency to make such determinations. Since the creation of the Workers' Compensation Division, the court of appeals had only assumed, but never specifically decided, that the whole record standard of review applies to appeals from the Division. *Id.*

255. *Id.* at 126-27, 767 P.2d at 365-66.

256. *Id.* at 127, 767 P.2d at 366.

257. *Id.* Whether evidence was to be reweighed was suggested in briefs submitted to the *Tallman* court, as well as possibly implied in *National Council on Compensation Ins. v. New Mexico State Corp.* Comm'n, 107 N.M. 278, 756 P.2d 558 (1988).

258. *Tallman*, 108 N.M. at 127, 767 P.2d at 366.

259. *Id.* at 129, 767 P.2d at 368 (citing *Trujillo v. Employment Sec. Dep't*, 105 N.M. 467, 734 P.2d 245 (Ct. App. 1987)).

260. *Id.* at 128, 767 P.2d at 367.

261. *Id.*

262. In two subsequent cases, the New Mexico Supreme Court, without specifically citing to *Tallman*, implicitly affirmed that holding. In *Rodman v. Employment Sec. Dep't*, 107 N.M. 758, 759, 764 P.2d 1316, 1317 (1988), an unemployment compensation case, the court noted that "no part of the evidence may be exclusively relied upon if it would be unreasonable to do so." When evidence is amenable to more than one reasonable interpretation, the court will not substitute its reasonable interpretation for the agency's reasonable interpretation. In another unemployment compensation case, *In re Apodaca*, 108 N.M. 175, 769 P.2d 88 (1989), the supreme court agreed that evidence is viewed in the light most favorable to the agency, and the court will not reweigh that evidence.

263. 108 N.M. 276, 771 P.2d 984 (Ct. App. 1989).

264. *Id.* at 280, 771 P.2d at 988.

265. *Id.* (citing *Sandoval v. Department of Employment Sec.*, 96 N.M. 717, 634 P.2d 1269 (1981)).

This observation is a retreat to the old substantial evidence test under which the existence of any evidence would be sufficient to uphold an agency determination regardless of the weight of contrary evidence. The *Sanchez* court never attempted to articulate whether the hearing officer's reliance on particular evidence was reasonable. Determining the reasonableness of the use of evidence inherently requires reweighing evidence, something the courts have consistently said they will not do; yet failure to do so emasculates the whole record standard of review, leaving extreme deference to an agency and reviving of the substantial evidence test.

The whole record standard of review necessarily requires a complete examination of the facts. Many cases, however, provide only a cursory discussion of facts, therefore providing little, if any, insight into the continuing development of what constitutes substantial evidence. In *In re Demand Metering by Otero County Electric Cooperative*,²⁶⁶ an appeal from the Corporation Commission's denial of demand metering practices, the court simply reiterated its litany of whole record principles. Without discussion, the court determined that "[t]he record reflects individual customers of Otero testified to the disproportionate and harsh effects of demand metering Since evidence existed upon which the Commission could have found demand metering unjust and unreasonable, we must affirm the Commission's decision."²⁶⁷ Such conclusions, without any analysis, do very little to elucidate the meaning of the whole record standard of review.

Two cases in the survey period do, however, provide extensive insight into the facts and their role under the whole record standard of review. In *Randolph v. New Mexico Employment Security Department*,²⁶⁸ the court provided a good example of the inner workings of whole record review and substantial evidence. In that case, the appellant worked for only four weeks.²⁶⁹ During that time, four paychecks were received. Three of the paychecks were issued late, and as to the fourth, she was told not to cash the check until the following week. The supreme court held that this was good cause for leaving employment. The court therefore reversed the lower court's decision that appellant had generally been paid in a timely manner based on lack of substantial evidence. Although *Randolph* gives only rote discussion of the nature of the whole record standard of review, its application is illuminating.²⁷⁰

266. 108 N.M. 462, 774 P.2d 1050 (1989).

267. *Id.* at 466, 774 P.2d at 1054.

268. 108 N.M. 441, 774 P.2d 435 (1989).

269. *Id.* at 442, 774 P.2d at 436. Appellant also worked briefly in 1981. *Id.* Appellant also claimed that the religious influence in the work environment was religious harassment. The court held that appellant's prior employment in 1981, with knowledge of the employer's religious predilections, amounted to acceptance of working conditions. *Id.* at 445, 774 P.2d at 439.

270. Although the fourth check was issued on time, Randolph was unable to cash it. Presumably, the supreme court did not reweigh the evidence, but rather found that the Department's reliance on one timely issued check provided no reasonable grounds for determining that Randolph had, in general, been paid on time. *Id.* at 445, 774 P.2d at 439.

In *Molenda v. Tomsen*,²⁷¹ the court affirmed a denial of unemployment benefits. In that case, Molenda worked for an attorney for approximately six weeks in 1987.²⁷² During that period, the attorney, Thomsen, was edgy, and Molenda confronted him concerning his behavior. Thomsen apologized and said he would try to improve. One day, Molenda was chatting with her boyfriend at the front desk. Thomsen yelled at her and told her boyfriend to leave. Molenda responded with "[y]ou can't yell at me or James in that tone. I love you dearly but I quit."²⁷³

The supreme court noted that good cause for leaving employment required circumstances "of such magnitude that there is no alternative to leaving gainful employment."²⁷⁴ The court held that Thomsen's previous receptiveness to Molenda's complaints, and Molenda's failure to try to resolve the incident before quitting, constituted substantial evidence to uphold the denial of unemployment compensation.²⁷⁵

In several other cases decided during the survey period, New Mexico courts discussed under what circumstances the whole record standard of review applies. In *Tallman v. Arkansas Best Freight*,²⁷⁶ the court of appeals held that the whole record standard of review applies in appeals from the Workers' Compensation Division.²⁷⁷

In *Tenneco Oil Company v. New Mexico Water Quality Control Commission*,²⁷⁸ the court of appeals discussed the applicability of the whole record standard of review in agency rulemaking proceedings.²⁷⁹ The *Tenneco* court held that the whole record standard of review from *Duke City* also controls where an agency acts in its rulemaking capacity.²⁸⁰ The court reached this conclusion by finding similar statutory standards of review in the statutes underlying *Duke City* and *Tenneco*.²⁸¹ Unresolved is whether the holding in *Tenneco* applies only to the Water Quality Control Commission, to all agencies for which appeal is based on "the record made at the hearing," or to any agency acting in its rulemaking capacity.

Several other cases decided during the survey period discuss additional inner workings of the whole record standard of review. In both *In re*

271. 108 N.M. 380, 772 P.2d 1303 (1989).

272. Molenda previously worked with the attorney at the City Attorney's Office, and joined him when he entered private practice. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* at 381, 772 P.2d 1304. Again, presumably the court found that the Department's reliance on these factors was not reasonable.

276. 108 N.M. 124, 767 P.2d 363 (Ct. App.), *cert. denied*, 107 N.M. 785, 781 P.2d 305 (1988).

277. *Id.*

278. 107 N.M. 469, 760 P.2d 161 (Ct. App. 1987), *cert. denied*, 106 N.M. 708, 749 P.2d 99 (1988).

279. All cases prior to *Tenneco* dealt with agency adjudications. *Id.*

280. *Id.* at 471, 760 P.2d at 163.

281. The court reasoned that:

Section 74-2-9 of the Air Quality Control Act is similar to Section 74-6-7 of the Water Quality Act in providing that: 'appeals shall be upon the record made at the hearing' and the court of appeals shall set aside the denial of a variance 'not supported by substantial evidence.' (Emphasis in original.)

Id.

*Apodaca*²⁸² and *Rodman v. New Mexico Employment Security Department*,²⁸³ the supreme court held that pursuant to court rules dealing with unemployment compensation appeals,²⁸⁴ the court may adopt new findings if the agency's findings were unsupported by substantial evidence, ambiguous, or inadequate because of a misapplication of law.²⁸⁵

These cases, at first glance, seem inconsistent with *Green v. New Mexico Human Services Department*.²⁸⁶ In that case, which involved welfare benefits, the court of appeals held that the failure to make specific findings of fact should appropriately result in a remand. But the reason for remand was the failure to make a factual finding regarding the credibility of a witness,²⁸⁷ not an ambiguous or unsubstantiated finding. To this extent, *Green* can be reconciled with *Apodaca* and *Rodman*.

Traditional legal principles previously applied to the substantial evidence standard of review need to be reinterpreted for application under the whole record standard of review. Three cases during the survey period addressed "legal residuum" and the review of agency actions. In *Anaya v. New Mexico State Personnel Board*,²⁸⁸ the court confirmed that the legal residuum rule equally applies under the whole record standard of review.²⁸⁹ The legal residuum rule does not require an agency to base its decision entirely on admissible evidence. But, for the agency's decision to be upheld, the "administrative action [must] be supported by some evidence that would be admissible in a jury trial."²⁹⁰ In *Tallman*,²⁹¹ the court stated that legal residuum applies in the "winnowing" process of discarding irrelevant evidence.²⁹² And in *Tenneco*,²⁹³ the court of appeals refused to apply the legal residuum doctrine to its review of rulemaking proceedings because rulemaking and adjudications lack sufficient similarity.²⁹⁴

Differing standards of review may apply depending on an agency's enabling statute or constitutional provisions. In *In re Burlington Northern Railway*,²⁹⁵ the supreme court discussed the standard of review for the

282. 108 N.M. 175, 769 P.2d 88 (1988).

283. 107 N.M. 758, 764 P.2d 1316 (1988).

284. N.M. R. Civ. P. 1-081(C)(4).

285. *Apodaca*, 108 N.M. at 177, 769 P.2d at 90; *Rodman*, 107 N.M. at 763, 764 P.2d at 1321.

286. 107 N.M. 628, 762 P.2d 915 (Ct. App. 1988).

287. *Id.* at 630-31, 762 P.2d at 917-18.

288. 107 N.M. 622, 762 P.2d 909 (Ct. App. 1988).

289. *Id.* at 626, 762 P.2d at 913. The court in *Duke City* also implicitly affirmed the continuing applicability of the legal residuum rule: "[T]he substantial evidence rule and the whole record . . . reaffirm the rule that some competent evidence is required to support an action by an administrative agency which affects a substantial right." *Duke City*, 101 N.M. at 295, 681 P.2d at 721.

290. *Anaya*, 107 N.M. at 626, 762 P.2d at 913 (emphasis omitted) (citing *Duke City*, 101 N.M. at 295, 681 P.2d at 721).

291. 108 N.M. 124, 767 P.2d 363 (Ct. App.), cert. denied, 107 N.M. 785, 781 P.2d 305 (1988).

292. *Anaya*, 107 N.M. at 624, 762 P.2d at 911.

293. 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

294. *Id.* at 477, 760 P.2d at 169. Rulemaking inherently involves hearsay evidence gathered through public comment. This lack of similarity implicitly invalidates the logic that similar statutory language requires applying the whole record standard in rulemaking as well as in adjudications. *Id.*

295. 107 N.M. 582, 761 P.2d 855 (1988).

State Corporation Commission's decision to deny a railroad's application to close a station. The Corporation Commission's actions are controlled by the New Mexico Constitution rather than by statute.²⁹⁶ Because the constitution requires a court to decide the case on its merits,²⁹⁷ its review "is more exacting than that normally accorded administration decision-making."²⁹⁸ Although not a *de novo* review,²⁹⁹ "the court makes an independent determination that it is more likely than not that the Commission's order is just and reasonable,"³⁰⁰ rather than searching for substantial evidence based on the whole record."³⁰¹ Thus, the standard of review for railroad applications is markedly different than that for most administrative agencies.

It is apparent that the whole record standard of review is very much factually driven, for it requires an examination of the entire factual record. When the courts do examine and discuss all of the factual record, we gain an insight into how this new test operates. When the courts fail to do so, we are left with the unsettling feeling that the whole record standard of review is little more than new clothing for the old substantial evidence test.

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296. N.M. CONST. art. XI, § 7.

297. Cases may be removed from the Commission to the supreme court. *Id.* "[T]he said court shall have the power and it shall be its duty to decide such cases on their merits." *Id.*

298. *Burlington*, 107 N.M. at 585, 761 P.2d at 858 (citation omitted).

299. *Id.* at 586, 761 P.2d at 859.

300. *Id.* (citation omitted).

301. *Id.*