



Summer 1995

**Criminal Law - New Mexico Adopts a Subsequent Consent Rule  
for Motorists Who Refuse to Submit to Chemical Testing: In re  
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**Recommended Citation**

Gianna M. Mendoza, *Criminal Law - New Mexico Adopts a Subsequent Consent Rule for Motorists Who Refuse to Submit to Chemical Testing: In re Suazo*, 25 N.M. L. Rev. 261 (1995).  
Available at: <https://digitalrepository.unm.edu/nmlr/vol25/iss2/7>

# CRIMINAL LAW—New Mexico Adopts a Subsequent Consent Rule for Motorists Who Refuse to Submit to Chemical Testing: *In re Suazo*

## I. INTRODUCTION

In *In re Suazo*,<sup>1</sup> the New Mexico Supreme Court adopted a subsequent consent rule for motorists asked by a police officer to submit to a chemical test.<sup>2</sup> The subsequent consent rule allows a motorist who initially refuses to submit to a chemical test to rescind his decision under limited circumstances.<sup>3</sup> After *Suazo*, a reasonable “change of mind” will vitiate a prior refusal.<sup>4</sup> Consequently, the motorist will not invoke the administrative penalty of refusal—automatic license revocation.<sup>5</sup> In adopting a subsequent consent rule, New Mexico aligned itself with a minority of jurisdictions<sup>6</sup> that have either explicitly or implicitly adopted a similar rule.<sup>7</sup> This Note provides an overview of the New Mexico Implied Consent Act, discusses authority from other jurisdictions, examines the rationale of the *Suazo* court, analyzes the *Suazo* decision and explores its implications.

## II. STATEMENT OF THE CASE

On January 11, 1990, a New Mexico State Police officer arrested Abel G. Suazo for driving under the influence of alcohol.<sup>8</sup> The arresting officer asked Suazo to take a breathalyzer test and explained the penalties that accompany a refusal to submit.<sup>9</sup> Between 10:56 and 10:57 p.m., Suazo agreed to take the test.<sup>10</sup> Suazo made three attempts to take the test, but each time failed to breathe hard or long enough to generate an adequate breath sample. The arresting officer determined that Suazo's failures amounted to a refusal to submit. Suazo contacted his attorney who advised him to submit to a blood test.<sup>11</sup> At approximately 1:15

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1. 117 N.M. 785, 877 P.2d 1088 (1994).

2. *Id.* at 792, 877 P.2d at 1095.

3. *See id.* at 793, 877 P.2d at 1096. For a discussion of specific circumstances, *see infra* Part IV.

4. *See Suazo*, 117 N.M. at 793, 877 P.2d at 1096.

5. *See id.*

6. *See infra* note 28.

7. *See Suazo*, 117 N.M. at 790-91, 877 P.2d at 1093-94.

8. *Id.* at 786, 877 P.2d at 1089. Just before his arrest, Suazo was involved in a two-vehicle accident near Espanola, New Mexico. *Id.* The arresting officer allowed Suazo to accompany his daughter, who was injured in the accident, to Espanola Hospital. At the hospital the arresting officer gave Suazo a field sobriety test; Suazo failed the test. *Id.*

9. *Id.* The penalty for refusing to submit is an automatic one-year revocation of one's driver's license. *See* N.M. STAT. ANN. § 66-8-111(B) (Repl. Pamp. 1994); *see infra* note 23.

10. Unless otherwise noted, all subsequent factual and procedural references refer to *Suazo*, 117 N.M. at 786-87, 877 P.2d at 1089.

11. *Id.* The officer drove Suazo to the Santa Fe Detention Center. During the trip, Suazo asked the officer to deliver him to St. Vincent's Hospital for treatment. The officer complied. Suazo contacted his attorney from the hospital. *Id.*

a.m., two hours and fifteen minutes after Suazo's initial refusal, Suazo took the blood test. Suazo's blood alcohol content was .04% by weight.<sup>12</sup>

At Suazo's driver's license revocation hearing,<sup>13</sup> the hearing officer found that Suazo's initial failures to complete the breathalyzer test constituted a refusal to submit to the chemical test. The hearing officer upheld the revocation of Suazo's driver's license for one year.<sup>14</sup> On appeal,<sup>15</sup> the district court held that Suazo's inability to take the test did not amount to a refusal and that his consent to a subsequent breathalyzer test would have "cured" any initial refusal. The New Mexico Court of Appeals reversed, concluding that Suazo's behavior constituted a refusal. The court of appeals established criteria which would allow one to rescind a prior refusal. On certification, the New Mexico Supreme Court adopted a stricter version of the criteria the court of appeals set forth.<sup>16</sup> The supreme court held, however, that Suazo's "change of mind" after a two hour and fifteen minute delay, was unreasonable, did not meet the criteria for a legal rescission, and thus, did not cure his initial refusal.<sup>17</sup>

### III. RULES GOVERNING REFUSAL OF CHEMICAL TESTING

#### A. *The Implied Consent Act*

The New Mexico Implied Consent Act<sup>18</sup> states that any person who operates a motor vehicle within the state and has been arrested for driving under the influence of alcohol implicitly consents to chemical tests of his blood, breath, or both.<sup>19</sup> Law enforcement officers may administer

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12. *Id.* Suazo had an alcohol concentration of four one-hundredths in his blood. *See id.* It is unlawful for any person who has an alcohol concentration of eight one-hundredths or more in his blood or breath to drive any vehicle in New Mexico. N.M. STAT. ANN. § 66-8-102(C) (Repl. Pamp. 1994). While Suazo's blood alcohol level at the time of the blood test was not above the lawful level, the court did not give weight to this fact in its holding. *See Suazo*, 117 N.M. at 794, 877 P.2d at 1097. The only issue the court evaluated was the two hours and fifteen minutes that elapsed between Suazo's initial refusal to submit to a chemical test and his subsequent consent. *See infra* note 17 and accompanying text.

13. The arresting officer must serve immediate written notice of license revocation and of right to a hearing on the motorist who refuses to submit to a chemical test. *See* N.M. STAT. ANN. § 66-8-111.1 (Repl. Pamp. 1994). The motorist must request a hearing within ten days after receiving such notice, or the right to a hearing is forfeited. N.M. STAT. ANN. § 66-8-112(B) (Repl. Pamp. 1994).

14. *Suazo*, 117 N.M. at 787, 877 P.2d at 1090.

15. N.M. STAT. ANN. § 66-8-112(G). If one requests a hearing and is adversely affected by the order of the taxation and revenue department, which presides over the hearing, he may seek review in the district court in the county in which he was arrested. *Id.*

16. *See* discussion of criteria *infra* Part IV.

17. *Suazo*, 117 N.M. at 794, 877 P.2d at 1097. The supreme court remanded the case to the court of appeals for entry of a mandate to the district court to amend its order consistent with the supreme court's opinion. *Id.*

18. N.M. STAT. ANN. §§ 66-8-105 through 66-8-112 (Repl. Pamp. 1994).

19. N.M. STAT. ANN. § 66-8-107 (Repl. Pamp. 1994). Following Suazo's arrest and prior to the supreme court decision, the New Mexico Legislature amended the Implied Consent Act. However, the *Suazo* court stated that its findings would not differ under the most recent amendments. *See Suazo*, 117 N.M. at 787, 877 P.2d at 1090.

a chemical test if they have reasonable grounds<sup>20</sup> to believe the motorist was driving while under the influence of alcohol.<sup>21</sup> If the motorist refuses to submit to a chemical test, "none shall be administered, except when authorized by search warrant."<sup>22</sup> However, if a motorist refuses, his driver's license is automatically revoked for one year.<sup>23</sup>

A legislature's purpose for enacting an implied consent act is generally twofold. First, the statute is meant to deter people from driving while intoxicated.<sup>24</sup> Second, an implied consent act allows an arresting officer to obtain the best evidence of a motorist's blood alcohol content by administering a chemical test almost immediately after the motorist stops driving.<sup>25</sup> All fifty states have enacted similar implied consent acts.<sup>26</sup>

The implied consent acts give rise to a critical question that every jurisdiction will eventually face: what if a motorist, who initially refuses a chemical test, later rescinds his decision and agrees to submit to the test? The two competing schools of thought which address this issue are commonly called the "absolute rule" and the "subsequent consent rule."

### B. *The Absolute Rule*

Jurisdictions that apply the absolute rule refuse to accept a motorist's recantation under any circumstances after an initial refusal to submit to a chemical test.<sup>27</sup> The majority of jurisdictions adhere to an absolute

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20. The Supreme Court of New Mexico has held that the smell of alcohol on a motorist's breath, the motorist's inability to walk correctly, and the motorist's involvement in an accident constitute reasonable grounds to administer a chemical test. See *Commissioner of Motor Vehicles v. McCain*, 84 N.M. 657, 661, 506 P.2d 1204, 1208 (1973).

21. N.M. STAT. ANN. § 66-8-107(B). Generally, the Implied Consent Act requires that the law enforcement officer place the motorist under arrest before administering a chemical test. See *State v. Richerson*, 87 N.M. 437, 441, 535 P.2d 644, 648, (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975). If the officer fails to do so, the test results are not admissible in a court of law. *Id.*

22. See N.M. STAT. ANN. § 66-8-111(A) (Repl. Pamp. 1994).

23. N.M. STAT. ANN. § 66-8-111(B) (Repl. Pamp. 1994). Because one's driver's license shall be revoked for one year upon his refusal to submit to a chemical test, the statutory right to refuse is only a conditional right. See *McKay v. Davis*, 99 N.M. 29, 30, 653 P.2d 860, 861 (1982). Thus, the only right a motorist actually has is the right not to be forcibly tested after refusing to submit. See *id.*

Furthermore, the refusal to submit to a chemical test transforms the charge of driving while under the influence of alcohol (DWI) into aggravated driving while under the influence of alcohol. See N.M. STAT. ANN. § 66-8-102(D)(3) (Repl. Pamp. 1994). The court must sentence one convicted of an aggravated DWI to no less than forty-eight hours in jail, in addition to the penalties he would suffer for the conviction of a simple DWI. N.M. STAT. ANN. § 66-8-102(E) (Repl. Pamp. 1994).

24. See *McKay*, 99 N.M. at 30, 653 P.2d at 861 (holding that evidence of defendant's refusal to take a chemical test is admissible under the Implied Consent Act).

25. See *Schroeder v. Department of Motor Vehicles*, 772 P.2d 1278, 1280 (Nev. 1989) (citation omitted).

26. See *Lively v. State*, 804 P.2d 66, 69 (Alaska Ct. App. 1991) (citation omitted).

27. See *Suazo*, 117 N.M. at 787-88, 877 P.2d at 1090-91 ("[A]nything substantially short of an unqualified, unequivocal assent to an officer's request that the arrested motorist take the test constitutes a refusal to do so.") (citing *State v. Corrado*, 446 A.2d 1229, 1233 (N.J. Super. Ct. App. Div. 1982)).

rule.<sup>28</sup> Three major concerns underlie the absolute rule: 1) the statutory construction of the applicable implied consent act; 2) the duration between initial refusal to submit to the chemical test and subsequent recantation; and 3) the burden imposed on local police officers.

Courts that have adopted the absolute rule based on statutory construction look to the plain language of their state's implied consent act to determine whether rescission vitiates prior refusal.<sup>29</sup> If the statute does not expressly state or imply the allowance of a "cure" by recantation, it is unavailable.<sup>30</sup> Courts applying strict statutory construction reason that legislative silence regarding a "cure" indicates its intent to deny a motorist the opportunity to successfully change his mind.<sup>31</sup> To hold otherwise would frustrate legislative intent.<sup>32</sup>

Courts utilizing the duration factor reason that the accuracy and reliability of a chemical test diminishes with the passage of time because the percentage of alcohol in the bloodstream decreases shortly after one stops drinking.<sup>33</sup> Consequently, any delay in the administration of a chemical test would impede access to the "best evidence," thereby thwarting the purpose of an implied consent act.<sup>34</sup>

While it is possible to use expert testimony to ascertain a "fairly reasonable estimate" of the motorist's blood alcohol content at the time of the event by examining results of a chemical test administered hours after the initial arrest,<sup>35</sup> this process is potentially prejudicial to the State, and is therefore, often rejected.<sup>36</sup>

Finally, courts addressing the burden on law enforcement personnel focus on the role of the arresting officer.<sup>37</sup> It would be unreasonable and unduly burdensome to expect the arresting officer to accept every refusal as conditional and wait for a recantation.<sup>38</sup> Additionally, a rule

28. Every state applies the absolute rule except Alaska, Arizona, Florida, Georgia, Hawaii, Idaho, Kansas, Louisiana, Minnesota, New Hampshire, North Dakota, Ohio, Oklahoma, and Washington. See *Suazo*, 117 N.M. at 790-91 nn. 1-9, 877 P.2d at 1093-94 nn. 1-9.

29. See *Peterson v. State*, 261 N.W.2d 405, 410 (S.D. 1977) ("We see no language in our law authorizing the arrested driver to delay his decision to take the requested test.").

30. See *Hoyle v. Peterson*, 343 N.W.2d 730, 734 (Neb. 1984) (explaining that the Implied Consent Act contains no language which implies additional time for reflection or reconsideration after a driver's refusal to take the test).

31. *Id.* The *Hoyle* court found that the plain language of the Act ("[i]f a person arrested . . . refuses to submit, . . . the test shall not be given") is indicative of the Legislature's intent to deny a motorist's subsequent consent. *Id.* (citation omitted).

The language of Nebraska's Implied Consent Act, as set forth in *Hoyle*, is almost identical to the language of New Mexico's Implied Consent Act. See N.M. STAT. ANN. § 66-8-111(A) (Repl. Pamph. 1994).

32. See *Hoyle*, 343 N.W.2d at 734.

33. See *Schroeder v. Department of Motor Vehicles*, 772 P.2d at 1278, 1280 (Nev. 1989).

34. See *id.*

35. See *Peterson v. State*, 261 N.W.2d 405, 409 (S.D. 1977). This is known as an extrapolation process. *Id.* It estimates the blood alcohol level at the time of the arrest by using the known rate of average elimination of blood alcohol in the average person plus the test result in the instant case. *Id.*

36. *Id.* The *Peterson* court so held because the extrapolation process entails proving that the motorist on trial is an "average person." *Id.*

37. See *State v. Corrado*, 446 A.2d 1229, 1232 (N.J. Super. Ct. App. Div. 1982).

38. *Schroeder*, 772 P.2d at 1280.

allowing cure or recantation would prevent the arresting officer from attending to his other duties in order to arrange a belated test.<sup>39</sup> The absolute rule promotes fairness to arresting officers and ensures a better use of time.<sup>40</sup>

### C. *The Subsequent Consent Rule*

A minority of jurisdictions apply subsequent consent rules.<sup>41</sup> These jurisdictions allow a motorist to rescind an initial refusal to submit to a chemical test if the recantation is in accordance with the specific rules enumerated for cure.<sup>42</sup> The following concerns underlie adoption of the subsequent consent rule: 1) the notion of fairness to the motorist; 2) the duration between initial refusal and recantation; 3) an additional legislative purpose for enactment of an implied consent act; and 4) the procedural reality of the situation.

First, adoption of the subsequent consent rule is based on the notion of fairness to the driver.<sup>43</sup> The Washington Court of Appeals has noted that the absolute rule would "unreasonably bind an arrested person to his first words spoken, no matter how quickly and under what circumstances those words are withdrawn."<sup>44</sup>

Second, like the absolute rule,<sup>45</sup> the subsequent consent rule recognizes that the accuracy and reliability of a chemical test diminishes over time.<sup>46</sup> These courts, however, conclude that a short delay in the administration of a chemical test does not negatively affect the scientific reliability of its results.<sup>47</sup>

Third, courts that adopt the subsequent consent rule based on legislative intent often look beyond the plain language of the Act.<sup>48</sup> These courts

39. *Id.* (citation omitted).

40. *Id.*

41. *See supra* note 28.

42. Each state establishes its own rules for effective recantation. For example, in *Lund v. Hjelle*, 224 N.W.2d 552, (N.D. 1974), the court formulated what is known as the *Lund* test for determining an effective rescission of an initial refusal:

[1] the request to take the test is made within a reasonable time after the prior first refusal; [2] such a test administered upon the subsequent consent would still be accurate; [3] when testing equipment or facilities are still readily available; [4] honoring a request for a test, following a prior first refusal, will result in no substantial inconvenience or expense to the police; and [5] the individual requesting the test has been in police custody and under observation for the whole time since his arrest.

*Suazo*, 117 N.M. at 791, 877 P.2d at 1094 (quoting *Lund*, 224 N.W.2d at 557). While some states have adopted the *Lund* test in its entirety, others have adopted a slightly modified version. *See Suazo*, 117 N.M. at 791, 877 P.2d at 1094.

43. *See State Department of Licensing v. Lax*, 871 P.2d 1098, 1102 (Wash. Ct. App. 1994) ("[I]t is a harsh form of justice that always gives final legal effect to a suspect's initial statement or indication that he or she refuses to submit to a test.").

44. *State v. Moore*, 614 P.2d 931, 935 (Haw. 1980).

45. *See supra* notes 33-36 and accompanying text.

46. *Moore*, 614 P.2d at 935.

47. *See Lund v. Hjelle*, 224 N.W.2d 552, 557 (1974) ("[T]he accuracy of a chemical test . . . does not depend upon its being administered immediately after an arrest . . .").

48. *See Pruitt v. State Department of Public Safety*, 825 P.2d 887, 894 (Alaska 1992) (explaining that one basis for the adoption of a subsequent consent rule is that it furthers the legislative purpose behind the Implied Consent Act).

have found that the legislature's intention was to provide incentive for a motorist to submit to chemical testing.<sup>49</sup> By giving a motorist a "second chance" to submit, the arresting officer is likely to administer more chemical tests than he would in the absence of a subsequent consent rule. This rule effectuates the legislature's intent and encourages the administration of chemical tests in as many cases as possible.<sup>50</sup>

Finally, in rebuttal to the absolute rule's concern for the officer's time,<sup>51</sup> the Supreme Court of Oklahoma found that arresting officers normally give a motorist more than one opportunity to submit to the test.<sup>52</sup> Therefore, the court held that so long as the motorist's recantation fell within the limitations of a "subsequent consent rule,"<sup>53</sup> an arresting officer could administer a chemical test without suffering any inconveniences.<sup>54</sup>

#### IV. RATIONALE OF THE *SUAZO* COURT

The New Mexico Supreme Court adopted a subsequent consent rule in *Suazo*,<sup>55</sup> aligning New Mexico with a minority of jurisdictions. The *Suazo* court concluded that the test it promulgates strikes a balance between the subsequent consent rule and the absolute rule.<sup>56</sup> The court relied on the reasoning expounded by other jurisdictions<sup>57</sup> and New Mexico's Implied Consent Act to support its conclusion.<sup>58</sup>

New Mexico's variation of the rule takes the form of the *Lund* test<sup>59</sup> with one important change regarding the element of time.<sup>60</sup> While the *Lund* test requires rescission to be made within a reasonable time after initial refusal, New Mexico's rule requires that a motorist rescind his initial refusal "almost immediately."<sup>61</sup> "Almost immediately," however,

49. See *In re Smith*, 770 P.2d 817, 821 (Idaho Ct. App. 1989).

50. *Pruitt*, 825 P.2d at 894.

51. See *supra* notes 37-40 and accompanying text.

52. *Baldwin v. State*, 849 P.2d 400, 405 (Okla. 1993).

53. *Id.* at 406.

54. *Id.* at 405.

55. *Suazo*, 117 N.M. at 793, 877 P.2d at 1095.

56. *Id.*

57. *Id.* at 787-93, 877 P.2d at 1090-96.

58. *Id.* at 788-89, 877 P.2d at 1091-92.

59. See *supra* note 42.

60. *Suazo*, 117 N.M. at 793, 877 P.2d at 1096. The New Mexico test provides:

A motorist will be permitted to rescind his initial refusal

1) when he does so before the elapse of the reasonable length of time it would take to understand the consequences of his refusal;

2) when such a test would still be accurate;

3) when testing equipment or facilities are still readily available;

4) when honoring a request for a test, following a prior first refusal, will result in no substantial inconvenience or expense to the police; and

5) when the individual requesting the test has been in police custody and under observation for the whole time since his arrest.

*Id.*

61. *Id.* The *Suazo* court explained that the *Lund* test was not specific enough regarding the amount of time a motorist should be given to consider his decision. *Id.* Thus, the temporal criterion of the *Lund* test may give a motorist more leeway as to when he may effectually rescind. See *id.* The *Suazo* court states that the time period it establishes is shorter than that of any case following the *Lund* test. *Id.*

is vague and subject to interpretation. Therefore, the court reasoned that the driver's ability to comprehend his situation must be a factor used in determining whether he effectively "cured" his initial refusal.<sup>62</sup> The *Suazo* court suggested that the time requirement should never be more than a "matter of minutes."<sup>63</sup>

## V. ANALYSIS AND IMPLICATIONS OF THE *SUAZO* DECISION

The *Suazo* court failed to address two vital issues: the statutory construction of the Implied Consent Act, and the rules governing administrative license-revocation hearings.

### A. *Statutory Construction: The Plain Meaning of the Statute v. Legislative Intent*

The supreme court failed to thoroughly analyze the intent of the legislature in enacting the Implied Consent Act. Justice Baca, in his special concurrence,<sup>64</sup> found that the plain language of the Implied Consent Act precludes the motorist from an opportunity to "cure" his initial refusal to submit to a chemical test.<sup>65</sup> The language of the statute does not provide the motorist with a chance to effectually rescind his decision, either explicitly or implicitly.<sup>66</sup> New Mexico case law holds that if a statute is free from ambiguity, the court should not engage in statutory interpretation.<sup>67</sup> Rather, the court must give the statute effect as it is written, instead of second-guessing the legislature.<sup>68</sup> Therefore, under a strict statutory construction theory, the *Suazo* court may have transgressed its discretion by adopting the subsequent consent rule.

While the court's failure to thoroughly analyze the Implied Consent Act is troubling, it appears that traditional New Mexico statutory construction would not have resulted in a different decision. The New Mexico Supreme Court and the New Mexico Court of Appeals have consistently refused to adopt the "formalistic and mechanistic" interpretation of statutory language as the sole means of statutory analysis.<sup>69</sup> If a statute that appears unambiguous on its face engenders disagreements regarding its meaning,<sup>70</sup> a literal interpretation of the statute will not bind the

62. *Id.* at 793-94, 877 P.2d at 1096-97.

63. *Id.* at 793, 877 P.2d at 1096.

64. Justice Baca concurred with the court in affirming the suspension of *Suazo's* driver's license, but he did not concur in the Court's adoption of a subsequent consent rule. *Suazo*, 117 N.M. at 794, 877 P.2d at 1097 (Baca, J., specially concurring).

65. *Id.*

66. *See id.*; N.M. STAT. ANN. §§ 66-8-105 to 66-8-112 (Repl. Pamp. 1994).

67. *State v. Elliot*, 89 N.M. 756, 757, 557 P.2d 1105, 1106 (1977) (citing *State v. Weddle*, 77 N.M. 420, 423 P.2d 611 (1967)).

68. *See Burch v. Foy*, 62 N.M. 219, 223, 308 P.2d 199, 202 (1957).

69. *D'Avigon v. Graham*, 113 N.M. 129, 131, 823 P.2d 929, 931 (Ct. App. 1991) (citing *Martinez v. Research Park, Inc.*, 75 N.M. 672, 410 P.2d 200 (1965)).

70. *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994). This apparent rejection, however, does not nullify the first approach. *Id.* at 352, 871 P.2d at 1358. The two approaches are not contradictory, but complimentary. *Id.* While courts should not second-guess the legislature, they must also take caution when applying the statute as written. *Id.* at 352-53, 871 P.2d at 1358-59.



court, especially if such an interpretation would defeat the legislative purpose.<sup>71</sup>

The court stated that one purpose of the Implied Consent Act is to remove motorists driving under the influence of alcohol from the highways in New Mexico.<sup>72</sup> By giving a motorist a "second chance" to submit, the arresting officer is able to administer more chemical tests, thereby providing the State with stronger evidence to successfully convict drunk drivers.<sup>73</sup> Consequently, the adoption of a subsequent consent rule will promote the reduction of drunk driving in New Mexico. Thus, while it is evident that the *Suazo* court did not adhere to a formalistic approach, it appears that the court acted within the boundaries of statutory interpretation.

### B. *The Administrative License-Revocation Hearing*

The New Mexico Legislature limited the administrative license-revocation hearings to the five issues enumerated in § 66-8-112(E) of the Implied Consent Act<sup>74</sup> in order to provide the Taxation and Revenue Department with a procedure by which it can conduct numerous hearings within the time constraints set forth in the Act.<sup>75</sup> In response to the State's argument,<sup>76</sup> the *Suazo* court maintained that the adoption of a subsequent

71. See *State v. Nance*, 77 N.M. 39, 44, 419 P.2d 242, 247 (1966), *cert. denied*, 386 U.S. 1039 (1967) (citing *In re Vigil's Estate*, 38 N.M. 383, 34 P.2d 667 (1934) ("[W]here . . . an adherence to the literal use of words would lead to injustice, absurdity or contradiction, the statute will be construed according to its obvious spirit or reason, even though this requires the rejection of words or the substitution of others.")).

72. See *Suazo*, 117 N.M. at 793, 877 P.2d at 1096.

73. See *id.* The court states that "the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test." *Id.* at 790, 877 P.2d at 1093 (quoting *South Dakota v. Neville*, 459 U.S. 553, 564 (1983)).

74. N.M. STAT. ANN. § 66-8-112(E) (Repl. Pamp. 1994). The issues are as follows:

- 1) whether the law enforcement officer had reasonable grounds to believe that the person had been driving a motor vehicle within this state while under the influence of intoxicating liquor;
- 2) whether the person was arrested;
- 3) whether this hearing is held no later than ninety days after notice of revocation; and either
- 4)(a) whether the person refused to submit to a test upon request of the law enforcement officer; and
- (b) whether the law enforcement officer advised that the failure to submit to a test could result in revocation of the person's privilege to drive; or
- 5)(a) whether the chemical test was administered pursuant to the provisions of the Implied Consent Act[66-8-105 to 66-8-112 NMSA 1978]; and

- (b) the test results indicated an alcohol concentration of eight one-hundredths or more in the person's blood or breath if the person is twenty-one years of age or older or an alcohol concentration of two one-hundredths or more in the person's blood or breath if the person is less than twenty-one years of age.

*Id.*

75. See *Bierner v. State Taxation and Revenue Department*, 113 N.M. 696, 699, 831 P.2d 995, 998 (Ct. App. 1992) (holding that the Implied Consent Act does not require the State to prove the motorist's blood alcohol content equalled or exceeded the statutory limit at the time he was driving, but only at the time he took the chemical test).

76. The State claimed that the adoption of a subsequent consent rule would have the effect of adding a sixth issue to the administration license-revocation hearing. *Suazo*, 117 N.M. at 787, 877 P.2d at 1092.

consent rule will not introduce a sixth issue into the administrative license-revocation hearing.<sup>77</sup> The court, however, never accounted for its resolution. An explanation of the above is indispensable, for it appears that the nature of the subsequent consent rule lends itself to controversy, manifesting itself as an additional issue at the license-revocation hearing.

Furthermore, in the absence of an explanation regarding how the issue of subsequent consent will fit into the administrative hearing, procedural questions arise. For instance, must the hearing officer first determine the existence of a prior refusal and then determine whether the motorist "cured" his initial refusal using the five criteria set forth in the New Mexico subsequent consent rule; or must the hearing officer employ the subsequent consent rule criteria as a means of determining whether the motorist has refused at all?

Ultimately, the hearing officer's choice of procedures is irrelevant, for the effects of either defeat the legislature's desire to reduce driving while intoxicated. The evaluation of a motorist's refusal to submit to a chemical test, based on the five additional criteria set forth in the New Mexico rule, is time consuming and will hinder the motor vehicle department's expedient, as well as efficient, procedures.

## VI. CONCLUSION

The *Suazo* court aligned with a minority of jurisdictions and adopted a subsequent consent rule for the state of New Mexico. The court found that this rule encourages the administration of chemical testing in more driving while intoxicated cases than would be possible without the allowance of a "second-chance," thereby decreasing the number of drunk drivers on the highway. Adoption of the subsequent consent rule may present problems to the license-revocation hearings as the rule's five criterion could raise issues that frustrate the numerous license revocation hearings conducted by the Taxation and Revenue Department. Nevertheless, when balancing potential administrative inefficiencies against the fairness a motorist receives under the subsequent consent rule, the *Suazo* court's decision is justified.

GIANNA M. MENDOZA

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77. *Id.* at 793, 877 P.2d at 1096.