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Recommended Citation
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MANDAMUS IN NEW MEXICO

CHARLES T. DUMARS*
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INTRODUCTION

Although the common law origins of the writ of mandamus are somewhat obscure, mandamus apparently began as nothing more than a royal wish or direction conveyed to subordinates regarding something the King wished done. Sir Edward Coke is credited with first formalizing the writ when, as Chief Judge of the King’s Bench, in Bagg’s Case, he took the King’s prerogative into his own hand and fashioned a remedy to restore an official to office. Nearly a century later, Chief Justice Holt defined the writ as applying to matters public in nature, and limited its use to situations where no other remedy existed. Building from these essentials, Lord Mansfield, Chief Justice of King’s Bench in the mid-eighteenth century, formulated mandamus into an established remedy for an individual to obtain redress of grievances against officers and bodies of government. By the late 18th century, the writ had become so entrenched that Blackstone could describe it in terms which readily serve as a definition for the modern writ:

A Writ of Mandamus is in general, a command issuing in the King’s name from the Court of King’s Bench, and directed to any person, corporation, or inferior court of judicature within the King’s dominions requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King’s Bench has previously determined, or at least supposes to be consonant with right and justice.

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2. Weintraub, supra note 1, at 479-80.
4. For a discussion of Bagg’s Case, see Jenks, supra note 1, at 530.
7. See generally Weintraub, supra note 1, at 498-502. Eminating originally from the King’s Bench, the Writ was legal rather than equitable in nature. Jenks, supra note 1, at 532; Ferris, supra note 1, at 221-22.
8. 3 Blackstone, Commentaries *110.
The prerogative writ of mandamus, along with general King's Bench jurisdiction, found roots in the early courts of the American Colonies. As in England, however, the American states generally adopted statutory provisions governing writs of mandamus. Indeed, the current New Mexico mandamus statute harks back to Blackstone's definition, and has remained virtually unchanged since its first enactment in 1884.

It is the purpose of this article to give a broad overview of mandamus in New Mexico in a manner which will prove instructive to the prospective mandamus litigant. After outlining in some detail the legal basis for the writ and the statutory requirements which govern its issuance, attention will be given to the case law suggesting that mandamus is an exclusive remedy against official wrongdoing. The bulk of the article then deals with the three most litigated mandamus questions: (1) Who has standing? (2) When is the remedy at law inadequate so that mandamus will lie? And (3) what constitutes official discretion which cannot be controlled by the writ? Finally, special attention is paid to the relationship between mandamus and the doctrine of sovereign immunity.

LEGAL BASIS AND STATUTORY REQUIREMENTS

Article VI, Section 3 of the New Mexico Constitution provides that the supreme court "shall have original jurisdiction in... mandamus against all state officers, boards and commissions." Section 6 of that same article gives district courts original jurisdiction concurrent with that of the supreme court to issue writs of mandamus, but prohibits their issuance to courts of equal or superior jurisdiction. Notwithstanding these clear constitutional directives, New Mexico statutory law gives exclusive original jurisdiction to the district court or a judge thereof. It is primarily from these sources the supreme court and the district courts derive their power to issue writs of mandamus.

11. E.g., Id. at 671; Note, Mandamus in New England, 37 Boston U.L. Rev. 456, 457 (1957).
12. Laws of N.M. 1884, ch. 1, § 37.
14. See, e.g., State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968). The supreme court held in State ex rel. Townsend v. Court of Appeals, 78 N.M. 71, 428 P.2d 473 (1967), that Article VI, Section 29, of the New Mexico Constitution, does not confer upon the Court of Appeals original jurisdiction to issue extraordinary writs. The court did
The conflict between Article VI, Section 3 of the Constitution and New Mexico statutory law has never given rise to difficulty since the supreme court, irrespective of the statute, has regularly exercised original jurisdiction in mandamus.\textsuperscript{15} However, Supreme Court Rule 12 has given force and effect to the policy behind the statute,\textsuperscript{16} by requiring that an original petition which could have been brought in a lower court must set forth "the circumstances necessary or proper to seek the writ in the supreme court."\textsuperscript{17} The standard applied in exercising original jurisdiction under the Rule has been whether the particular case is of such public importance to the state as to require original consideration by the high court.\textsuperscript{18} Absent a compelling reason for bringing the action in the supreme court, the district court is the proper forum for a mandamus action against anyone other than another district court.

The New Mexico statutes delineate in some detail the requirements for a proper mandamus action.\textsuperscript{19} As more fully developed below,\textsuperscript{20} these requirements are often strictly construed.\textsuperscript{21} The writ may be issued to any inferior "tribunal, corporation, board or person to compel the performance of an act which the law especially enjoins as a duty resulting from an "office trust or station."\textsuperscript{22} Although the

\textsuperscript{15} See, e.g., State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n, 79 N.M. 357, 443 P.2d 850 (1968).
\textsuperscript{16} No doubt the legislature, in enacting § 22-12-3, recognized that the primary function of the supreme court, as the ultimate appellate tribunal of the State, should not be undercut by the needless concern for cases which could first be presented to an inferior tribunal.
\textsuperscript{17} N.M. Stat. Ann. § 21-2-1(12)(a)(1) (1953). This subsection represents an amendment to the Rules, effective May 1, 1974, and tracks the language of its predecessor, Supreme Court Rule 24.
\textsuperscript{18} State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968); State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n, 79 N.M. 357, 443 P.2d 850 (1968); State ex rel. Shell Petroleum Corporation v. Worden, 44 N.M. 400, 103 P.2d 124 (1940). In Thompson v. Legislative Audit Commission, 79 N.M. 693, 448 P.2d 799 (1968), the court found issuance of the original writ proper "... in view of the possible inadequacy of other remedies and the necessity of an early decision on the question of great public importance." \textit{Id.} at 694-95, 448 P.2d at 800-01.

In addition, on rare occasions, the court will, under its "superintending power" over inferior courts conferred by Article VI, Section 3, issue the writ to lower courts irrespective of traditional or statutory mandamus considerations. State ex rel. Dubois v. Ryan, 85 N.M. 575, 514 P.2d 851 (1973); Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961).
\textsuperscript{20} See the Exclusivity of Mandamus, \textit{infra} pp. 165-169.
\textsuperscript{21} Even a \textit{pro se} indigent prisoner in solitary confinement has been held to the strict requirements of mandamus pleading. Birdo v. Rodriguez, 84 N.M. 207, 501 P.2d 195 (1972).
\textsuperscript{22} N.M. Stat. Ann. § 22-12-4 (1953).
writ may require an inferior tribunal or body to exercise judgment or to discharge its functions, the New Mexico statute provides that it cannot control "judicial discretion."\textsuperscript{23} Nor will the writ issue when there is a "plain speedy and adequate remedy in the ordinary course of law."\textsuperscript{24} Furthermore, a party seeking the writ must be "beneficially interested"\textsuperscript{25} in the action sought to be compelled.

The procedure for filing a mandamus action is rather convoluted. The party seeking the writ files a "petition for writ of mandamus."\textsuperscript{26} If the petition is proper in form,\textsuperscript{27} the court issues an

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} N.M. Stat. Ann. § 22-12-14 (1953). See When Mandamus Will Lie, Section C, \textit{infra}.
\item \textsuperscript{24} N.M. Stat. Ann. § 22-12-5 (1953). See When Mandamus Will Lie, Section B, \textit{infra}.
\item \textsuperscript{25} N.M. Stat. Ann. § 22-12-5 (1953). See When Mandamus Will Lie, Section A, \textit{infra}.
\item \textsuperscript{26} The precise designation of the parties is a matter of some confusion. The statute [N.M. Stat. Ann. § § 22-12-1 through 22-12-14 (1953)] refers to the party seeking the writ as the plaintiff, the party opposing the writ as the defendant. Supreme Court Rule 12, however, refers to the party against whom the writ is sought as the respondent, and the party seeking the writ as the petitioner. The court has referred to the parties in a mandamus action as petitioner and respondent, \textit{State ex rel. Barela v. New Mexico State Board of Education}, 80 N.M. 220, 453 P.2d 583 (1969), as applicant and defendant, \textit{Hutchison v. Gonzales}, 41 N.M. 474, 71 P.2d 140 (1937), as plaintiff and defendant, \textit{Laumbauch v. Board of County Commrs}, 60 N.M. 226, 290 P.2d 1067 (1955) and as relator and respondent, \textit{State ex rel. Chavez v. Evans}, 79 N.M. 578, 446 P.2d 445 (1968). In an attempt to avoid confusion, the parties shall be denominated petitioner and respondent throughout this article.

Mandamus cases have on some occasions been styled "state ex rel. . . .", and on other occasions the caption does not involve the state at all. Since most petitioners stand in the posture of a private attorney general, it is proper to caption mandamus cases "State ex rel. . . .". But see \textit{Dunn v. Town of Gallup}, 38 N.M. 197, 29 P.2d 1053 (1934).

\item \textsuperscript{27} The following represents a hypothetical petition in proper form:

\begin{verbatim}
STATE OF NEW MEXICO COUNTY OF LOBO
IN THE DISTRICT COURT

STATE OF NEW MEXICO \textit{ex. rel.}
ABC ENTERPRISES, INC.,

Petitioner,

No. ____________________________

\textit{-vs-}

CITY OF LOBO, a
municipality,

Respondent.

VERIFIED PETITION FOR WRIT OF MANDAMUS

Petitioner alleges:
1. Petitioner is a corporation doing business within the City and County of Lobo.
2. Respondent is a municipality within Lobo County, State of New Mexico.
3. Petitioner is taxed by the City of Lobo at a rate of 10 mills whereas
\end{verbatim}
\end{itemize}
\end{footnotesize}
order\textsuperscript{28} directing the court clerk to issue the writ.\textsuperscript{29}

The court may issue either an "alternative" writ or a "peremptory" writ, based upon the prayer in the Petition. The alternative

other incorporated businesses within that same municipality are taxed at only 5 mills.
4. The Respondent has a mandatory non-discretionary duty to follow the United States Constitution.
5. This arbitrary taxation scheme is invidious and discriminatory in violation of the Fourteenth Amendment to the United States Constitution.
6. The Respondent has breached its mandatory non-discretionary duty to follow the United States Constitution by implementing and applying the discriminatory taxation scheme against Respondent.
7. Petitioner is a person "beneficially interested" in the issues of this case, namely the taxation schemes of the City of Lobo, in the same manner as all members of the public at large. Petitioner is also uniquely affected by the unconstitutional conduct of the Respondent.
8. Petitioner has no plain, speedy and adequate remedy in the ordinary cause of law.

WHEREFORE Petitioner prays that it be awarded a Writ of Mandamus commanding Respondent to:
1) comply with its mandatory non-discretionary duty to tax all businesses within the municipality including Petitioner, on an equitable non-discriminatory basis.
2) pay to Petitioner the damages it sustained as a result of the unlawful conduct of Respondents together with costs and disbursements.

Respectfully submitted,

__________________________
Attorney for Petitioner.

(verified)

28. The Order of the Court in the petition referred to in note 27, \textit{supra}, would read as follows:

\textit{STATE OF NEW MEXICO}
\textit{COUNTY OF LOBO}

\textit{IN THE DISTRICT COURT}

\textit{STATE OF NEW MEXICO ex. rel.}
\textit{ABC ENTERPRIZES, INC.,}

Petitioner,

\textit{No.}\textunderscore\textunderscore\textunderscore\

\textit{-vs-}

\textit{CITY OF LOBO, a}
municipality,

Respondent.

\textit{ORDER FOR ALTERNATIVE WRIT OF MANDAMUS}
This matter having come before the Court upon the verified Petition of Peti-
writ is in the nature of an order to show cause, and directs the
respondent to either grant the relief requested or show cause before
the court on a certain date why he has not done so. The peremptory

tioner; it appearing to the satisfaction of the Court from the Petition that the
Petitioner is entitled to the relief requested in the Petition; it further appearing
that an Alternative Writ should issue; that Petitioner has no plain, speedy and
adequate remedy in the ordinary course of law, and that this remedy is pre-
scribed by statute,

IT IS ORDERED that an Alternative Writ of Mandamus in due form of law
be issued by the Clerk of this Court commanding Respondent to:

1. Comply with its mandatory non-discretionary duty to tax all businesses
within the municipality, including Petitioner, on an equitable, non-discrim-

2. Pay to Petitioner the damages sustained as a result of the unlawful con-
duct of Respondents together with costs and disbursements; or show cause
before this Court at _ o'clock in the _ noon of the _ day of

IT IS FURTHER ORDERED that true copies of the Petition, the Writ, and
this Order be served upon Respondent in the same manner as a summons in a
civil action.

District Court Judge

29. N.M. Stat. Ann. § 22-12-6 (1953). The writ in our hypothetical case would appear as
follows:

STATE OF NEW MEXICO

COUNTY OF LOBO

IN THE DISTRICT COURT

STATE OF NEW MEXICO ex. rel.

ABC ENTERPRIZES, INC.,

Petitioner,

No.: ____________________________

-vs-

CITY OF LOBO, a

municipality.

Respondent.

ALTERNATIVE WRIT OF MANDAMUS

TO: City of Lobo,

a municipality

GREETINGS: Whereas it appears to the Court as follows:

1. Whereas Petitioner is a corporation doing business within the City and
County of Lobo.

2. Whereas Respondent is a municipality within Lobo County, State of
New Mexico.

3. Whereas Petitioner is taxed by the City of Lobo at a rate of 10 mills
whereas other incorporated businesses within that same municipality are taxed
at only 5 mills.
writ is a final appealable order which may be issued without notice to the opposing party "when the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not performing it."\(^3\)\(^0\)

The alternative writ is the usual writ sought since the peremptory writ is issued *ex parte* and grants final relief without any prior notice or opportunity to be heard. Although the New Mexico Supreme Court held in an early case that issuance of a peremptory writ did not contravene due process of law,\(^3\)\(^1\) more recent cases\(^3\)\(^2\) expanding

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4. Whereas the Respondent has a mandatory non-discretionary duty to follow the United States Constitution.
5. Whereas this arbitrary taxation scheme is invidious and discriminatory in violation of the Fourteenth Amendment to the United States Constitution.
6. Whereas the Respondent has breached its mandatory non-discretionary duty to follow the United States Constitution by implementing and applying the discriminatory taxation scheme against Respondent.
7. Whereas Petitioner is a person "beneficially interested" in the issues of this case namely the taxation schemes of the City of Lobo, in the same manner as all members of the public at large. Petitioner is also, uniquely affected by the unconstitutional conduct of the Respondent.
8. Whereas Petitioner has no plain, speedy and adequate remedy in the ordinary course of law.

THEREFORE, you are commanded forthwith to:
1. Comply with your mandatory non-discretionary duty to tax all businesses within the municipality, including Petitioner, on an equitable, non-discriminatory basis.
2. Pay to Petitioner the damages sustained as a result of the unlawful conduct of Respondent together with costs and disbursements; or show cause before this Court at _______o'clock in the _______noon of the _______day of __________, 1973, why you should not do so.

DISTRICT COURT CLERK

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31. In *Board of County Commissioners v. Fourth Judicial District*, 29 N.M. 244, 259, 223 P. 516, 520 (1924), the court found no due process violation was involved because the respondents, County Commissioners, as public officers, had not been deprived of any "rights" protected by the Constitution:
A public officer who is commanded to perform an official duty, suffers neither in his personal or his property rights, and these rights alone are safeguarded by the Constitution.

Unfortunately, the conclusion of the court that no "rights" were involved because no public officer has a "right" to breach his public duty begs rather than decides the due process issue.

Interestingly, since the writ had been issued *ex parte* immediately after the petition was filed, no service had been effected upon the respondents. Against the contention that the lower court had acquired no in personam jurisdiction, the court held that the filing of an answer attacking the final judgment as invalid because the parties were not allowed to appear, was a waiver of their contention the court lacked in personam jurisdiction.

the concept of due process have so undercut that earlier ruling as to render use of the peremptory writ constitutionally suspect and inadvisable.

In addition to delineating the full and complete allegations of the petition, the alternative writ designates the return day and the manner of service. On the return day, the party respondent is obligated to file a response in the same manner as an answer to a complaint in a civil action. If no answer is filed on the return date, the court may enter a default and award a peremptory writ. The statute further provides that if an answer is filed containing new matter "the Plaintiff may at the trial or other proceeding avail himself of any valid objection to its sufficiency or may countervail it by evidence either in direct denial or by way of avoidance." The pleadings in a mandamus action are construed and may be amended in the same manner as pleadings in any other civil action. Issues raised by the pleadings are tried in the same manner as any other civil action, but there exists no right to trial by jury. The court has the power to extend the time within which to answer a

U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Montoya v. Blackhurst, 84 N.M. 91, 500 P.2d 176 (1972). In Blackhurst, supra, the court, following Fuentes, decided due process requires that prior to issuance of a writ of replevin, the defendant must be given notice and an opportunity to be heard. The same should be true of a writ of mandamus.

33. Should the Board of County Commissioners issue arise again, it is hard to see how public officials would be given less due process protection than other citizens. Surely, in light of the cases referred to in note 32, supra, the court would be compelled to abandon Board of County Commissioners. Cf. Gomez v. Dulce Independent School District, 85 N.M. 708, 516 P.2d 697 (1974).

34. N.M. Stat. Ann. § 22-12-8 (1953). On original petitions, the supreme court often requires oral argument on the issue of whether an alternative writ should issue. Presumably, in cases other than against District Judges, this would be to determine whether the issue is of sufficient "public interest" to warrant issuance of the writ originally. However, in a case seeking a writ against a district judge, such preliminary oral argument is unnecessary. Such cases should always be heard on the merits.

35. N.M. Stat. Ann. § 22-12-10 (1953). The statute does not specify whether the return date is also the trial setting. Supreme court practice generally is to require trial on the return date unless the court instructs otherwise. The general district court practice also requires trial on the return date. This is understandable despite the absence of the usual 30-day answer time, Cf. N.M.R. Civ. P. 12(a), given the extraordinary nature of the writ. The general practice is tempered, however, by the natural proclivity of the courts to allow extensions of time when necessary for adequate preparation, especially in cases involving important questions of public policy. See text accompanying note 41, infra.

36. N.M. Stat. Ann. § 22-12-10 (1953). Of course, no due process problem is posed by a peremptory writ entered after service on the opposing party, followed by his failure to respond.


40. Territory of New Mexico ex. rel. Lewis v. Commissioner of Bernalillo County, 5 N.M. 1, 16 P. 855 (1888).
writ past the designated return date, and the supreme court has held that extensions of time or leave to amend should be freely granted. Since mandamus pleadings are construed in the same manner as pleadings in other civil actions, the broad rules relating to notice pleading contained in Rules 8 and 12 of the New Mexico Rules of Civil Procedure are used to test the sufficiency of the writ.

If judgment is awarded a petitioner, he is entitled as a matter of right to recover the damages he has sustained together with costs and disbursements. If a peremptory mandamus is issued to a public officer, body or board, and the officer or member of the body or board does not comply with the order, absent some showing of "just excuse," he may be fined up to $250.00. The fine is paid into the state treasury and when paid, is a bar to any further action for any "penalty incurred by such officer or member of such body or board by reason of his refusal or neglect to perform." This provision does not, however, preclude the court from jailing for contempt any person refusing to comply with its order. Appeals are taken from mandamus judgments in the same manner as from any other action, including the requirement that parties submit findings of fact and conclusions of law.

The mandamus statute provides that the case is to be tried on the writ and the answer. In applying the statute the supreme court has

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42. Heron v. Kool, 47 N.M. 218, 140 P.2d 737 (1943); State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242 (1926).
47. N.M. Stat. Ann. § 22-12-14 (1953). The supreme court has stated that in a mandamus action against the state to enforce a pre-existing judgment, the peremptory writ of mandamus to pay the judgment is not a final order for purposes of appeal, but rather a pleading auxiliary to a pre-existing judgment similar to a writ of execution. Consequently, in that circumstance, absent some jurisdictional contention, no appeal would be allowed. State ex rel. State Highway Commission v. Quesenberry, 72 N.M. 291, 383 P.2d 255 (1963).
48. N.M. Stat. Ann. § 22-12-11 (1953). See State ex rel. Cheser v. Beall, 41 N.M. 652, 73 P.2d 329 (1939). The supreme court in *State ex rel. Fitzhugh v. Council of City of Hot Springs*, 56 N.M. 118, 241 P.2d 100 (1952), though noting that a motion to dismiss was not a proper pleading in a mandamus action found it was not reversible error to deny the motion and grant leave to answer even after the return date of the writ.

Although the case is to be tried on the writ and the answer, this principle has not been applied so stringently as to foreclose intervention. But cf. *Mobile America, Inc. v. Sandoval County Comm’n.*, N.M., 518 P.2d 774 (1974). Non-state public officers have been allowed to file a "complaint in intervention," and oppose the relief requested by the petitioner, *Schmitz v. New Mexico State Tax Commission*, 55 N.M. 320, 232 P.2d 986 (1951), as well as to file a third-party answer, *Belmore v. State Tax Comm’n.*, 56 N.M. 436,
held that after issuance of the alternative writ the petition drops away and is a nullity.4 9

The court in an early case held that a public body could not use mandamus to compel other public officers to perform their statutory duties as it was not the "real party in interest."5 0 More recently, however, the Court in Reese v. Dempsey,5 1 made it clear that any public body may seek mandamus to compel a duty owed to it by another as a function of its status as a public body.5 2

The court has also held that a mandamus action may be dismissed for failure to join an indispensable party when the petitioner fails to join every person who has an act to perform in connection with the granting of the relief requested,5 3 and where it is not within the power of the respondent to perform the act requested.5 4 However, the better and more practical rule was articulated by the court in State v. Quesenberry,5 5 where the petitioner was seeking to enforce a money judgment against the State Highway Commission. The respondent contended that the petition should be dismissed for failure to join an indispensable party, or parties. Even though the judgment ran only against the State Highway Commission, the respondent argued that the chief highway engineer, the director of finance and administration, and the state treasurer were indispensable parties.

One pitfall to be avoided is answering allegations contained in the petition but not contained in the writ. If allegations contained in the petition are answered, the court can treat them as if they were contained in the writ. State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242 (1926). Rather than answering the petition, the appropriate procedure is to assert as the first defense in the responsive pleading that the writ is insufficient, and limit the remainder of the response to the actual writ. For an extended discussion of the problems created the writ-and-the-answer rule, see Exclusivity of Mandamus, infra p.

245 P.2d 149 (1952). Furthermore, mandamus actions have been successfully combined with actions for declaratory and injunctive relief. Montoya v. Blackhurst, 84 N.M. 91, 500 P.2d 242 (1972).

One pitfall to be avoided is answering allegations contained in the petition but not contained in the writ. If allegations contained in the petition are answered, the court can treat them as if they were contained in the writ. State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242 (1926). Rather than answering the petition, the appropriate procedure is to assert as the first defense in the responsive pleading that the writ is insufficient, and limit the remainder of the response to the actual writ. For an extended discussion of the problems created the writ-and-the-answer rule, see Exclusivity of Mandamus, infra p.


Supreme Court Rule 12(a) mitigates this rule in original jurisdiction cases by providing that "the proposed form of writ may have the petition appended as an exhibit." That procedure, however, will not suffice in district court actions.


50. Board of Commissioners of Bernalillo County v. Hubbell, 28 N.M. 634, 216 P. 496 (1923).

51. 48 N.M. 417, 152 P.2d 157 (1944).

52. See also, City of Santa Rosa v. Jaramillo, N.M., 517 P.2d 69 (1974). It should be noted that supreme court rule 12(a)(2) requires in original actions against public officers that the petitioner set forth the names of any real parties in interest.


55. 74 N.M. 30, 390 P.2d 273 (1964).
The basis of the argument was that under the statute, the chief highway engineer was required to sign the voucher, the director of the department of finance and administration must issue the warrant, and the state treasurer must pay it. The court gave this argument the burial it deserved:

As applied to the circumstances here present, we believe the better rule to be that persons are not indispensable parties who have mere ministerial duties to carry out in paying a judgment. [citations omitted] There should be no presumption, absent a showing to the contrary, that an officer who is to perform merely ministerial duties will refuse to act.\(^5\)\(^6\)

Thus, under *Quesenberry*, a petitioner need not join every single public officer in the chain of command when he seeks the performance of a statutory duty.

Finally, the court has rejected the contention that mandamus is improper if it seeks negative relief, i.e. to compel a public officer *not* to act. In New Mexico mandamus will lie to compel an officer to act or to enjoin him from acting.\(^5\)\(^7\)

**THE EXCLUSIVITY OF MANDAMUS**

In 1944, the case of *Heron v. Garcia*\(^5\)\(^8\) was decided by the supreme court. Born in obscurity, *Heron* was destined to spawn the most serious problem confounding New Mexico mandamus practice; a problem which must ultimately be faced and resolved by the supreme court.

In *Heron*, the petitioner brought an action against the county treasurer of Rio Arriba County seeking to compel him to issue petitioner a tax deed to property previously taken for delinquent taxes. The treasurer refused because two years previously he had issued a deed to another person claiming to be the owner. Although not brought in mandamus, the court concluded this was an action in the nature of mandamus and specifically held that “Any order commanding a public officer to perform a ministerial duty is equivalent to a writ of mandamus and should be governed by the rules for issuing such writs.”\(^5\)\(^9\)

Since a mandamus action must be tried on the writ and the

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56. 74 N.M. at 32-33, 390 P.2d at 275.
58. 48 N.M. 507, 153 P.2d 514 (1944).
59. 48 N.M. at 510, 153 P.2d at 515. The court denied the writ for failure to find a “clear” non-discretionary duty owed the petitioner.
answer, and since the court had already blurred the lines between mandamus and negative injunction, Heron raised the specter of the case brought (apparently properly) in injunction, but “in the nature of mandamus” which must fail because of the absence of a writ in proper form. Furthermore, if as Heron suggested, mandamus is an exclusive remedy, the possibility was raised that future litigants would be subjected to reversal based merely on the form of the action and the pleadings.

Unfortunately, the specter of Heron came to life in Laumbauch v. County Commissioners. Laumbauch began with a complaint in the District Court of San Miguel County challenging an annexation election. The complaint alleged that certain illegal votes had been cast, and that other qualified electors had been denied the right to vote. It further alleged that if the balance of the duly qualified voters were counted as required by law the result of the election would have been changed. The complaint then asked for the following relief:

1. That Defendants [election Judges] be required to count said rejected ballots or to call in the judges of election from said precincts numbers 22 and 65 of San Miguel County. To count the same for their respective precincts and to correct their returns.
2. That Defendants be required to deduct from said returns from said precincts the votes non resident and unqualified and challenged voters or to call in the judge of election to do so and to correct the returns.
3. That the Defendants be enjoined from proceeding with said canvass of election and that they continue to canvass by postponement thereof until they show cause if any they have, why they should not do as stated in Paragraph I and II of this prayer.

The trial court signed an “Order to Show Cause” why an injunction should not issue. The defendants answered by filing a document entitled “Response to Alternative Writ of Mandamus,” consisting of legal exceptions to the sufficiency of the “Order to Show Cause” which the defendants contended was an alternative writ of mandamus. The trial court found that although plaintiff had not intended to file an action in mandamus, this was in fact a mandamus action. Based upon that finding, the court held that the “Order to Show Cause” (now considered the alternative writ) did not contain sufficient allegations to state a claim upon which relief could be granted. The action was dismissed.

60. In re Sloan, 5 N.M. 590, 25 P. 930 (1891).
61. 60 N.M. 226, 290 P.2d 1067 (1955).
62. Id.
Plaintiff appealed, and the supreme court resoundingly affirmed, giving full life to the inchoate doctrine of Heron. The court began with the principle that the nature of the action was to be determined not by the style of the case or form of the pleading, but rather by an *ad hoc* analysis of the relief requested and the parties involved. Pointing out that this was an action against a public officer to force compliance with a legal duty, the court believed itself compelled to follow the Heron rule that "any order commanding a public officer to perform a ministerial duty is equivalent to a writ of mandamus and shall be governed by the rules for issuing such writs."  

In *Laumbauch*, unlike *Heron*, the rule was applied to the mere technicalities of mandamus pleading. The court followed the mandamus principle that the case must be tried solely on the writ and the answer. Finding the order to show cause to be a wholly insufficient alternative writ, the court affirmed the dismissal of the lower court despite the presence of a complaint with all the necessary allegations to warrant consideration on the merits. 

Under a literal reading of *Laumbauch*, all actions seeking to compel action by public officials must be brought in mandamus, and the lack of the formal requirements of mandamus pleading will doom the action to failure. This places the prospective litigant in a serious dilemma. As will be discussed in more detail, there must be no adequate remedy at law or any official discretion involved if mandamus is to succeed. Even where a case involves official discretion or an available remedy at law exists, the strict application of *Laumbauch* would force a litigant to pursue mandamus as an exclusive remedy, risking a ruling that mandamus will not lie. If, on the other hand, the pleader ignores *Laumbauch* and files an action for declaratory or injunctive relief, he runs the risk of a *Laumbauch* dismissal for failure to plead in mandamus.

One method of obviating the problem was brought to light in *Montoya v. Blackhurst*. In *Montoya* the magistrate court had issued an *ex parte* writ of replevin, pursuant to the New Mexico

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63. 60 N.M. at 233, 290 P.2d at 1071, quoting Heron v. Garcia, 48 N.M. 507, 508, 153 P.2d 514, 515 (1944). The fact that the complaint asked for a negative injunction against adjournment of the canvassors was of no moment to the court; this point was brushed aside with the assertion that the injunctive relief requested in the complaint was merely sought to aid the court’s mandamus powers.

64. In *Heron*, the question was one of substance, *i.e.*, is the legal duty clear?

65. See When Mandamus Will Lie, infra, p. 169.

66. For a classic example of the consequences which can result from failing to heed *Laumbauch*, see Alfred v. Anderson, 13 New Mexico Bar Bulletin and Advance Opinions 54 (1974).

67. 84 N.M. 91, 500 P.2d 176 (1972).
replevin statute. Petitioner filed a mandamus action in the district court seeking to invalidate the replevin statute on the grounds that the magistrate court had a mandatory, non-discretionary duty under the United States and New Mexico Constitutions to provide notice and an opportunity to be heard prior to the issuance of writs of replevin.

Laumbauch apparently dictated mandamus since the case sought to compel public officers (the magistrate judges) to comply with their obligation under the law. However, in anticipation of the possibility that the district court would conclude mandamus was improper because (1) there existed an adequate remedy at law by appeal, or (2) the case involved a discretionary function of the Judges, the petition was amended to a complaint for declaratory and injunctive relief or in the alternative, petition for alternative writ of mandamus. The district court ordered Defendants to show cause why a declaratory judgment should not be awarded and why an injunction should not issue. The court also issued an alternative writ of mandamus, returnable on the same day as the order to show cause. If mandamus was proper, the court could make the writ permanent, and if it was improper but the case merited relief, the court could grant the declaratory and injunctive relief. At the hearing on the merits, the district court granted both forms of relief. It declared the statute unconstitutional, enjoined its enforcement, and issued a peremptory writ of mandamus. On appeal, the New Mexico Supreme Court affirmed the granting of the writ of mandamus.

The appellants-respondents contended on appeal that under Laumbauch, the only allowable pleadings in a mandamus action were the Writ and the Answer, and therefore it was reversible error to join a mandamus action with a complaint for declaratory and injunctive relief. The court expressly stated that it did not decide whether joinder of declaratory judgment with mandamus was proper, but in ruling on the propriety of mandamus and affirming the lower court, it did decide that issue, albeit sub silentio. Reading Montoya with prior supreme court rulings that injunctive relief may be combined with mandamus, and that a declaratory judgment is also appropriate where mandamus will lie, leads to the firm conclusion that alternative pleading is valid, and can obviate the Laumbauch prob-
If the court concludes the action is not ripe for mandamus, declaratory and injunctive relief can be awarded. Alternatively, if the court concludes it is ripe for mandamus, the declaratory and injunctive relief can be denied at no loss to the petitioner.

Where Heron and Laumbauch lead us astray is in the negative inference present in both cases that declaratory and injunctive relief may not be sought against public officials to compel them to follow the law. Declaratory and injunctive relief have been used to that end, and pleading in that form against government officials need not be abandoned, Laumbauch to the contrary notwithstanding.

WHEN MANDAMUS WILL LIE

There are three major areas of concern for the litigant seeking to challenge official action or inaction by way of mandamus. First, in order to have standing the petitioner must be a party "beneficially interested" within the meaning of the mandamus statute. Second, it must be clear that there is no plain, speedy and adequate remedy at law. And, finally, petitioner must not be seeking to control official discretion. If any of these three factors are wanting, mandamus will not lie and the action will be subject to dismissal. Since these three issues are critical to the decision to seek mandamus, each shall be analyzed individually, in an effort to uncover the pitfalls awaiting those who may resort to mandamus without adequately assessing its propriety.

A. Standing—When is a Party "Beneficially Interested"?

Any consideration of standing in mandamus begins with the
seminal case of *State ex. rel. Burg v. City of Albuquerque.* In *Burg,* the petitioner sought a writ of mandamus against the city and the city commissioners to compel them to submit an ordinance granting a utility franchise to the voters pursuant to a proper referendum petition. The district court dismissed the writ for failure to state a cause of action, and the supreme court reversed and remanded.

Addressing the contention that petitioner did not have standing, the court stated as the general rule:

... that mandamus may be issued to enforce the performance of a public duty by public officers, upon application of any citizen whose rights are affected in common with those of the public. Such person is “beneficially interested” in the enforcement of the laws.

After reviewing the status of the law relative to whether mandamus can be brought only by the Attorney General, the court opted for the prevailing view that private persons may move for mandamus to enforce a public duty. Following its stated rule, the court held that petitioner’s status as a resident and qualified elector of the City of Albuquerque was sufficient to “imply that degree of identification with the citizenship of the community” that would entitle him to bring the action.

The broad standing definition enunciated in *Burg*—“any citizen whose rights are affected in common with those of the public”—was further developed in *Hutcheson v. Gonzales.* *Hutcheson* involved an original petition filed in the supreme court by a qualified elector against the Secretary of State to compel her to comply with Article XIX, Section 1 of the Constitution which seemingly obligated her to place certain proposed Constitutional Amendments on the general election ballot.

The court considered together respondent’s contentions that the original writ was improvidently issued and that petitioner lacked standing “because the same principles touch each contention.” Relying on an early original jurisdiction case, the court expanded the *Burg* doctrine to allow standing in mandamus “where the case ‘is publici juris; that is, a case which affects the sovereignty of the state,

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78. 31 N.M. 576, 249 P. 242 (1926).
79. 31 N.M. at 584, 249 P. at 246.
80. 31 N.M. at 586, 249 P. at 247.
81. 41 N.M. 474, 71 P.2d 140 (1937).
82. 41 N.M. at 491, 71 P.2d at 151. See notes 2-5 *supra* and accompanying text for a discussion of original mandamus jurisdiction.
its franchises or prerogatives or the liberties of its people."

(Emphasis by the court.) Finding that this case involved the right to vote, which the court characterized as "one of the 'blessings of liberty,'" the court ruled that petitioner was "beneficially interested" within the meaning of the mandamus statute. Burg and Hutcheson clearly established that standing in mandamus is broadly conferred upon those seeking to enforce public rights. In essence, then, a petitioner in mandamus is in the nature of a private attorney general, seeking to protect rights which are of a public nature.

Unfortunately, in State ex rel. Gomez v. Campbell the waters of mandamus standing were muddied. Gomez was brought by "residents, citizens, qualified electors and taxpayers of the City and County of Santa Fe" who sought by way of mandamus to compel the transfer to Santa Fe of all offices of the executive branch of government. The action was based upon certain constitutional requirements for the Executive Branch.

The Gomez court sidestepped both Hutcheson and Burg by finding that "[t]here is no question in this case relating to the elective franchise or the right to vote..." Relying primarily upon Asplund v. Hannett, the court concluded that petitioners were without standing. Surprisingly, however, after denying standing and warning against the dangers of rendering advisory opinions, the court turned to consider the merits, stating:

However, upon rare occasions involving questions of great public interest, the Court may, in its own absolute discretion, proceed to determine the question. (citations omitted) Although not without reluctance, in our judgment the instant case is a proper one for such a determination.

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84. 41 N.M. at 492, 71 P.2d at 151.
85. 41 N.M. at 494, 71 P.2d at 152. The court distinguished the narrow non-mandamus standing case, Asplund v. Hannett, 31 N.M. 641, 249 P. 1074 (1926), on grounds that plaintiff in that case brought the action as a taxpayer seeking to vindicate merely a private right.
86. 75 N.M. 86, 400 P.2d 956 (1965).
87. Id. at 88, 400 P.2d at 958.
88. Article V, Sec. 1 of the New Mexico Constitution reads in pertinent part as follows: The officers of the executive department except the lieutenant-governor, shall during their terms of office, reside and keep the public records, books, papers and seals of office at the seat of government.
89. 75 N.M. at 91, 400 P.2d at 959.
90. 31 N.M. 641, 249 P. 1074 (1926).
91. 75 N.M. at 92, 400 P.2d at 960 (emphasis added).
The action of the court in *Gomez* belied its words. While stating that the petitioners lacked standing, the court applied a variation of the *Burg-Hutcheson* rule and allowed the case to proceed because of its public import.\(^9\)

The court moved back to its pre-*Gomez* view of mandamus standing in word as well as deed in *State ex rel. Castillo Corp. v. New Mexico State Tax Commission*.\(^9\) In *Castillo*, the court held that petitioner had standing even though the right sought to be enforced was a private right (the right of a taxpayer) because the "case involves a question of such unusually great public interest that we feel called upon to exercise the discretion vested in us and to determine the issue."\(^9\)

The court, in 1971, gave renewed emphasis to the *Burg-Hutcheson* public interest concept of standing in mandamus actions in *Womack v. Regents of the University of New Mexico*.\(^9\) While holding that petitioner did not have standing as a mere taxpayer, the court, citing *Burg*, went out of its way to declare in dictum that: "This is not to say that a private person may not sue for mandamus to enforce a public duty not due to the state."\(^9\)

Most recently the court reemphasized that standing in mandamus is dependent upon the public nature of the right sought to be enforced. In *City of Santa Rosa v. Jaramillo*\(^9\) the court found that a city had standing to challenge by way of mandamus the failure of the Alcoholic Beverage Control Department to revoke a license as required by law. The court relied on the fact that "the object is the enforcement of a public right,"\(^9\) and then took the public interest notion to an extreme, noting that in this case (where the petitioner was a municipality) it was not even necessary for the petitioner "to show that it had any legal interest in the result."\(^9\)

In essence then, standing in mandamus is based upon the public nature of the issue sought to be resolved. If the right sought to be enforced is public in nature, then petitioner has standing to bring the

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\(^9\) *Id.* at 359, 443 P.2d at 852. In *State, ex rel. Barela v. New Mexico State Board of Education*, 80 N.M. 220, 453 P.2d 583 (1969), the court, without extended discussion, waived aside lack of standing arguments in a case in which petitioners brought an action as mere property owners within a school district seeking to void a consolidation by way of mandamus. This case can be rationalized only on the private-right-brigaded-with-public-interest doctrine of *Castillo*.

\(^9\) 82 N.M. 460, 483 P.2d 934 (1971).

\(^9\) 82 N.M. at 461, 483 P.2d at 934.


\(^9\) *Id.*
case. If the right is private in nature, standing will be found if the private right is infused with sufficient public importance. The court has, thus, given sufficiently broad definition to "a person beneficially interested" within the meaning of the mandamus statute to allow private suitors to vindicate public rights or private rights clothed with public interest. As a result, where clear official wrongs are perpetrated against the public at large, the remedy is at least theoretically available through any person.  

B. Is There a Plain, Speedy and Adequate Remedy at Law?

The second prerequisite for mandamus is the absence of any plain, speedy and adequate remedy in the ordinary course of law. If there is an alternative remedy, the writ ordinarily will not issue. The words "remedy in the ordinary course of law" have been defined as: (a) a remedy in damages; (b) a remedy by appeal to a higher court; and (c) an administrative remedy.

Mandamus is not a proper remedy to enforce contract rights since there exists an adequate remedy at law for damages. Also, if there exists a remedy by way of quo warranto, mandamus will not lie. Where the alternative remedy for damages is not adequate, as in the case of an action to compel the state to comply with its obligations under a contract involving real property, mandamus will lie.

Initially, the New Mexico Supreme Court took a restrictive view of mandamus where an appeal might lie. Following the narrow view of mandamus expressed in Conklin v. Cunningham, the court in State ex rel. Sweeney v. Second Judicial District Court held that

100. The public nature of standing and the need to allege it in those terms in mandamus is radically different from the standing considerations in the usual injunction case. The latter situation usually calls for alleging standing in private and personal terms rather than in the posture of vindication on behalf of the public. This conceptual difference should be kept in mind and considered in deciding whether to bring an action in mandamus or injunction. For a discussion of other differences between injunction and mandamus, see note 74, supra and text accompanying notes 173-79, supra.


102. State ex rel. Sweeney v. Second Judicial Dist., 17 N.M. 282 (1912). As pointed out in note 18, supra, the supreme court may issue the writ under its superintendency power irrespective of the adequacy of other remedies.


104. Jaramillo County Clerk v. State ex rel. Board of County Comm'nrs., 32 N.M. 20, 250 P. 729 (1926).


106. 7 N.M. 445, 455, 38 P. 170 (1894).

107. 17 N.M. 282, 127 P. 23 (1912).
mandamus would not lie to compel a district court to reinstate an appeal from probate court which it had dismissed for want of jurisdiction, as there existed an adequate remedy by appeal.\(^{108}\)

Since \textit{Sweeney}, the court has carved out numerous exceptions to this rule and held that the writ will issue, notwithstanding the existence of a right of appeal: (1) where the process of appeal will result in unnecessary delay and expense;\(^{109}\) (2) where it will result in the denial of fundamental constitutional rights;\(^{110}\) (3) where the petitioner is clearly and unquestionably entitled to relief on the merits;\(^{111}\) and (4) where the issue would be moot on appeal.\(^{112}\)

In \textit{State ex rel. Cardenas v. Swope},\(^{113}\) the court issued a writ to a district judge directing him to set a case for trial in Valencia County, \textit{after} he had granted a motion for a change of venue to Bernalillo County. The court held that the remedy by appeal was inadequate because of the great delay and expense involved if the petitioner had to defend and appeal the decision to the supreme court for reversal on the technical ground of improper venue.

In \textit{Flores v. Federici},\(^{114}\) the defendant in a criminal case was denied the right to trial by jury under Article II, Section 12 of the New Mexico Constitution. The court concluded the writ should be granted notwithstanding the right of appeal, because of the "fundamental right" involved:

\begin{quote}
The respondent strongly asserts that mandamus is not proper since petitioner has an adequate remedy at law. Frankly, we do not agree. \textit{The petitioner has been denied a fundamental right} which should not be left to any contingency. We think mandamus is the proper remedy. To hold otherwise could lead to palpable absurdity.\(^{115}\) (emphasis supplied)
\end{quote}

\(^{108}\) 17 N.M. at 285, 127 P. at 25. Finding the remedy by appeal to be adequate in workmen's compensation cases, the court has declined to consider such a case by way of mandamus. \textit{State ex rel. Gallegos v. McPherson}, 63 N.M. 133, 314 P.2d 891 (1957). The Court also has found appeal to be adequate to challenge an adverse decision of the Commission of Public Lands, absent the existence of exigent circumstances. \textit{Andrews v. Walker}, 60 N.M. 69, 287 P.2d 423 (1955).

\(^{109}\) Most recently the court found an adequate remedy by way of appeal from an order refusing to quash a writ of garnishment where the question is the jurisdiction of the issuing court. \textit{Alfred v. Anderson}, 13 New Mexico Bar Bulletin and Advance Opinions 54 (1974).


\(^{114}\) 58 N.M. 296, 270 P.2d 708 (1954).

\(^{115}\) \textit{Id.} at 361, 374 P.2d at 121 (Emphasis added).
In *Sender v. Montoya*, the court added another consideration to be weighed in determining whether the remedy by appeal is adequate. The supreme court in *Sender* granted a writ of mandamus against a district judge ordering him to dismiss a complaint for failure of prosecution. Relying on *Swope* and *Flores*, the court listed as one of its reasons for granting the writ, that "the final result cannot be otherwise than favorable to Petitioner." The court concluded that mandamus is proper whenever "a refusal to do so would have required a reversal on appeal after trial."

If *Sender* were read to allow mandamus whenever a petitioner is able to establish that he will succeed on appeal, it would negate the inadequate remedy of law doctrine and render every clear error by a district court subject to review by way of mandamus. The *Sender* fact situation involved sufficient burden, expense, delay and hardship, however, to render remedy by appeal inadequate. When such circumstances exist, the certainty of success on appeal becomes, as it did in *Sender*, an important consideration in favor of allowing mandamus.

Most recently in *Montoya v. Blackhurst*, the court added another consideration in determining whether the remedy by appeal would be adequate—whether the issue on appeal would be moot because the damage sought to be prevented would already been done. *Montoya* was an attack on the constitutionality of the magistrate court replevin statutes. The supreme court concluded man-

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117. id. at 291, 387 P.2d at 863.
118. id.
119. Id.

The issue in the trial court involves the ownership and right to possession of over three hundred separate documents, many of which are several pages in length and practically all of which are in longhand in the Spanish language. For these documents to be transcribed, and perhaps translated, would of itself involve great cost and considerable delay in the preparation of a transcript, even if the ordinary delays attendant to a somewhat involved trial could be minimized. It would be many months, if not years, before the case could be decided by us. However, this of itself would not justify the extraordinary relief sought. . . . It is more the combination of all the various facets of the litigation which makes it apparent that to refuse the writ "would result in needless expense and delay.

120. 84 N.M. 91, 500 P.2d 176 (1972). See also, State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n., 79 N.M. 357, 443 P.2d 850; State ex rel. State Highway Comm'n v. Clark, 79 N.M. 29, 439 P.2d 547 (1968). It is important to note that the court has held that where a petitioner fails to exhaust an available remedy by appeal, he totally forecloses his right to mandamus, even though the right of appeal no longer exists. State Board of Parole v. Lane, 63 N.M. 105, 314 P.2d 602 (1957).
damus was proper because the constitutional issue would have been moot on appeal:

In order to test the constitutionality of the procedures of the replevin statute, a defendant must appear at the hearing and assert as a defense the unconstitutionality of the replevin statute. If he should lose, on appeal to the district court, the issue of a taking without a prior hearing would clearly be *moot* because he had his day in court at the magistrate level. If he should win on the merits at the magistrate level there would be no appeal to test the taking of his property without notice and an opportunity to be heard.\(^2\)

The keys, then, to the allowance of mandamus as a remedy when the right of appeal exists, are the presence of irreparable injury, the deprivation of a fundamental right, great hardship, costly delays and unusual expense, which, when taken together, render the remedy by appeal inadequate. Where the harm to petitioner is sufficiently grave the court has not been timid about deeming the remedy by appeal inadequate.

An adequate remedy by appeal to an administrative body will bar mandamus\(^1\) as certainly as an adequate remedy by appeal to a court, and similar rules apply to the determination of whether the administrative appeal is adequate.\(^1\) Although mandamus will not lie before administrative remedies have been exhausted, it is the appropriate remedy to compel a state agency to provide administrative remedies it has failed to make available.\(^2\)

A dilemma is created by two somewhat contradictory New Mexico decisions relating to exhaustion of administrative remedies prior to application for mandamus. In *Brown v. Romero*,\(^1\) the plaintiff, a school teacher, was terminated without written notice or opportunity to be heard. The terms of her teaching contract provided that unless she received written notice to the contrary, her contract was automatically renewed each year. Pursuant to statute, she sought a hearing before the local school board. The board denied her a hearing contending that she was not entitled to one because she did not have tenure. From the denial of a hearing, Mrs. Brown appealed to the state board which also refused her a hearing. From the state board denial a statutory appeal was taken to district court. In district court,

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121. 84 N.M. at 92, 500 P.2d at 177.
125. 77 N.M. 547, 425 P.2d 310 (1967).
the boards of education which had denied her a hearing, moved to dismiss her appeal for her failure to exhaust administrative remedies. The district court agreed with the boards and dismissed the action. The supreme court affirmed, holding that in this case exhaustion of the remedy of mandamus was a prerequisite to statutory appeal to district court:

The allegation that both the local board and the State Board refused a hearing makes it plain that the teacher in this instance has failed to exhaust her administrative remedies. Mandamus was available as a remedy to test Mrs. Brown's right to a hearing before the governing board.\footnote{126}

The Brown case clearly holds that before an appeal can be sought in the courts from an inadequate administrative hearing or a failure to grant a hearing, the plaintiff must first exhaust available extraordinary remedies.

On the other hand, the court in State ex rel. Shepard v. Board of Education of Jemez Springs,\footnote{127} held that a party must exhaust his administrative and judicial remedies of appeal before mandamus is proper.\footnote{128} If these appellate routes are ignored, mandamus will not lie. The teaching of the two cases taken together is that after an adverse decision of a state agency, the petitioner must attempt to invoke whatever administrative review is available. If no hearing is granted, however, the only appropriate way to proceed is to seek a writ of mandamus prior to appealing through the administrative framework. If, on the other hand, an opportunity for a hearing is provided by the agency, the petitioner is obligated to seek review by way of available administrative and judicial appeals.\footnote{129}

C. Does the Writ Seek to Control "Official Discretion"?

The third line of inquiry by a court in evaluating the propriety of mandamus is whether the petitioner is attempting to control official

\footnote{126. 77 N.M. at 549, 425 P.2d at 312.}
\footnote{127. 81 N.M. 585, 470 P.2d 306 (1970).}
\footnote{128. 81 N.M. at 586, 470 P.2d at 307. See, e.g., State Board of Parole v. Lane. 63 N.M. 105, 314 P.2d 602 (1957).}
\footnote{129. If, after a request for a hearing before the administrative agency a decision is rendered denying relief to the petitioner which is based on factual determinations by the agency, but the petitioner is unsure whether this would be construed by the court to constitute a hearing, the safest route is to appeal from the decision and also seek the writ. In the mandamus proceeding, the petitioner can take the view that the agency has failed to provide him with an administrative hearing and therefore to protect his rights of appeal under Brown he must seek the extraordinary writ. In the appellate case he should contend that the decision was a final appealable administrative action. The cases should be consolidated and the alternative theories explained as an attempt to avoid the Brown-Shepard dilemma.}
discretion. The court speaks to the same issue by asking whether the act sought to be compelled is a clear "ministerial duty," but the inquiry under either label is the same.

In outlining the contours of official discretion the court has developed three lines of authority. One deals with the discretion of judges, another with the discretion of public officers and a third with judicial review of the fact-finding decisions of administrative bodies where no right of appeal exists.

1. The Discretion of Judicial Officers.

The court in State ex rel. Sweeney v. Second Judicial District articulated its first general definition of judicial discretion:

In every court of general jurisdiction there resides authority which is not strictly defined or limited by fixed rules of law, but which must be exercised in order to justly vindicate substantive rights, properly framed issues, and duly conduct trial. This authority may be said in a general way to be the power of the judge to rule and decide as his best judgment and sound discretion dictate. (emphasis supplied)

Under this broad definition, the court held that the question of jurisdiction over an appeal from probate court was within the discretion of the district judge and not subject to control by mandamus.

The court has retreated dramatically from the absolute prohibition laid down in Sweeney. In State ex rel. Heron v. Kool, the court held that even if the issue involves discretion, the writ is proper if there has been an "abuse of discretion." In Sender v. Montoya, the court, over the vigorous dissent of Justice Noble, narrowed the scope of judicial discretion further. The petitioner brought

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130. N.M. Stat. Ann. § 22-12-4 (1953). Although the statute refers to judicial discretion, the term has been applied to all official discretion exercised by governmental agencies.


132. 17 N.M. 282, 127 P. 23 (1912).


134. Id.

135. 47 N.M. 218, 140 P.2d 737 (1943).

136. 47 N.M. at 220, 140 P.2d at . In State ex rel. Cardenas v. Swope, 58 N.M. 296, 270 P.2d 708 (1954), the court found an abuse of discretion in a decision concerning proper venue. One of the factors justifying the application of the abuse of discretion doctrine was the tremendous waste of judicial time and resources if the matter proceeded to trial in the wrong venue. Yet, in State ex rel. Gallegos v. MacPherson, 63 N.M. 133, 314 P.2d 891 (1957), the court found no abuse of discretion by the lower court in granting a new trial.

an original mandamus proceeding in the supreme court seeking to compel a district judge to dismiss a replevin action brought against him by the state records administrator. The basis of the petition was the failure of plaintiff in the replevin action to take any action to bring the case to trial for more than two years. The petitioner contended that under Rule 41(e) of the New Mexico Rules of Civil Procedure, the court had a non-discretionary duty to dismiss the action. The trial court disagreed and refused to dismiss because the plaintiff had filed requests for admissions within the two year period.

The supreme court granted the writ, concluding that the dismissal under Rule 41(e) was mandatory notwithstanding the filing of the requests for admissions. Justice Compton, writing for the court, addressed the question whether an act by a judicial officer involves judicial discretion if the judge must exercise legal or factual judgment before acting. He concluded that even though a judicial act (in this case whether to grant a Rule 41 motion) may require an exercise of judgment, this does not mean it necessarily involves judicial discretion.\(^\text{138}\) He concluded further that there is no clear and distinct line dividing acts which involve judicial discretion and those that do not. Rather, each case must be examined on its own facts.\(^\text{139}\)

Justice Noble, in dissent, attempted to define judicial discretion in terms of whether the legal issue before the lower court had previously been ruled upon by the supreme court and hence was clear. After pointing out that the court below had exercised judicial judgment he stated:

The motion in this case sought dismissal for failure to prosecute the action within two years after its filing. Response to the motion recited the actions reflected by the files and called for the exercise of judicial judgment as to whether any of those actions, including plaintiff’s request for admissions, constituted such action by plaintiff to bring the cause to its final determination as to satisfy the

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\(^{138}\) 73 N.M. at 292, 387 P.2d at 862.

\(^{139}\) Thus, *Kiddy* implies that mandamus will issue to control the actions of an officer if he acts contrary to law, but the writ will be denied when the officer decides in accord therewith. Other language in the opinion, to the effect that mandamus is inappropriate where interpretation and judgment are necessary, must be considered in context, not as an inflexible rule. Were it otherwise, mandamus would practically never issue, because it can almost always be shown that some form of judicial determination must be exercised upon which the refusal to act is based. *The border line between judicial discretion and ministerial duty is not clearcut. It is frequently a matter of degree—a shading from black to white or a grey area which can only be determined in each particular case.*

73 N.M. at 292, 387 P.2d at 863. (Emphasis added.)
requirements of and prevent mandatory dismissal under Rule 41(e).  

He concluded the writ should not have issued in this case and forcefully argued it should not issue in any case where the exercise of judgments of fact or law are involved. The court in Sender, by rejecting the dissent of Justice Noble, highlighted its willingness in a proper case to overturn a lower decision by mandamus, even though the lower court exercised legal and factual judgment before acting.

In *State ex rel. Peters v. McIntosh*, the court without explanation went further and stated that mandamus will control judicial discretion if it will prevent the doing of useless things. In *Montoya v. Blackhurst*, the writ of mandamus issued to a magistrate judge directing him to dismiss a writ of replevin previously issued because the issuance of the writ violated due process. Issuance of the writ was upheld even though the replevin statutes provided that the court *shall* issue the writ of replevin upon posting of the appropriate bond. The magistrate court had breached its mandatory duty to *not* follow the statute in view of its higher duty to follow the United States Constitution.

Perhaps the most dramatic evidence of the court's movement away from the broad definition of "judicial discretion" articulated in *Sweeney*, is found by a comparison of that case with the more recent decision in *Frock v. Fowlie*. In *Sweeney*, the petitioner sought an original writ in the supreme court to compel a district court to assume jurisdiction of an appeal from probate court. The lower court had previously dismissed the appeal for lack of jurisdiction. The supreme court denied the writ because there existed a plain speedy and adequate remedy by appeal, and because the action of the lower court involved judicial discretion.

Fifty-seven years later, an original writ was again sought from the...
supreme court again seeking to compel a district judge to assume jurisdiction of an appeal from probate court. The district judge had concluded he did not have jurisdiction of the appeal based upon his interpretation of the complicated statutes relating to probate court appeals. The supreme court in Frock analyzed the statutes, disagreed with the interpretation of the lower court, and issued a peremptory writ directing him to reinstate the appeal without mention of judicial discretion, Sweeney, or its progeny.

It is now beyond question that in cases involving questions of law, such as the constitutionality or interpretation of a statute, the rubric of judicial discretion is no longer a bar to mandamus.

2. Discretion of Public Officers

The decisions limiting the power of the court to review administrative discretion by mandamus did not have so humble or conservative a beginning as did the decisions dealing with the discretion of judges. The supreme court has always been unwilling to restrict its power to review administrative agencies by way of mandamus.

As early as 1913, in the case of Lorenzio v. James, the court was called upon to answer the question whether certain county commissioners could be compelled to revoke a liquor license pursuant to a statute which provided: "Any retail liquor license granted as provided for by law may be revoked by the Board of County Commissioners of the county wherein the same was issued. . . ." Although the statute on its face granted discretion to the commission, by use of the word may, the court found that mandamus was appropriate and no discretion was involved. Nor did the fact that the public officer made factual determinations in deciding whether or not to revoke the license mean the duty was discretionary:

A duty to be performed is nonetheless ministerial because the person who is required to perform it may have to satisfy himself of the existence of the state of facts under which he is given his right or warrant to perform the required duty.

In State ex rel. Perea v. County Commissioners, the court temporarily retreated from its position in Lorenzio. While agreeing

146. 18 N.M. 240, 135 P. 1172 (1913).
148. See State ex rel. Robinson v. King, 13 New Mexico Bar Bulletin and Advance Opinions 22 (1974), where any language in the election code was construed as being mandatory, thereby supporting a writ of mandamus.
149. 18 N.M. at 244-45, 135 P. at 1173.
150. 25 N.M. 338, 182 P. 865 (1919).
that an act was not discretionary merely because it involved factual determinations, the court suggested that if an exercise of judgment was involved, the act was discretionary and mandamus would not lie:

A ministerial act is an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done.\(^\text{151}\)

The court, in *Kiddy v. Board of County Commissioners of Eddy County*,\(^\text{152}\) continued to backslide and articulated this very narrow definition of acts subject to mandamus:

As brought out by the court in *Wailes v. Smith*, a nondiscretionary or ministerial duty exists when the officer is entrusted with the performance of *an absolute and imperative duty, the discharge of which requires neither the exercise of official discretion nor judgment*.\(^\text{153}\) (emphasis supplied)

The retreat from *Lorenzio*, however, was shortlived. Just four years after *Kiddy*, the court, in *State ex rel. Four Corners Exploration Co. v. Walker*,\(^\text{154}\) abandoned the position taken in *Kiddy* and *Perea*. The court broadened its mandamus power by limiting the inquiry into administrative discretion to an examination of whether the law directs the public officer to act in a certain way. Whether or not the administrator has made factual determinations or whether he has exercised judgment before acting are not relevant under the *Four Corners* test.

... it is nevertheless well established that mandamus will lie to compel the performance of mere ministerial acts or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown, *even though the officer be required to exercise judgment before acting*.\(^\text{155}\) (emphasis supplied)

Under *Four Corners*, the defense of discretion by a public officer

\(^\text{151}\) 25 N.M. at 340, 182 P. at 866.
\(^\text{152}\) 57 N.M. 145, 255 P.2d 678 (1953).
\(^\text{153}\) 57 N.M. at 149, 255 P.2d at 681 (Emphasis added).
\(^\text{154}\) 60 N.M. 459, 292 P.2d 329 (1957). Since *Walker*, the court has upheld a mandamus action against the state parole board. The court recognized that the parole board has discretion to determine whom it will parole, and whose parole it may choose to revoke. However, the court held that where statutes proscribed procedures for parole revocation and the degree to which time previously served should be credited to his sentence, mandamus would lie to compel compliance with the statutes. *Conston v. New Mexico State Board of Probation and Parole*, 79 N.M. 385, 444 P.2d 296 (1968).
\(^\text{155}\) 60 N.M. at 463, 292 P.2d at 331.
appears to be limited to those situations where the official is not obligated as a matter of law to do the act.

In summary, the court has taken the position that it will examine acts of public officers on a case-by-case basis to determine whether discretion is involved and hence whether mandamus will lie. The court will not be deterred from reviewing official actions by mandamus solely because the public official was making factual determinations or exercising judgment before acting.

3. Review of Administrative Fact-Finding Bodies Where No Right of Appeal Exists

In *Swisher v. Darden*, the court expanded the scope of mandamus by holding that mandamus is an appropriate remedy for review, on the record, of final agency action where no right of appeal exists. That decision placed administrative fact-finding boards in a category separate and apart from traditional mandamus respondents.

Mary Alice Swisher, a black, tenured teacher at Booker T. Washington High School in Las Cruces was terminated by the local school board when the black and white high schools in Las Cruces were integrated. She appealed the decision to the state school board, which found she had been terminated "without just cause." The local board refused to follow the state board's decision. Mrs. Swisher brought a mandamus action in the district court to enforce the state board decision against the local board. In the district court the board attempted to put on evidence and the testimony of witnesses. The court denied the proffer of additional evidence, and adopted the findings and decision of the state board, holding that they were not "arbitrary, unlawful, unreasonable or capricious."

On appeal, the supreme court affirmed the lower court, holding that a mandamus action based upon the decision of an administrative board should be tried in the same manner as an administrative appeal, namely, on the record. The court also limited its review to "Whether its [the state board's] decision is based upon substantial evidence or whether it is arbitrary, unlawful, unreasonable or capricious."

The court in *Ross v. State Racing Comm'n* followed the *Swisher* case in reviewing by mandamus a final decision of the State Racing Commission denying the award of a license to engage in horse racing near Carlsbad, New Mexico. The court conceded that the

157. 59 N.M. at 516, 287 P.2d at 77.
158. 59 N.M. at 515, 287 P.2d at 76.
159. 64 N.M. 478, 330 P.2d 701 (1958).
power vested in a board to grant a license on prescribed conditions is
generally a matter of discretion. However, the court held, it had
power by way of mandamus to "correct arbitrary or capricious
action which amounts to an abuse of discretion and is thus contrary
to law." The court then reversed the racing commission because
there was "no factual basis for the conclusion reached here."

The supreme court has adhered to the principles of Swisher and
Ross, and most recently articulated the state of the law in Sanderson
v. State Racing Comm'n:

Generally, mandamus will not lie to control the discretion of an
administrative board. [Citations omitted] But an exception to the
general rule is recognized where the administrative board has acted
unlawfully or wholly outside its jurisdiction or authority, or where it
has abused its discretion (emphasis supplied)

Thus, the court has seen fit, where no right of review exists, to create
a right of judicial review by way of mandamus. When mandamus
is used in this manner it is clear that the court should apply the
traditional standard of review of administrative decisions.

MANDAMUS AND THE DEFENSE OF SOVEREIGN IMMUNITY

Perhaps one of the most significant features of mandamus is that it
creates a vehicle for avoiding the doctrine of sovereign immunity.

Since the early case of State ex rel. Evans v. Field, the supreme
court has stated that actions in mandamus against public officers are
not barred by the doctrine of sovereign immunity, because the suit is
not one against the state, but rather is to enforce a duty owed by a
public officer to his principal—the State. The court was unequivocal
in this regard, despite the fact that the case involved a contract with
the state and could result in an award of a money judgment against
the state.

160. 64 N.M. at 483, 330 P.2d at 704.
161. Id.
163. 80 N.M. at 201, 453 P.2d at 370.
164. Resort to mandamus was made necessary by the failure of the New Mexico Admin-
rative Procedures Act to provide for general applicability to all agencies. See N.M. Stat.
Ann. § 4-32-23 (1953), as amended.
165. 27 N.M. 384, 201 P. 1059 (1921).
166. [W]here the law directs or commands a state officer to perform an act under
given circumstances, which performance is a mere ministerial act, not involving
discretion, mandamus will lie to compel the action, notwithstanding per-
formance of the state's contract may incidentally result. In such a case the
action is not really upon the contract, but is against the officer as a wrong-
doer. He is, under such circumstances, not only violating the rights of the
The principle was reasserted in *Gamble v. Velarde*, an action against the state auditor, and in *Harriet v. Lusk*, an action to enjoin the consolidation of public schools. Although *Harriet* was an action for declaratory and injunctive relief, the holding relating to sovereign immunity was dictated by its similarity to mandamus. The court concluded that had the action been in mandamus, sovereign immunity would not have been a bar:

> Before considering the merits of this case it is necessary to dispose of appellee's contention that this is a suit against the state concerning which the court is without jurisdiction. However, the defense of suit against the state does not apply in this case.

As we interpret Section 73-20-1 of 1953 Compilation, the duty of the State Board of Education to determine the economic feasibility of consolidation of schools not meeting minimum attendance requirements was mandatory. There was no discretion to so determine or not determine. If the board had refused to make the determination mandamus would certainly lie to enforce action on the part of the board.

Most recently, in *State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n*, the supreme court allowed a corporation to sue the New Mexico Tax Commission in mandamus to compel it to promulgate an order providing for a uniform assessment rate for ad valorem taxes:

> It is contended that the sovereign immunity doctrine is applicable to this case. We find such an argument completely without merit, having been answered in *Harriet v. Lusk*, 63 N.M. 383, 320 P.2d 738 (1958). This is not a suit against the State; it is a mandamus proceeding to require the performance of a duty plainly required under the constitution, i.e., to prescribe an assessment ratio so that property shall be uniformly assessed in proportion to its value.

The mandamus route around sovereign immunity has taken on increased importance due to the confused state of New Mexico law

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167. 36 N.M. 262, 13 P.2d 559 (1939).
169. 63 N.M. at 386, 320 P.2d at 740-41.
171. It is interesting to note that this was suit against the State Tax Commission as well as the individual commissioners and the court apparently did not consider this to be a problem.
172. 79 N.M. at 359, 443 P.2d at 852.
in the area of injunctions against state officials caused by *Sangre De Cristo Development Corp., Inc. v. City of Santa Fe.* The court in *Sangre De Cristo* disregarded the substantial authority to the contrary and held that sovereign immunity is a bar to an action seeking to enjoin a city and county from exercising planning and platting authority over a subdivision on Indian land. The court cavalierly ignored the contrary authority stating:

A reference to the foregoing cited cases shows that in New Mexico the doctrine of governmental immunity has not only been adhered to in tort cases or in cases in which there is likely to be a direct and adverse effect upon the public treasury, but in other types of cases as well.

Although this sweeping assertion suggests that all of the previous decisions of the court with respect to sovereign immunity have been reversed, no such reading is compelled. At the outset, the court pointed out that sovereign immunity became a problem because the action was brought against the city and county and not the individual city and county commissioners:

The issue of governmental immunity arises from the fact that the Plaintiff sued defendants as governmental entities. The councilmen and Commissioners of Defendants were not sued as individuals.

This language is an invitation to litigants to avoid the sovereign immunity doctrine in New Mexico by engaging in the *Ex Parte Young* fiction of suing individuals—rather than the state—to enjoin them from acting illegally and unconstitutionally under color of their office. This conclusion is bolstered by the recent decision of *Gomez v. Dulce Independent School District,* in which the court held that the Federal Civil Rights Act of 1871 states a cause of action in state court and also creates an exception to the sovereign immunity doctrine.

However, the confusion caused by *Sangre De Cristo* has hardly

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173. 84 N.M. 343, 503 P.2d 323 (1972).
174. *e.g.*, Harriet v. Lusk, 63 N.M. 383, 320 P.2d 738 (1958); Board of Trustees of the Town of Casa Colorado Land Grant v. Pooler, 32 N.M. 460, 259 P. 629 (1927); State ex rel. Evans v. Field, 27 N.M. 384, 201 P. 1059 (1921).
175. 84 N.M. at 347, 503 P.2d at 327.
176. 84 N.M. at 346, 503 P.2d at 326.
177. 209 U.S. 123 (1908).
dissipated, and until further clarified by the supreme court, mandamus is the only sure way to avoid sovereign immunity problems when seeking to compel action by governmental officials.

CONCLUSION

Early English antecedents of the modern writ of mandamus lead us to expect a remedy extraordinary in nature and narrow in scope. A reading of the New Mexico Mandamus Statute leads to the same expectation, and the early New Mexico decisions reinforce that view of the writ. Recent case law, however, has transformed the writ into a thoroughly modern instrument.

The rigidity of form has survived the onslaught of time, but it is not a stumbling block to the use of the writ. And, surely its historic antecedents deserve at least that touch of recognition. Once past the matter of form, however, mandamus becomes a versatile and useful device.

The rules of standing in mandamus have been broadly defined to allow individual vindication of public wrongs by way of the writ. Furthermore, the availability of appeal is no longer an absolute roadblock to its issuance. In addition, the early definition of official discretion has given way, allowing mandamus to be used to challenge interpretations of law, even where those interpretations require factual judgments. Mandamus has also been used to impress a right to judicial review where statutes expressly foreclose that right. Finally, use of the writ is an express exception to and the surest way around the defense of sovereign immunity.

The writ is now available against a plethora of officials, to control such wide-ranging kinds of official action that in New


181. Mandamus has been used: to compel the Governor to amend his proclamation of election, State ex rel. Robinson v. King, 13 New Mexico Bar Bulletin and Advance Opinions 22 (1974), to require the Secretary of State to certify names for election, State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968), to challenge the constitutionality of a statute, Montoya v. Blackhurst, 84 N.M. 91, 500 P.2d 176 (1972), to compel judges of election to count certain ballots, Reese v. Dempsey, 48 N.M. 417, 152 P.2d 157 (1944), to compel the state to pay a judgment, State Highway Commission v. Quesenberry, 74 N.M. 30, 390 P.2d 273 (1964), to compel an ousted elected official to turn over his books and papers to a newly elected successor, Conklin v. Cunningham, 7 N.M. 445, 38 P. 170 (1894), to compel a county to assess utility taxes, State ex rel. Reynolds v. Board of Commissioners, Guadalupe County, 71 N.M. 194, 376 P.2d 976 (1962), to compel a District Attorney to
Mexico it has become the most common vehicle for challenging official wrongs. In an era of expanding government size and concomitant growth in governmental power, it is not surprising that the ancient writ of mandamus should become a major device by which the individual can control the abuse of governmental power.