
NATURAL RESOURCES JOURNAL

Volume 3
Issue 1 *Winter 1963*

Winter 1963

Constitutional Law—Separation of Powers: Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962)

Thomas A. Garrity

CONSTITUTIONAL LAW—SEPARATION OF POWERS*—In 1881, the United States Supreme Court expressed the prevailing theory that the powers of government should be distributed into three distinct departments and that one department should not be permitted to exercise any power belonging to another.[1] This separation of powers theory conflicts with the practice of many modern administrative agencies which exercise both legislative and judicial powers.[2] Any conflict between the complete separation of powers theory and an actual agency's practice reaches the court as a constitutional issue since the federal and most state constitutions provide for separation of powers either implicitly[3] or explicitly.[4] Where the constitutional provision is not explicit, courts have resolved the conflict by interpreting separation of powers to merely mean that the whole power of one governmental branch cannot be exercised by any group having the whole power of another branch.[5] Using this approach, courts have allowed agencies to combine governmental powers.[6] But, the problem of reconciling the constitutional mandate with the practical need for allowing agencies to use more than one power is much more difficult in a state with an explicit constitutional provision for complete separation of powers. This was the problem before the New Mexico Supreme Court in *Continental Oil Co. v. Oil Conservation Comm'n.*[7]

In *Continental,* an order of the Oil Conservation Commission[8] which changed the proration formula used in the Jalmat Pool from one based on pure acreage to one including a deliverability factor was in issue. The district court, upon review of the order, admitted new evidence, and affirmed the Commission's order. On appeal to the Supreme Court of New Mexico, *held,* Reversed with directions to declare the orders of the Commission invalid and void. The district court should not have admitted new evidence because those provisions of the appeal statute[9] allowing the court to consider new evidence or

---

* Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962).

1. Kilbourn v. Thompson, 103 U.S. 168, 191 (1881).

2. Davis, Administrative Law Text § 1.09 (1959).

3. See, *e.g.,* U.S. Const. art. I, § 1, art. II, § 1, art. III, § 1.

4. See *e.g.,* Idaho Const. art. 2, § 1; Iowa Const. art. 3, § 1; Mont. Const. art. 4, § 1; Miss. Const. art. 1, § 1; N.M. Const. art. 3, § 1.

5. See, *e.g.,* Bailey v. Board of Pub. Affairs, 194 Okla. 495, 153 P.2d 235 (1944); see generally, Hamilton, Madison & Jay, The Federalist, No. XLVII at 246 (Everyman's Library ed. 1948).

6. *Ibid.*

7. 70 N.M. 310, 373 P.2d 809 (1962).

8. There were two orders involved. Order No. R-1092-C with only one minor change affirmed Order No. R-1092-A. Since the court treats the validity of Order No. R-1092-A as the only practical issue, this comment also refers to "an order" rather than "the orders." See Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962).

9. "The trial upon appeal shall be *de novo*. . . . The court shall determine the issues of fact and of law and shall, upon a preponderance of the evidence . . . which

allowing a trial *de novo* are unconstitutional under Article III, Section 1 of the New Mexico Constitution.

Article III, Section 1 of the New Mexico Constitution reads as follows:

> The powers of the government of this state are divided into three *distinct* departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this Constitution otherwise expressly directed or permitted. (Emphasis added.)

The supreme court interpreted this language to mean that courts can not perform legislative functions.[10] The supreme court also stated that the protection of oil and gas correlative rights is a legislative function which may be delegated to the Oil Conservation Commission.[11] In view of these conclusions, the statutory provisions[12] for trial *de novo* and admission of new evidence logically had to be declared unconstitutional. If a trial *de novo* is allowed or new evidence is admitted, the court must necessarily substitute its discretion for that of the Commission. The court, in effect, would be exercising a legislative function. This would contravene Article III, Section 1 as interpreted by the supreme court.

This decision that a *de novo* review of an administrative order is unconstitutional is another step in the development of the separation of powers doctrine in New Mexico. In 1913 the supreme court considered a statute[13] which provided for a *de novo* review when an order of the State Engineer was in issue.[14] The court said that the statute contemplated a hearing or trial *de novo* and not a review of the agency order. More recent decisions, however, reflect a trend towards complete separation of powers and away from *de novo* review. In *Yarbrough v. Montoya*[15] a statute[16] providing for *de novo* review of decisions by the Liquor Control Division Chief was interpreted. The supreme court said that a hearing *de novo* required only that the decision be examined to see if it was contrary to the evidence, unreasonable, arbitrary or capricious. While the *de novo* provision was not declared unconstitutional, *de*

---

may include evidence in addition to the transcript of proceedings before the commission. . . ." N.M. Stat. Ann. § 65-3-22(b) (1953).

10. Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962).

11. *Id.* at 318, 373 P.2d at 814.

12. N.M. Stat. Ann. § 65-3-22(b) (1953).

13. N.M. Stat. Ann. § 75-6-1 (1953).

14. Farmers Dev. Co. v. Rayado Land & Irr. Co., 18 N.M. 1, 133 Pac. 104 (1913). *Contra,* Kelley v. Carlsbad Irr. Dist. & Reynolds, 379 P.2d 763 (N.M. 1963).

15. 54 N.M. 91, 214 P.2d 769 (1950).

16. N.M. Stat. Ann. § 46-5-16 (1953).

novo was defined in such a way that the provision lost most of its effectiveness. Where there is no *de novo* statutory provision, the court has long used the "unreasonable, arbitrary or capricious" test when reviewing orders of an agency.[17] In *Yarbrough*[18] the same test was used even though the statute[19] did provide for a *de novo* review. In *Spencer v. Bliss*[20] the court was not required to rule on the constitutionality of the statutory provision[21] for a *de novo* hearing. But the dictum[23] clearly indicates that the court, had it been necessary, would have either declared the provision unconstitutional or, in spite of the *de novo* provision, limited the scope of review to questions of law and to determining whether the State Engineer acted fraudulently, arbitrarily or capriciously.[23]

State ex. rel. Hovey Concrete Products Co. v. Mechem,[24] decided in 1957, is a landmark case in the development of the separation of powers doctrine. The *Mechem*[25] court found that Article III, Section 1 of the New Mexico constitution requires complete separation of governmental powers, that under Article VI, Section 1 of the constitution the legislative branch is not authorized to decide questions of fact in order to adjudicate disputes between private litigants, and that a department of government can exercise only those powers specifically au-

17. See, *e.g.*, Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960); Garrett Freight Lines v. Corporation Comm'n, 63 N.M. 48, 312 P. 2d 1061 (1957).

18. 54 N.M. 91, 214 P.2d 769 (1950).

19. N.M. Stat. Ann. § 46-5-16 (1953).

20. 60 N.M. 16, 287 P.2d 221 (1955).

21. N.M. Stat. Ann. § 75-6-1 (1953).

22. Spencer v. Bliss, 60 N.M. 16, 287 P.2d 221 (1955).

23. Very recently the court did consider N.M. Stat. Ann. § 75-6-1 (1953), in Kelley v. Carlsbad Irr. Dist. & Reynolds, 379 P.2d 763 (N.M. 1963). The supreme court's first opinion, dated Feb. 7, 1963 said:

> [W]e conclude that the term *de novo* as used in § 75-6-1 . . . does not permit the district court . . . to hear new or additional evidence . . . the court is limited to . . . the legal evidence produced at the hearing before the state engineer, and to determining whether his action was fraudulent, arbitrary or capricious; was substantially supported by the evidence; whether there are errors of law; and, whether the action was within the scope of the state engineer's authority.

The court withdrew the first opinion and substituted a second opinion dated March 15, 1963 which revised the above quote to read:

> [W]e conclude that § 75-6-1 . . . does not permit the district court . . . to hear new or additional evidence. . . . The review . . . is limited to questions of law and restricted to whether, based upon the legal evidence produced at the hearing before the state engineer, that officer acted fraudulently, arbitrarily or capriciously; whether his action was substantially supported by the evidence; or, whether the action was within the scope of the state engineer's authority.

The second opinion also included a new paragraph which said that the State Engineer was acting in an administrative capacity and not making judicial determinations. This was implied in the first opinion but not expressly stated.

24. 63 N.M. 250, 316 P.2d 1069 (1957).

25. *Ibid.*

thorized by the constitution. The court considered the Workmen's Compensation Act[26] of 1957 as an act purporting to authorize an administrative agency to decide questions of fact in order to adjudicate disputes between private parties. Therefore, a large part of the act[27] was declared unconstitutional as an improper delegation of judical power to a legislative agency.

The *Continental*[28] case makes it clear that the judiciary can not exercise legislative powers. The *Mechem*[29] case makes it clear that an administrative agency will not be allowed to exercise judicial powers. Theoretically under the complete separation of powers doctrine, each function can be classified as legislative or judicial. Once this is accomplished, the solution to a separation of powers problem becomes mechanical. In reality, however, in a modern, complex society many governmental tasks cannot be easily assigned to only one of the traditional categories. And, from a practical standpoint, many tasks can not be adequately performed using the powers of only one branch of government. Administrative agencies were developed as a practical means of performing governmental tasks requiring the exercise of more than one power. New Mexico needs the expert services of such agencies, but the supreme court is handicapped by the explicit language in Article III, Section 1 of the constitution.

Although the court in *Continental*[30] was careful to maintain formal compliance with the complete separation of powers theory, the case can be interpreted to mean that the Oil Conservation Commission is, in fact, authorized to adjudicate private disputes. If this interpretation is correct, then *Continental*[31] may be a slight retreat from the *Mechem*[32] extreme separation of powers doctrine.

Legislation preventing or prohibiting waste is a constitutional exercise of the state's police power, and the power to make fact determinations to which the law is to be applied may be delegated to the Oil Conservation Commission.[33] In *Continental*[34] the court concluded that the protection of correlative rights is a legislative function since, in the court's view, correlative rights and waste are inseparable. But, in fact, correlative rights and waste can be considered separate issues. To illustrate this, it is necessary to recognize the difference be-

26. N.M. Stat. Ann. §§ 59-10-38, to -125 (1953) (now unconstitutional).
27. *Ibid.*
28. 70 N.M. 310, 373 P.2d 809 (1962).
29. 63 N.M. 250, 316 P.2d 1069 (1957).
30. 70 N.M. 310, 373 P.2d 809 (1962).
31. *Ibid.*
32. 63 N.M. 250, 316 P.2d 1069 (1957).
33. Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 318, 373 P.2d 809, 814 (1962); *accord,* Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900); F. C. Henderson, Inc. v. Railroad Comm'n, 56 F.2d 218 (10th Cir. 1932); Shannon v. Shaffer Oil & Ref. Co., 51 F.2d 878 (10th Cir. 1931).
34. 70 N.M. 310, 373 P.2d 809 (1962).

tween proration and the proration formula. Proration is based upon the economic waste concept.[35] The public has an interest, under the economic waste concept, in fixing the maximum amount of production to be allowed from each field in the state in accordance with market demand.[36] Proration is the term used when each field's allowable is set. The proration formula governs how a particular field's allowable is to be divided among the individual owners of the field. The public has no recognized interest in how the allowable is shared by the co-owners of a field, as long as the formula used does not introduce waste. A dispute involving two formulas, neither of which would introduce waste, is of concern only to the owners of the field. The Commission is authorized to decide such a dispute on the basis of each owner's correlative right to have an opportunity to take his equitable share of the common reservoir.[37] When the Commission does decide such a dispute, as it did in the *Continental*[38] case, it is deciding a controversy between rival claimants to interests in property. Under the *Mechem*[39] rationale such a procedure is an exercise of judicial power. Therefore, it should follow that the Commission cannot issue orders based solely on correlative rights. In the past, a few courts have found that agency orders based solely on correlative rights are invalid as unconstitutional delegations of judicial power.[40] However, today in most jurisdictions a commission is allowed to issue such orders.[41] The *Continental* court said that waste is an

35. Proration must be distinguished from the MER which is the maximum efficient recovery ratio. MER is the maximum rate of production from a well consistent with maximum ultimate recovery from the producing structure. Its primary purpose is to conserve reservoir energy so that the energy will be used in the most efficient manner. It is not analogous to the *time-rate-of-use* concept applicable to conservation of other types of resources. The *time-rate-of-use* principle applies where there is a reasonable replacement cycle. Thus, in the case of timber, the idea is to cut timber at a rate which allows the forest to replenish itself. If timber is cut too rapidly, erosion can spoil the area and completely interrupt the timber replacement cycle. There is no replacement cycle in the case of oil and gas, for all practical purposes. Therefore, the only reason to limit the rate of recovery is to use the reservoir energy most efficiently (MER) and to keep the supply in line with market demand (proration). Production in excess of market demand is considered to be economic waste. While N.M. Stat. Ann. § 65-3-13 (1953) gives the Commission authority to limit production to prevent physical waste as well as economic waste, in practice field production is limited on the basis of market demand, *i.e.*, economic waste, except where the demand is very large and the MER sets an upper limit on production. See, Oil Conservation Comm'n, Rules & Regulations, Rule 503(c) (1961).

36. See, *e.g.*, Amazon Petroleum Corp. v. Railroad Comm'n, 5 F. Supp. 633 (E.D. Tex. 1934); Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210 (1932).

37. N.M. Stat. Ann. § 65-3-10 (1953).

38. 70 N.M. 310, 373 P.2d 809 (1962).

39. 63 N.M. 250, 316 P.2d 1069 (1957).

40. *E.g.*, Consolidated Gas Util. Corp. v. Thompson, 14 F.Supp. 318, 327 (W.D. Tex. 1936).

41. *E.g.*, Railroad Comm'n v. Sterling Oil & Ref. Co., 147 Tex. 547, 218 S.W.2d 415 (1949).

integral part of the definition of correlative rights.[42] But, the words *without waste* used in the definition[43] can be interpreted as a means of fixing the priority between the two duties assigned to the Commission rather than an integral part of the correlative rights definition. The Commission's first and paramount duty is to prevent waste.[44] After this duty is performed, the Commission is then authorized to protect correlative rights. Using this reasoning, waste is not only separable from correlative rights, but whenever the Commission properly reaches a correlative rights issue, it has to be the last and, therefore, only issue. It is true that without all the Commission's rules and regulations designed to prevent waste, correlative rights could not be protected.[45] In view of the dependence of correlative rights protection upon the other duties of the Commission, it would be impractical, but not impossible, to use the judicial system to protect correlative rights.[46] This dependence upon prior commission actions is probably what the court had in mind when it said that waste was inseparable from correlative rights. Another strong reason for permitting the Commission to decide correlative rights disputes is that settlement of such disputes is pecularily dependent upon specialized judgment. It takes experts to properly decide these controversies and the court was reluc-

42. 70 N.M. 310, 373 P.2d 809 (1962).

43. (h) "Correlative rights" means the opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce *without waste* his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practicably determined, and so far as can be practicably obtained *without waste,* substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy. [Emphasis added.]
N.M. Stat. Ann. § 65-3-29(h) (1953).

44. 70 N.M. 310, 373 P.2d 809 (1962).

45. The correlative right of an owner to have the opportunity to take his pro-rata share of the oil in a common reservoir is not protected under the common law. Protection of this right is only available under the conservation statutes. Cribbet, Fritz & Johnson, Property, 1049 (1960).

46. Consider the hypothetical case where A and B are co-owners of a gas field. They disagree as to how the total recoverable gas should be shared. Under the common law, the "rule of capture" would prevail and each could produce as much gas as possible, even if one or the other succeeds in taking a disproportionate share by draining gas from under the property of the other. But, under the conservation statutes, means are available to protect an owner's interest in his *in situ* gas. The Commission exercises the state's police power to issue orders preventing physical waste (*e.g.,* well-spacing, operating procedures). To prevent economic waste, the field allowable is fixed. A and B would have to submit their formulas governing how the allowable should be shared to the Commission. The Commission would then certify that neither formula would introduce waste. Now the controversy is private and the court could decide the dispute. But it would be unreasonable and impractical to have the court enter the situation at this point. It is much better to allow the Commission to decide the dispute since the Commission has to do so much before the matter can be adjudicated.

tant to substitute "its discretion for that of the expert administrative body."[47] The court's rationale is understandable since it is a reasonable way to reconcile the practicalities of the situation with Article III, Section 1 of the constitution and with the extreme separation of powers doctrine expressed in *Mechem*.[48]

The *Continental*[49] decision along with other recent decisions[50] indicate that the court will not allow *de novo* review of administrative orders. When a statutory provision for *de novo* review is in issue, the court will probably either declare the provision unconstitutional[51] or, in spite of the *de novo* provision, limit the scope of review to questions of law and to determining whether the agency acted fraudulently, arbitrarily, or capriciously.[52] The *Continental*[53] decision may also indicate that the extreme position taken in *Mechem*[54] will be relaxed to allow an agency to adjudicate a private dispute whose settlement requires specialized knowledge and experience and can be best handled by the agency as part of its overall purpose.

THOMAS A. GARRITY

47. Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962).
48. 63 N.M. 250, 316 P.2d 1069 (1957).
49. 70 N.M. 310, 373 P.2d 809 (1962).
50. *E.g.*, Heine v. Reynolds, 69 N.M. 398, 367 P.2d 708 (1962); Kelley v. Carlsbad Irr. Dist. & Reynolds, 379 P.2d 763 (N.M. 1963).
51. Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962).
52. *E.g.*, Heine v. Reynolds, 69 N.M. 398, 367 P.2d 708 (1962); Kelley v. Carlsbad Irr. Dist. & Reynolds 379 P.2d 763 (N.M. 1963).
53. 70 N.M. 310, 373 P.2d 809 (1962).
54. 63 N.M. 250, 316 P.2d 1069 (1957).