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ADMINISTRATIVE LAW

SUEDEEN G. KELLY* and DEBRA A. GILMORE**

I. INTRODUCTION

This survey of administrative law follows the pattern established by its five predecessors.¹ The last survey of this area covered cases decided through March 31, 1984.² This article will cover significant appellate cases decided from April 1, 1984, through January 31, 1988. The discussion attempts to fit each case into the framework of existing New Mexico law and, where appropriate, to explain the value of the case in the development of the law. Appellate cases decided during this time period are organized into three major areas: the authority of agencies to act, the exercise of administrative authority, and judicial review of agency decisions.

There were significant developments in each area of administrative law during the survey period. Under the first topic—authority of agencies to act—the supreme court overruled thirty-year-old precedent and upheld the constitutionality of the Workers' Compensation Commission.³ Also, eight cases decided under the *ultra vires* doctrine provide insight into how New Mexico courts approach the task of statutory construction when an agency's interpretation of its statute is involved.⁴ The supreme court also overruled precedent in a case under the second major topic—exercise of administrative power—now holding that before a board can reject the decision of its hearing officer, it must at least review enough of the

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1. See Browde & Schultz, *Administrative Law*, 15 N.M.L. REV. 119 (1985) [hereinafter cited as *1983-84 Administrative Law Survey*]; Kelly & O'Leary, *Administrative Law*, 14 N.M.L. REV. 1 (1984) [hereinafter cited as *1982-83 Administrative Law Survey*]; Shapiro & Jacobvitz, *Administrative Law*, 13 N.M.L. REV. 235 (1983) [hereinafter cited as *1981-82 Administrative Law Survey*]; Browde, *Administrative Law*, 12 N.M.L. REV. 1 (1982) [hereinafter cited as *1980-81 Administrative Law Survey*]; Browde, *Administrative Law*, 11 N.M.L. REV. 1 (1979-80) [hereinafter cited as *1979-80 Administrative Law Survey*].

2. *1983-84 Administrative Law Survey*, *supra* note 1, at 119 n.2.

3. See *infra* text accompanying notes 8-35.

4. See *infra* text accompanying notes 58-120.

transcript of the proceedings to support its reversal.⁵ Under the final major topic—judicial control of administrative power—the court of appeals decided a case of first impression in New Mexico, providing a guideline for deciding where venue lies when the appeal involves multiple claims governed by different venue statutes.⁶

II. AUTHORITY OF AGENCY TO ACT

A. *Delegation of Powers*

Administrative agencies are part of the executive branch of government but nevertheless typically have both legislative and judicial powers. They are routinely given authority to issue rules and regulations that have the force of law (legislative power) and authority to decide cases (judicial power). Since the constitution also grants legislative and judicial power to the legislative and judicial branches respectively,⁷ the principle of separation of powers demands that there be a limit on delegation of these powers to executive agencies. One case decided during the survey period addresses what that limit is and demonstrates that it is not marked with a bright line. Another case involves the issue of delegation of legislative power to private individuals, which violates constitutional due process guarantees.

1. Delegation of Judicial Power

The New Mexico Constitution provides that the judicial power of the government shall reside in the judicial department.⁸ In 1957, the New Mexico Supreme Court, in *Estate ex rel. Hovey Concrete Products Co. v. Mechem*,⁹ interpreted this provision to mean that while the legislature could confer “quasi-judicial” power on administrative agencies, it could not delegate “judicial” power to them.¹⁰ In *Mechem*, the court defined judicial power to include the determination of rights and liabilities between individuals. *Mechem* involved the constitutionality of a Workmen’s Compensation Commission.¹¹ The majority of the supreme court found the Commission unconstitutional because it had been given the authority to decide a dispute between an employer and an employee—a “private

5. See *infra* text accompanying notes 256-62.

6. See *infra* text accompanying notes 387-96.

7. N.M. CONST. art. III, § 1.

8. *Id.*

9. 63 N.M. 250, 316 P.2d 1069 (1957).

10. *Id.* at 252, 316 P.2d at 1071.

11. *Id.* at 251, 316 P.2d at 1070. The Workmen’s Compensation Act of 1957, 1957 N.M. Laws, Ch. 246, § 1, 1953 Comp. §§ 59-10-36 to -125, provided for a Workmen’s Compensation Commission to *inter alia*, decide disputes between employers and employees claiming Workmen’s Compensation benefits. The Commission’s decision in each case would have the force and effect of law but would be subject to the normal judicial review of administrative actions.

dispute" within the sole jurisdiction of the judicial branch.¹² The *Mechem* case has stood for the proposition that, in New Mexico, administrative agencies may adjudicate public but not private rights.¹³

The public/private rights distinction first surfaced in federal law in 1855 in *Murray's Lessee v. Hoboken Land and Improvement Co.*¹⁴ It was used in that case to uphold the constitutionality of judicial acts by the Treasury Department in a case involving a United States customs collector.¹⁵ The Court characterized "private rights" as those arising in common law, in equity and in admiralty, and "public rights" as those which Congress created.¹⁶ The Court declared that while Congress could not withdraw the adjudication of private rights from the jurisdiction of the courts, Congress did not have to present public rights to the courts for resolution.¹⁷ The Court reasoned that since Congress has the discretion to determine whether a remedy will be allowed at all in cases involving public rights, Congress may prescribe how the remedy shall be made available.¹⁸

Over the next 80 years, agency adjudications increased, as did acceptance by judges of the notion of administrative adjudications.¹⁹ In 1932, the Court expanded the scope of constitutional agency adjudications. In *Crowell v. Benson*,²⁰ it upheld the authority of an executive agency to adjudicate disputes involving private rights.²¹ Although the

12. 63 N.M. at 253-54, 316 P.2d at 1071-72. Justice Sadler wrote a vigorous dissent, in which Justice Armijo concurred, criticizing the majority for making an unjustified distinction in the types of judicial powers being exercised by administrative agencies. *Id.* at 255, 316 P.2d at 1072.

13. New Mexico was one of the few states to make the determination that administrative agencies may adjudicate public but not private rights. In his dissenting opinion Sadler stated, "New Mexico stands alone in the hierarchy of states holding the legislature lacks power to create an industrial commission to hear and screen . . . cases [arising] under its workmen's compensation act." 63 N.M. at 256, 316 P.2d at 1074.

14. 59 U.S. (18 How.) 272 (1855).

15. The controversy in *Murray's Lessee* involved a U.S. customs collector; when the collector's account was audited, a deficiency was found. As a result, the solicitor of the Treasury Department issued a distress warrant, pursuant to federal law, ordering the collector's property to be sold to make up the difference. *Id.* at 274-75.

16. *Id.* at 284.

17. *Id.*

18. *Id.*

19. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFFALO L. REV. 765, 787-89 (1986).

20. 285 U.S. 22 (1932).

21. *Id.* The controversy in this case involved a compensation program to assist injured workers under the Longshoremen's and Harbor Worker's Compensation Act. *Id.* at 36. The Act created a commission to review facts and issue orders awarding compensation. *Id.* at 42-45. Federal district courts reviewed the cases on appeal, reversing only those holdings which contained errors of law and gross inadequacies in findings of fact. *Id.* The issue was whether this scheme violated Article III of the Constitution, particularly in light of the Court's holding in *Murray's Lessee* which seemed to prohibit Congress from withdrawing from judicial cognizance any matter "which, from its nature, is the subject of a suit . . . [in] admiralty." 59 U.S. (18 How.) at 284.

Court found the public/private rights distinction helpful in analyzing the separation of powers problem, it did not find it determinative. In *Crowell*, the Court viewed the agency chiefly as a finder of fact, while the courts retained "full authority" to deal with matters of law upon judicial review of agency action.²² The Court found that there was no constitutional obstacle to this method of dispute resolution involving private rights.²³ Instead, the Court saw it as relieving the courts' heavy workload while preserving their "complete authority" to insure proper application of the law.²⁴

Crowell marked the beginning of the demise of the "bright line" approach to determining the constitutionality of federal agency adjudications based on whether a private or public right was involved.²⁵ Although a plurality of the Court relied on the public/private rights distinction as recently as 1982,²⁶ in 1985, in *Thomas v. Union Carbide Agric. Products Co.*,²⁷ the Supreme Court rejected the use of any bright line test.²⁸ Instead,

22. 285 U.S. at 46, 54.

23. *Id.* at 54.

24. *Id.*

25. One commentator has characterized *Crowell's* approach as a two-part analysis. The first question is whether judicial involvement is required. If the function at issue involves "public rights," then there is no constitutional cause for concern. However, if the matter the agency is to decide involves "private rights," then it is an act of which the judiciary has cognizance. This gives rise to the second question: whether the agency adjudicator can fairly be seen as an "adjunct" of the courts. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 504 (1987) [hereinafter cited as *Formal and Functional Approaches*].

26. In *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court, in a plurality opinion authored by Justice Brennan, made the public/private distinction the most important factor in determining that the Bankruptcy Act of 1978 violated Article III of the Constitution. The Act created in each judicial district a bankruptcy court comprised of judges who served for 14 years and were subject to removal and salary cuts. *Id.* at 54-55. The judges could entertain a wide variety of claims related to the property at issue in the bankruptcy proceeding. *Id.* These included state claims, common law claims and federal law claims. *Id.* Justice Brennan viewed the matters the bankruptcy courts were to decide as involving private rights and viewed the bankruptcy court as too powerful and too unlike an Article III court to allow it to be looked upon as an "adjunct" to the Article III courts. *Id.* at 70, 84-85; *Formal and Functional Approaches*, *supra* note 25, at 504. For these reasons, the plurality found the Act unconstitutional. *Id.* The concurring Justices, Rehnquist and O'Connor, found the Act unconstitutional because it allowed bankruptcy judges jurisdiction in traditional state common law actions which were merely related to the bankruptcy determination. 458 U.S. at 90-91 (Rehnquist, J., concurring). Justice White dissented, criticizing the plurality's creation of "an artificial structure that itself lacks coherence." *Id.* at 94 (White, J., dissenting). He also maintained that the public/private distinction had "received its death blow" in *Crowell*. *Id.* at 109.

27. 473 U.S. 568 (1985). This case involved a procedure of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), to work out the amount of compensation one industry was to pay to another for providing data necessary to the other for compliance with the environmental regulations of FIFRA. *Id.* at 573-75. The statute called for a federal arbitrator to determine the amount of compensation if the parties could not reach agreement. *Id.* The decision of the arbitrator was subject to judicial review only upon allegation of fraud and misconduct. *Id.* at 573-74. The petitioners argued this provision violated Article III of the U.S. Constitution. *Id.* at 576.

28. *Id.* at 586.

it said, the inquiry should be on a case-by-case basis, the question being whether the statutory scheme at issue allows Congress or the Executive to impermissibly encroach upon the independent role of the judiciary.²⁹ The Court reiterated this approach a year later in *Commodity Futures Trading Commission v. Schor*³⁰ where it looked to (1) the origins and importance of the right to be adjudicated and (2) the concerns that pushed Congress to have the right adjudicated outside the court system, in light of the interest in maintaining an independent judicial branch.³¹

During the survey period in *Wylie Corp. v. Mowrer*, the New Mexico Supreme Court followed the federal lead and expressly overruled the formalistic, private/public rights distinction announced in *Mechem*.³² *Wylie* involved a challenge to the new Workers' Compensation Act which provides for an administrative agency to adjudicate claims under the Act between an employer and an employee.³³ In a unanimous opinion, with all justices participating, the court upheld the constitutionality of the law and expressly overruled *Mechem* and its reasoning. The court adopted the reasoning in Justice Sadler's dissent in *Mechem*, which rejected as chimerical the attempted distinction between the Workmens' Compensation Commission and other administrative commissions.³⁴ The *Wylie*

29. 473 U.S. at 582-94. Justice O'Connor, writing for the majority of six, said, "The enduring lesson of *Crowell* is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." *Id.* at 587. The *Thomas* Court, however, still maintained that the public/private rights distinction was relevant to the Article III question. *Id.* at 586-89. It informs the court whether the right which Congress has assigned to an agency to adjudicate is one which has historically been confined to the courts for adjudication, thus aiding the court in its attempt to comprehensively determine whether the congressional scheme for adjudication unduly encroaches on the role of the courts. *Id.*

30. 478 U.S. 833 (1986). This case involved the question whether the Commodity Futures Trading Commission (CFTC) had the power to assert jurisdiction over state common law counterclaims in reparations proceedings. *Id.* at 835-36.

31. *Id.* at 853-60. Again, however, the Court made use of the public/private rights distinction, pointing out that when a case involves a "private" right, it is a claim "of the kind assumed to be at the 'core' of matters normally reserved to Article III courts." *Id.* at 853. While this is not determinative of the decision, it informs the decision. *Id.*

32. 104 N.M. 751, 726 P.2d 1381 (1986).

33. After suffering through nearly 30 years of court administration of the Workmen's Compensation Act, the legislature, in 1986, passed a proposed constitutional amendment to allow the creation of an administrative agency to handle claims made under the Act. *See id.* at 752, 726 P.2d at 1382. At the same time, the legislature passed a new law, this time called the Workers' Compensation Act, which likewise divested the courts of jurisdiction over the law and created a Workers' Compensation Division to administer the law. *Wylie*, 104 N.M. at 752, 726 P.2d at 1382. The Workers' Compensation law became effective on May 21, 1986, 90 days after the 1986 legislature recessed. *Id.* However, the proposed constitutional amendment could not become effective until it was passed by a majority of New Mexico voters at the next general election in November 1986. N.M. CONST. art. XIX, § 1. In the interim, the *Wylie* lawsuit was filed asking the court to declare the new Workers' Compensation law unconstitutional. *Wylie*, 104 N.M. at 751, 726 P.2d at 1381. The *Wylie* case was decided only several days before the constitutional amendment was approved by New Mexico voters. *Id.*; N.M. CONST. art. III, § 1.

34. The *Wylie* court stated,

[W]e would take exception to the characterization in *Mechem's* majority opinion

court also pointed out that *Mechem*'s efforts to classify the Workmen's Compensation Commission's adjudications as those of private rights ignored the public stake in the adjudication of workers' remedies.³⁵

Although the court in *Wylie* rejected the public/private rights approach to determining the constitutionality of adjudicatory power delegated to administrative agencies, it did not leave us with an alternative standard. Future decisions regarding the constitutionality of adjudicatory powers delegated to state agencies might be informed by federal precedent and thus might take a functional approach to this separation of powers issue.

2. Delegation of Legislative Power to Private Individuals

Legislatures may delegate legislative power to municipal and county governments and to administrative agencies with appropriate and sufficiently detailed standards.³⁶ However, legislatures may not delegate legislative power to private individuals.³⁷ The U.S. Supreme Court forcefully made this point in *Carter v. Carter Coal Co.*³⁸ In that case the Court struck down a provision of the Bituminous Coal Conservation Act of 1935 which delegated the power to establish maximum hours and minimum wages for the coal mining industry to the major coal producers.³⁹ The Court called the provision "legislative delegation in its most obnoxious form" and found it to be "an intolerable and unconstitutional interference with personal liberty and private property," in violation of the due process clause of the fifth amendment.⁴⁰

The doctrine prohibiting delegation of legislative power to private in-

of the [Workmen's Compensation] commission . . . as a 'clearly . . . judicial' rather than 'quasi-judicial' body. . . . The distinction attempted simply does not withstand examination of the two definitions . . . [A] Workmen's Compensation Commission is no more 'purely judicial' . . . than is New Mexico's Public Service Commission, Environmental Improvement Board, Employment Security Department. . . .

104 N.M. at 752, 726 P.2d at 1382 (citation omitted).

35. The *Wylie* court pointed out that the public's interest included minimum financial security for the injured worker and his family and prevention of the worker becoming a public charge. *Id.*

36. 1980-81 *Administrative Law Survey*, *supra* note 1, at 2-3 n.17.

37. 2 C. ANTIEAU, *MODERN CONSTITUTIONAL LAW* § 11:21 (1969).

38. 298 U.S. 238 (1936). This was not the first time the Supreme Court found an unconstitutional delegation of legislative power to private individuals. For example, in *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), the Court found unconstitutional a Seattle ordinance which permitted a philanthropic home for aged poor to be built in a residence district if the owners of two-thirds of the property within four hundred feet of the proposed building consented. Noting that the owners were free to withhold consent for selfish reasons or arbitrarily and that the Superintendent of Building of the City of Seattle was bound by their decision with no provision for review by any administrative body, or otherwise, the Court held that the "delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment." *Id.* at 122.

39. 298 U.S. at 310-11.

40. *Id.* at 311.

dividuals retains its vitality today.⁴¹ However, it does not prohibit legislatures from allowing individuals to decide whether or when an existing legislative policy should be applied to them. For example, in *Currin v. Wallace*,⁴² the Supreme Court upheld a provision of the Tobacco Inspection Act of 1935 which conditioned the effectiveness of a regulation on the approval of two-thirds of the affected tobacco growers. The Court explained that this was not a case where Congress was abdicating its law-making function.⁴³ Congress could lawfully place a restriction on the effectiveness of its own regulation.⁴⁴

As *Currin* shows, legislatures may not delegate to private individuals the right to make public policy but may allow private individuals to decide whether a legislatively-decreed policy should be applied to them.⁴⁵ Thus, in any case involving an alleged unconstitutional delegation of power to private individuals, the question is whether the purported delegation is one of legislative power. If so, the delegation violates due process and is void. Such a case arose in New Mexico during the survey period.

In *Deer Mesa Corp. v. Los Tres Valles Special Zoning District Commission*,⁴⁶ a developer sued a special zoning district commission and the

41. See, e.g., *Gumbhir v. Kansas State Bd. of Pharmacy*, 228 Kan. 579, 618 P.2d 837 (1980) (Kansas Pharmacy Act provision permitting no one to take examination for registration as a pharmacist or to be admitted by reciprocity if the person does not have an undergraduate degree from a U.S. school accredited by the American Council on Pharmaceutical Education is an unconstitutional delegation of legislative authority to a non-governmental agency).

42. 306 U.S. 1 (1939). See also *Roberts v. City of Mesa*, 158 Ariz. 42, 760 P.2d 1091 (1988) (statute requiring that the owners of not less than one-half the value of the real and personal property located in a proposed annexation area sign the petition for annexation is not an unlawful delegation of legislative power to private individuals because the decision to annex is made by the city or town's governing body at its discretion, not by the private individuals), and *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982) (provision of the Boundary Waters Canoe Area Wilderness Act (1) allowing owners of resorts on certain lakes to require the Federal Government to purchase their resort and (2) allowing owners of lands riparian to the lake on which the government has purchased a resort to offer to sell their lands to the Government is not a delegation of legislative power because Congress itself established the restrictions affecting the property and merely gave the land owners the ability to choose whether to take advantage of them).

43. 306 U.S. at 15.

44. *Id.* at 15-16.

45. The Court in *Currin* explained it thus:

Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective . . . and it may leave the determination . . . to the . . . Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of . . . [those] to be affected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.

Id. at 16 (quoting *Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1928)).

46. 103 N.M. 675, 712 P.2d 21 (Ct. App. 1985).

board of county commissioners, challenging the constitutionality of the Special Zoning District Act.⁴⁷ The trial court ruled that the Act unconstitutionally delegated power to private persons and allowed an arbitrary exercise of power by individuals.⁴⁸

The New Mexico Court of Appeals affirmed.⁴⁹ The statutory provision at issue allowed the formation of a special zoning district upon the filing of a petition signed by at least fifty-one percent of the registered electors residing in the area to be designated.⁵⁰ Under this statute, the area to be designated had to be outside the boundaries of an incorporated municipality and of any general zoning ordinance, and had to contain at least one hundred and fifty single-family dwellings.⁵¹ However, the statute provided no limitation on the amount of territory or the location of territory which could be included in the district. The special zoning district was to be created upon the filing of the petition with the clerks of the counties affected, without any further action by any administrative agency or local governing body.⁵²

In deciding this case, the court of appeals asked the pertinent question: whether the statute unconstitutionally delegated legislative power to private individuals.⁵³ In answering the question, however, the court engaged in an unnecessary, and somewhat confusing, two-step process: the court found, first, that the formation of a special zoning district was a legislative act, and, second, that the legislature had provided no standard in this statute to guide the private individuals in determining the size or location of the district.⁵⁴ The court thus concluded the statute was "void as an unconstitutional delegation of legislative power."⁵⁵

It appears that the court confused the doctrine prohibiting delegation of legislative power to private individuals with the doctrine prohibiting

47. *Id.* at 676, 712 P.2d at 22. The Special Zoning District Act was found at N.M. STAT. ANN. §§ 3-21-15 to -26 (Repl. Pamp. 1985). *Id.*

48. *Id.*

49. *Id.* at 683, 712 P.2d at 29.

50. *Id.* at 681-82, 712 P.2d at 27-28. N.M. STAT. ANN. § 3-21-18 provided the following limitations on location and size of the districts:

[T]he district must be outside the boundary limits of an incorporated municipality, there must be 150 single-family dwellings within the area of the proposed district, fifty-one percent of the registered electors within the area of the proposed district must sign a petition requesting a district, there must be no general zoning ordinance applicable to the area of the proposed district and the district is not limited to one county.

Deer Mesa, 103 N.M. at 681-82, 712 P.2d at 27-28.

51. *Id.*

52. *Id.* at 681, 712 P.2d at 27 (quoting N.M. STAT. ANN. § 3-21-18)).

53. *Id.* at 680, 712 P.2d at 26.

54. *Id.* at 680-83, 712 P.2d at 26-29.

55. *Id.* at 683, 712 P.2d at 29.

unduly broad delegations of legislative power to administrative agencies.⁵⁶ Under the former doctrine, as discussed above, the inquiry is merely: did the legislature attempt to delegate legislative power to private individuals? In *Deer Mesa*, the legislature attempted to delegate to private individuals the ability to make policy, i.e. to decide where a special zoning district would be located and what its boundaries would look like.⁵⁷ Thus, it was an unconstitutional delegation of legislative power to private individuals. The *Deer Mesa* court came to this conclusion, but its analysis is confusing and threatens to hamper the appropriate adjudication of similar issues in the future.

B. Statutory Authority

The foundation for all administrative decision-making is the authority conferred on an agency by law.⁵⁸ Statutory authority may create an agency's power to act,⁵⁹ or the state constitution may grant an agency specific powers.⁶⁰ As earlier surveys have indicated, legislative grants of authority are not always clear and, thus, legal challenges to agency action as *ultra vires*—outside the scope of agency authority—are quite common.⁶¹ There were eight cases during the survey period involving such challenges. Although they add little new to the law of *ultra vires*,⁶² the cases do shed considerable light on the often perplexing question of when the court will defer to an agency's interpretation of its governing statute.

When courts review agency interpretations of statutory provisions, they

56. The court's seeming confusion is also underscored by its failure to announce anywhere in its opinion the rule that delegation of legislative power to private individuals is void per se. This, of course, contrasts with the doctrine, arising under separation of powers, which allows the legislature to delegate legislative power to administrative agencies if it provides sufficiently detailed standards to guide the agency in the exercise of its powers. For a discussion of the latter non-delegation doctrine generally and its status in New Mexico law, see 1980-81 *Administrative Law Survey*, *supra* note 1, at 2-8. The court's approach in *Deer Mesa* would make more sense if the statute had delegated the decision on the ultimate formation of a special zoning district to an administrative agency. If it were an administrative agency, rather than private individuals, that was going to determine the location and boundaries of a district, it would be appropriate to ask whether the legislature had provided adequate standards to enable a non-arbitrary decision to be made.

57. The court in *Deer Mesa* relied on the fact that the statute failed to provide for location and boundaries to find a delegation of legislative power too broad and, therefore, unconstitutional. 103 N.M. at 681-83, 712 P.2d at 27-29. Instead, it should have relied on this fact to find the delegation one of legislative power and, therefore, unconstitutional.

58. 1979-80 *Administrative Law Survey*, *supra* note 1, at 2.

59. *Id.*

60. For example, the constitution gives fundamental authority to the Corporation Commission, N.M. CONST. art. XI; the Commissioner of Public Lands, *id.* art. XIII, § 2; and the State Department of Education, *id.* art. XII, § 6. 1979-80 *Administrative Law Survey*, *supra* note 1, at 2 n.7.

61. 1979-80 *Administrative Law Survey*, *supra* note 1, at 2.

62. For a discussion of the *ultra vires* doctrine, see 1979-80 *Administrative Law Survey*, *supra* note 1, at 2-5.

have the discretion to decide the question of law independently⁶³ or to defer⁶⁴ to the agency's interpretation. In New Mexico, as well as in the federal system, it has been impossible to predict how a court will exercise its discretion in any given case.⁶⁵ Courts do not hesitate to strike down an agency interpretation they find to be contrary to legislative intent.⁶⁶ Yet, they have yielded to an agency's interpretation if they deem it to be reasonable.⁶⁷ The factors which seem to influence courts to defer to reasonable agency determinations include

[t]he character of the administrative agency, the nature of the problems with which it deals, the nature and consequences of the administrative action, the confidence which the agency has won, the degree to which the review would interfere with the agency's functions or burden the courts, the nature of the proceedings before the administrative agency, and similar factors.⁶⁸

Much of the ambiguity in this area of federal law was eliminated by the recent U.S. Supreme Court decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁶⁹ where the Court announced that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."⁷⁰ In upholding the

63. Making an independent determination of the question of law would not preclude the court's taking the agency's interpretation into consideration.

64. Deference, used in this context, means to yield to the agency's interpretation. It does not mean to take the agency's interpretation into account. See *supra* note 1.

65. For a case where a court has deferred to the construction given the statute by the agency charged with its administration see *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n*, 93 N.M. 546, 603 P.2d 285 (1979), discussed in *1979-80 Administrative Law Survey*, *supra* note 1, at 4-5. For a case where a court has not deferred see *Strebeck Properties, Inc. v. New Mexico Bureau of Revenue*, 93 N.M. 262, 599 P.2d 1059 (Ct. App.), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979), cited in *1979-80 Administrative Law Survey*, *supra* note 1, at 5 n.25. For years, commentators have debated whether any principle governs the federal courts' approach to a review of agency decisions of law and, if so, what it is. See, e.g., S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 285 (2d ed. 1986) [hereinafter cited as *ADMINISTRATIVE LAW AND REGULATORY POLICY*], for a summary of three commentators' views. Professor Davis has opined that a court's choice "usually depends on which way it wants to resolve the substantive question." 5 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29:16 at 403 (2d ed. 1984) [hereinafter cited as *ADMINISTRATIVE LAW TREATISE*]. The federal courts have substituted their interpretation for that of the agency far more often than not. *Id.*

66. *ADMINISTRATIVE LAW TREATISE*, *supra* note 65, at 400, 403-04.

67. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), as discussed in *ADMINISTRATIVE LAW TREATISE*, *supra* note 65, § 29:16 at 400.

68. K. DAVIS, *ADMINISTRATIVE LAW TEXT* 553 (3d ed. 1972) (citing Rep. Att'y Gen. Comm. Ad. Proc. 91 (1941)).

69. 467 U.S. 837 (1984).

70. *Id.* at 866. *Chevron* involved the construction given the statutory term "major stationary source" by the Environmental Protection Agency (EPA). *Id.* at 839-40. EPA interpreted this term so as to allow the states to treat all units within an industrial complex as though they were within a single "bubble" for purposes of meeting the requirements of the Clean Air Act Amendments of 1977. *Id.* Adoption of this "bubble concept" allows the industrial complex to install or modify one

Environmental Protection Agency's (EPA) construction of a statute, the *Chevron* Court declared that whenever the wisdom of an agency's policy is at issue, the courts must defer to that policy if it is based on a reasonable construction of the statute.⁷¹ With this, the Supreme Court clearly announced that federal courts are not to substitute their judgment on questions of policy for that of an agency, assuming the agency's is reasonable.

The *Chevron* Court explained that when questions involving statutory interpretation arise on review of administrative decisions, the job of the court is to give effect to congressional intent.⁷² Thus, if congressional intent is clear on the face of the statute or ascertainable through the traditional tools of statutory construction, the court's job is to enforce that intent, regardless of the agency's interpretation of it.⁷³ However, if Congress has not directly addressed the precise question at issue, there is no congressional intent to be implemented. In such cases, someone else must formulate the policy to fill in the legislative gap. If the agency has adopted a reasonable policy to fill this gap, the courts must uphold it.⁷⁴ The *Chevron* Court emphasized that a reasonable agency policy is entitled to deference even if other policies could have been adopted and even if the court would have chosen a different policy had it not been faced with an agency choice already made.⁷⁵ The Court did not provide any rule to govern whether an agency policy is "reasonable" except to say that it must be based on a permissible construction of the statute.⁷⁶ In upholding EPA's construction of the statutory term "source" as reasonable, the Court found that it "represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."⁷⁷

The *Chevron* Court also clarified two other issues relating to the proper

piece of equipment without meeting permit requirements if the modification will not increase the total emissions from the plant. *Id.* The Natural Resources Defense Council challenged EPA's interpretation, arguing that the Clean Air Act required EPA to define major stationary source so as to compel the industrial complex to comply with stringent permit requirements designed to significantly reduce emissions whenever the complex modified or installed a piece of equipment. *Id.* at 859.

71. *Id.* at 843, 866.

72. *Id.* at 842-43.

73. *Id.* at 843 & n. 9.

74. This approach toward review of an agency's construction of the statute it administers has been called the *Chevron* two-step approach. The first step is to determine whether Congress has directly spoken to the precise question at issue. If not, the question is whether the agency's construction is reasonable. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 287-88 (1986).

75. 467 U.S. at 843 n.11.

76. *Id.* at 843.

77. *Id.* at 865 (footnotes omitted).

role of the judiciary in reviewing agency decisions. First, it emphasized that questions of law are to be decided independently by the judiciary.⁷⁸ Second, by characterizing the agency decision at issue as one of policy, the Court implicitly defined questions of law narrowly, excluding many which have been viewed historically as questions of law.⁷⁹ The agency decision on review in *Chevron* was one of pure statutory interpretation which has usually been viewed as a question of law. However, *Chevron* shows that issues of statutory interpretation are correctly viewed as questions of policy, not law, when classical methods of statutory interpretation reveal Congress has not formed an intent on the precise question at issue.

In summary, *Chevron* has more clearly defined the sphere within which the federal courts are required to substitute their judgment for that of an administrative agency and the sphere within which they are restrained from doing so.⁸⁰ These courts are now to engage in judicial review of an agency's construction of its statute by, first, determining whether Congress has directly spoken to the question at issue. If so, Congress' intent is to be implemented. If not, resolution of the issue is a question of policy, and the agency's resolution is to be given effect if it is reasonable. *Chevron* leaves unclear what is meant by "reasonable"⁸¹ but emphasizes that a court's mere disagreement with the policy chosen by the agency is insufficient to overturn it.

New Mexico courts have not announced any rule governing judicial statutory interpretation in a case where an agency has already interpreted its statute. Following is a discussion of the eight cases decided during the survey period which involved challenges to an agency's action as *ultra vires* and, of necessity, to the agency's interpretation of its statute.

78. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

79. For an in-depth discussion of this issue, see Pierce, *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 304-10 (1988).

80. The *Chevron* doctrine is not without its critics. See, e.g., Starr, Sunstein, Willard, Morrison & Levin, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353 (1987) and Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

81. It may be that "reasonable" merely means not arbitrary and capricious. Or, it may be that the courts will undertake a more searching evaluation using the factors that historically have influenced courts to defer to agency policy determinations, see *supra* text accompanying notes 63-68. If the latter is so, we know that at least one of these factors—the degree to which the review would interfere with the agency's functions or burden the courts—has been rendered irrelevant by the *Chevron* Court's finding that the agency is more competent institutionally than the courts to decide questions of policy:

[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'

467 U.S. at 866 (citation omitted).

These cases provide an overview of the ad hoc basis on which New Mexico courts have treated agency interpretations of law.

In *New Mexico Pharmaceutical Association v. State*,⁸² the court did not defer to the agency's interpretation. In this case, the Association alleged that a New Mexico Board of Medical Examiners rule allowing physician assistants to dispense dangerous drugs in certain situations was invalid because it conflicted with a statute defining the practice of medicine.⁸³ The Board, however, had interpreted the statute so that it did not conflict with its rule.⁸⁴

The court began its analysis of the case by finding that the meaning of the statutory language was unclear and that it had to, therefore, "resort to construction and interpretation in order to ascertain and give effect to the intention of the Legislature."⁸⁵ This is the usual procedure for interpreting a statute. The goal of statutory interpretation is to give effect to the intent of the legislature. The first step in determining legislative intent is to look at the statute itself, giving the words their plain meaning. If the statute is not clear on its face, the court must resort to other methods. It is at this point, said the *New Mexico Pharmaceutical* court, that a court should look to the statutory interpretation given by the agency.⁸⁶ However,

82. 106 N.M. 73, 738 P.2d 1318 (1987).

83. *Id.* at 74, 738 P.2d at 1319. The rule allowed the Board to give written permission to a supervising physician to delegate to a physician's assistant the authority to dispense certain drugs, if the patient was located more than twelve miles from the nearest pharmacy open at the time of dispensing. *Id.* The Pharmaceutical Association contended that N.M. STAT. ANN. § 61-1-16(G) (Repl. Pamp. 1986) prohibited physician assistants from dispensing dangerous drugs. *Id.* Section 61-6-16(G) is set out *infra* note 84.

84. The Board interpreted the statute to mean that a physician could not permit any "qualified person" to dispense dangerous drugs but that physicians' assistants could dispense them. 106 N.M. at 75, 738 P.2d at 1320. The Pharmaceutical Association argued that the term "qualified person" meant a physician's assistant who acts in accordance with the criteria of § 61-6-16(G)(1), (2), and (3). *Id.* at 74-75, 738 P.2d at 1319-20. Section 61-6-16(G) provides that the statutes regarding licensing the practice of medicine shall not apply to:

[A]ny act, task or function performed by a physician's assistant at the direction of and under the supervision of a licensed physician, when:

- (1) such assistant is certified by and annually registered with the board as one qualified by training or experience to function as an assistant to a physician;
- (2) such act, task or function is performed at the direction of and under the supervision of a licensed physician in accordance with the rules and regulations promulgated by the board; and
- (3) the services of the physician's assistant are limited to assisting the physician in the particular fields for which the assistant has been trained, certified and registered; provided that this subsection shall not limit or prevent any physician from delegating to a qualified person any acts, tasks or functions which are otherwise permitted by law or established by custom, except the dispensing of dangerous drugs.

N.M. STAT. ANN. § 61-6-16(G) (Repl. Pamp. 1986).

85. 106 N.M. at 75, 738 P.2d at 1320. Since New Mexico does not have legislative history, its courts must rely on rules of statutory construction.

86. *Id.*

the court was quick to note that it was not yet ready to defer to the agency interpretation; it merely found it to be persuasive authority.⁸⁷

In this case, the court reviewed the statute as a whole and found that it forbade delegation of the task of dispensing dangerous drugs to physician assistants.⁸⁸ Thus, the court rejected the Board's interpretation of its statute and found that the Board acted outside the scope of its authority when it promulgated the rule allowing physicians to delegate the task of dispensing dangerous drugs.⁸⁹

New Mexico Pharmaceutical stands for the proposition that when faced with interpretation of a statute administered by an agency, New Mexico courts will independently attempt to interpret the statute. If the court finds that the statute is clear on its face or that legislative intent can be inferred from other methods of statutory interpretation, it will not defer to an agency's interpretation of its statute. However, in attempting to divine legislative intent, courts will *consider* the agency's interpretation. The next case gives us a better idea of the circumstances in which a court might *defer* to an agency interpretation of its law.

In *Public Service Co. of New Mexico v. Public Service Commission*,⁹⁰ PNM challenged the Commission's disapproval of PNM's general diversification plan to restructure itself into a public utility holding company. PNM argued that no statute gave the Commission the power to disapprove a restructuring plan prior to completion of the restructuring but rather that the Commission had only the power to issue remedial orders to rectify any adverse impacts of a completed holding company restructuring.⁹¹ At issue was the meaning of Section 62-6-19 of the New Mexico Statutes.⁹² The court proceeded with statutory interpretation much as the court in *New Mexico Pharmaceutical* did. The court first looked to the words of the statute, attributing to them their plain meaning.⁹³ The court found that the statute clearly allowed the Commission to investigate either the

87. *Id.* (citing *City of Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 99, 678 P.2d 1170, 1174 (1984)).

88. *Id.*

89. *Id.* at 76, 738 P.2d at 1321.

90. 106 N.M. 622, 747 P.2d 917 (1987).

91. *Id.* at 623, 747 P.2d 918.

92. *Id.* N.M. STAT. ANN. § 62-6-19(B) (Repl. Pamp. 1984) provides that:

In order to assure a reasonable and proper utility service at fair, just and reasonable rates the Commission may investigate:

.
(2) Class II transactions or the resulting effect of such Class II transactions on the financial performance of the public utility to determine whether such transactions or such performance have an adverse and material effect on such services and rates.

Section 62-3-3(K) defines Class II transactions as including "the formation . . . of a . . . public utility holding company by a public utility or its affiliated interest."

93. *Public Serv. Co.*, 106 N.M. at 624, 747 P.2d at 919.

utility's act of giving form or shape to the holding company or the resulting effect of the holding company.⁹⁴ This did not settle the question, however, because finding that the Commission has the power to investigate the formation of a holding company is not coequal with upholding the Commission's rule that a utility cannot form a holding company without pre-approval of the plan by the Commission. So the court looked to the Public Utility Act⁹⁵ as a whole to ascertain legislative intent.⁹⁶ The court found that the legislature gave the Commission the right to formulate the means "reasonably necessary" to investigate any Class II transaction.⁹⁷ The court also found that the Commission had the power to do all things "necessary and convenient in the exercise of its [duty to supervise public utilities]."⁹⁸ It found that the Commission's pre-approval requirement was reasonable, and it explicitly deferred to the Commission's determination that it was necessary to perform the investigatory task under Section 62-6-19.⁹⁹

This case shows that the court will defer to a reasonable agency interpretation in instances where the legislature has been silent on the issue and has expressly delegated to the agency the power to decide the issue. In short, in this case the court followed the usual rules of statutory interpretation to conclude: (1) that the legislature had given the Commission the authority to investigate the formation of utility holding companies; (2) that the legislature was silent as to the means the Commission should employ in carrying out this duty; and (3) that the legislature had delegated to the Commission the power to formulate the means reasonably necessary to carry out its investigations and to supervise public utilities. Then the court deferred to the agency's interpretation of the statute as allowing it to give prior approval to Class II transactions as necessary.

*Elliott v. New Mexico Real Estate Commission*¹⁰⁰ is a case where the New Mexico Supreme Court upheld an agency's interpretation of its statutory jurisdiction in the face of an ambiguous statute but without ever mentioning the doctrine of deference to an agency interpretation of law. This case involved the appeal of the Commission's suspension of Elliott's real estate broker's license for his actions in connection with the sale of an interest in a New Mexico real estate contract.¹⁰¹ Elliott was to receive a selling fee as a result of the sale.¹⁰² Elliott argued that the Commission had no jurisdiction over him in connection with the sale because the

94. *Id.*

95. Public Utilities Act, N.M. STAT. ANN. §§ 62-3-1 to -13-13 (Repl. Pam. 1984).

96. 106 N.M. at 625, 747 P.2d at 920.

97. *Id.* at 624-25, 747 P.2d at 919-20 (citing N.M. STAT. ANN. § 62-6-19(E) (Repl. Pam. 1984)).

98. *Id.* at 625, 747 P.2d at 920 (citing N.M. STAT. ANN. § 62-6-4(A) (Repl. Pam. 1984)).

99. *Id.*

100. 103 N.M. 273, 705 P.2d 679 (1985).

101. *Id.* at 274, 705 P.2d at 680.

102. *Id.*

vendor's interest in a contract for the sale of realty is personalty, not real estate.¹⁰³ The Commission has jurisdiction over real estate brokers.¹⁰⁴ Under the statute, "real estate broker" includes one who sells real estate for a fee.¹⁰⁵ The term "real estate" is defined to include "leaseholds and other interests less than leaseholds."¹⁰⁶

The question in *Elliott* was whether the sale of an interest in a real estate contract is a sale of real estate as defined by the statute. The majority of the court answered affirmatively with the conclusory statement that "[t]he district court found that Elliott is a real estate broker as defined in Section 61-29-2(A) and that he represented himself as such and acted in that capacity."¹⁰⁷ However, the dissent pointed out that the supreme court has held that the vendor's interest in a contract for the sale of realty is personalty under the doctrine of equitable conversion.¹⁰⁸ These holdings throw some ambiguity into the resolution of the question whether Elliott was acting as a real estate broker for purposes of applying the statute, although the majority never acknowledged this.¹⁰⁹

The majority could have reached its conclusion logically by one of two routes. Presumably it could have concluded, as a matter of statutory construction, that the legislative intent was clearly to extend the jurisdiction of the Real Estate Commission to those persons who sell an interest in real estate contracts for a selling fee. Alternatively, the court could have concluded that legislative intent regarding this issue was unclear and deferred to the agency's interpretation, assuming it was reasonable.¹¹⁰

There were five other cases during the survey period which involved the question whether agency action was *ultra vires*. In four of those cases the court concluded that the question could be disposed of by looking at

103. *Id.* at 275-76, 705 P.2d at 681-82.

104. N.M. STAT. ANN. § 61-29-1 (Repl. Pamph. 1983).

105. N.M. STAT. ANN. § 61-29-2 (Repl. Pamph. 1983).

106. *Id.*

107. 103 N.M. at 275, 705 P.2d at 681.

108. *Id.* at 276, 705 P.2d at 682, (citing *Marks v. City of Tucumcari*, 93 N.M. 4, 595 P.2d 1199 (1979); *Gregg v. Gardner*, 73 N.M. 347, 388 P.2d 68 (1963)).

109. Indeed, it is unclear whether the majority even realized that it was interpreting a question of law rather than a question of fact. The court answers the question by referring to the decision of the district court which found that Elliott was a real estate broker as defined in Section 61-29-2(A) and by concluding that "[u]nder these facts, there was substantial evidence to support the district court's judgement [that the Commission had jurisdiction over the parties and the subject matter]." 103 N.M. at 275, 705 P.2d at 681. Needless to say, the issue of the Commission's jurisdiction over Elliott is one of law, subject to independent review by the court, not one of fact subject to the substantial evidence test. See *infra* note 306.

110. The dissent points out that although the Commission argued that there was a public policy interest in regulating those who sell property interests, the court would not find this reasonable because the jurisdiction of the Commission is clearly limited by the legislature to those who broker or sell real estate and does not extend to those who sell property interests. 103 N.M. at 276, 705 P.2d at 682.

the statute at issue which was clear on its face,¹¹¹ and the court did not mention deference to the agency's interpretation of its statute.¹¹² In the fifth case, *Southern Pacific Transportation Co. v. Corporation Commis-*

111. In only one of these four cases, *Grauerholtz v. New Mexico Labor and Indus. Comm'n*, 104 N.M. 674, 726 P.2d 351 (1986), did the court reject the agency's assertion of its jurisdiction. In that case, the Labor Commission determined that Grauerholtz, a subcontractor on a public works project, was employing apprentices in excess of the journeyman-to-apprentice ratio allowed in the trade. *Id.* at 675, 726 P.2d at 352. The Commission determined that the journeymen were actually performing the work of carpenters or laborers, which would entitle the journeymen to a higher wage. *Id.* Therefore, the Commission ordered Grauerholtz to pay additional wages under the New Mexico Public Works Minimum Wage Act. *Id.*; N.M. STAT. ANN. §§ 13-4-10 to -17 (Repl. Pamph. 1985). On appeal, the district court reversed the decision of the Commission and ruled that the Commission lacked the power under the Wage Act to order the payment of wages. 104 N.M. at 676, 726 P.2d at 353. The New Mexico Supreme Court noted that it would make sense to give the Commission the power to order payment of wages but found that the legislature clearly limited the remedies available to the Commission when it found a failure to pay prevailing minimum wage and that ordering payment was not one of the remedies available. *Id.* The court found that "Section 13-4-14 is free from ambiguity; therefore, there is no room for construction, and it is to be given effect as written." *Id.* (citation omitted). Thus, the Commission's actions were *ultra vires*—outside the scope of its authority.

The other three cases, in which the courts upheld agency jurisdiction, are discussed *infra* note 112.

112. In three of these four cases, the courts sustained the agencies' assertion of jurisdiction, finding that the statutes clearly authorized the agencies' involvement.

The court upheld the statutory authority of the State Property Tax Division (Division) to promulgate regulations for claiming property tax exemptions in *Cottonwood Gulch Foundation v. Gutierrez*, 102 N.M. 667, 699 P.2d 140 (Ct. App. 1985). The Division regulations required entities seeking tax exempt status to apply for and obtain a ruling from the Division recognizing the group's tax exempt status. *Id.* at 669, 699 P.2d at 142. The Division Regulations in question were 36-7(B)(1):12 and 36-7(B)(1):13 (Rev. April 1983). *Id.* Cottonwood Gulch, a nonprofit educational group, failed to apply for such an exemption, and the McKinley County Assessor denied Cottonwood's claim for tax exempt status. *Id.* The McKinley County Valuation Protest Board upheld the Assessor's denial. *Id.* at 668, 699 P.2d at 141. The Board conceded that the Foundation's claim of exemption would warrant granting a property tax exemption, but the Foundation had failed to apply for a ruling recognizing its right to tax exemption status as an educational entity. *Id.* at 669, 699 P.2d at 142.

Cottonwood Gulch claimed the Division regulations impermissibly infringed upon the County Assessor's statutory right to authorize a property tax exemption. *Id.* The court of appeals held that the legislature expressly authorized the Division to adopt regulations governing the claiming of property tax exemptions, *id.* at 670, 699 P.2d at 143; N.M. STAT. ANN. § 7-38-8.1 (Repl. Pamph. 1986), and that the challenged regulations reasonably fell within the parameters delegated by the legislature, 102 N.M. at 670, 699 P.2d at 143.

In *Gonzales v. Public Serv. Comm'n of New Mexico (In re Electrical Serv. in San Miguel County)*, 102 N.M. 529, 697 P.2d 948 (1985), local utility consumers appealed a Public Service Commission (PSC) decision which approved a transfer agreement entered into between Public Service Co. of New Mexico (PNM) and Mora-San Miguel Rural Electric Co-operative (Co-op). *Id.* at 530, 697 P.2d at 949. Plaintiffs contended that the PSC order was unlawful because it required Co-op to serve some customers within the city limits of Las Vegas and conflicted with the New Mexico Rural Electric Cooperative Act (REC). *Id.* at 531, 697 P.2d at 950. The court reviewed the REC, as well as the Public Utility Act (PUA), N.M. STAT. ANN. §§ 62-3-1 to -4.1 (Repl. Pamph. 1984), and held that in the event of a conflict between the language of the two acts, PUA would control. 102 N.M. at 531, 697 P.2d at 950. In this case, the Commission was acting within its authority to prevent "'unnecessary duplication and economic waste' between utility companies, a primary objective of PUA." *Id.*

In *In re Generic Investigation Into Cable Television Serv.'s*, 103 N.M. 345, 707 P.2d 1155 (1985),

sion,¹¹³ the court expressly rejected the Commission's interpretation of its constitutional authority to regulate intrastate railways but, in doing so, did not discuss the doctrine of deference to agency interpretations of their governing statutes. In that case, the railroads challenged the Corporation Commission's rules requiring the use of manned cabooses on certain trains and particular methods of reporting railroad accidents.¹¹⁴ The Commission had relied on its constitutional authority to regulate intrastate railways for safety purposes in promulgating these rules.¹¹⁵ The Commission interpreted "intrastate railways" to mean "railroad operations within New Mexico."¹¹⁶ The Commission furnished no authority for its interpretation, and the court explicitly rejected it, relying on the "long-recognized meaning" of intrastate operations as those which occur wholly within the boundaries of a single state.¹¹⁷ Since the railways being affected by the Commission's order traveled through other states, they were not intrastate railways under the usual definition.¹¹⁸ Therefore, the court held the Commission had no authority to promulgate the rules.¹¹⁹

Two principles regarding the treatment New Mexico courts will give to an agency's interpretation of its governing statute emerge from these cases. First, the courts will not defer to an agency interpretation of law when the legislative intent behind the statute at issue is apparent. The legislative intent might be clear on the face of the statute, or in looking at the statute as a whole, or in resort to statutory construction. In the latter case, the courts may consider the agency's construction of the statute, but they will not defer to it. Second, the courts will, at least sometimes, defer to an agency interpretation of law where the legislative

the issue was whether the Corporation Commission had the authority to regulate cable companies' digital data transmission services. *Id.* at 347, 707 P.2d at 1157. The New Mexico Supreme Court construed the New Mexico Constitution, *id.* at 348, 707 P.2d at 1158, and the New Mexico Telecommunications Act, N.M. STAT. ANN. §§ 63-9A-1 to -20 (Cum. Supp. 1985) (presently codified in Cum. Supp. 1987), and determined that the Corporation Commission had the authority to regulate intrastate digital high speed transmission services offered on a contract basis for compensation by the cable companies. 102 N.M. at 353, 707 P.2d at 1163.

113. 105 N.M. 145, 730 P.2d 448 (1986).

114. The railroads challenged the Commission's Rules 2 and 3. *Id.* at 146, 730 P.2d at 449. Rule 2 required the use of manned cabooses on certain trains, including "through" trains exceeding 2000 feet in length. *Id.* Rule 3 required immediate telephonic reporting of certain accidents to the Commission. *Id.* at 148, 730 P.2d at 451.

115. *Id.* at 146-47, 730 P.2d at 449-50. Article XI, section 7 of the New Mexico Constitution grants the State Corporation Commission the "power . . . to make . . . just rules requiring the supplying of cars and equipment for the use of shippers and passengers, and to require all intrastate railways . . . to provide such reasonable safety appliances . . . as may be necessary and proper for the safety of its employees and the public."

116. 105 N.M. at 148, 730 P.2d at 451.

117. *Id.*

118. *Id.*

119. *Id.*

intent on an issue is unclear and the agency's interpretation is consistent with the statute as a whole. It is unclear, but unlikely, that courts will always defer to a reasonable agency interpretation in the face of ambiguous legislative intent. Deference will be more likely where it is clear that the legislature intended to delegate such a "filling-in" of the statute to the agency, as in the *Public Service Co. of New Mexico* case.¹²⁰ Deferring to reasonable agency statutory interpretations in the face of vague legislative intent reflects the courts' preference to leave policy-making power with the agencies. The development of administrative law would be better served, however, if the courts would explicitly explain what weight they will give to agency interpretations when construing statutes.

III. EXERCISE OF ADMINISTRATIVE POWER

A. *Gathering and Disseminating Information*

The Inspection of Public Records Act¹²¹ gives citizens the right to inspect public records, subject to several exceptions.¹²² The New Mexico Supreme Court has also added an exception not found in the statute. It has held that, although there is a strong public policy in favor of disclosure, when the countervailing public policy in favor of confidentiality is stronger, disclosure will not be permitted.¹²³ During the survey period, the court, in *Ex rel. Barber v. McCotter*,¹²⁴ made it clear that this court-balancing of the conflicting public interests will occur only if the information sought to be released does not otherwise come under a statutory

120. Discussed *supra* text accompanying notes 90-99.

121. N.M. STAT. ANN. §§ 14-2-1 to -3 (Cum. Supp. 1987).

122. The exceptions include:

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

N.M. STAT. ANN. § 14-2-1 (Cum. Supp. 1987). It is unclear whether an agency could *choose* to make public any of those records which the public does not have a *right* to inspect.

123. State *ex rel. Newsome v. Alarid*, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977). The court clearly acknowledged that it was creating an exception not provided for in the legislation. *Id.* However, it cited cases in other jurisdictions where courts had done the same thing and argued that the "greater weight of authority" supported its action. *Id.* The court also noted that the legislature had not defined "public records" as used in the Public Records Act and stated its intention to apply a "rule of reason" in evaluating each disputed claim for release of records. *Id.* In determining whether a countervailing public policy exists sufficient to prohibit disclosure, the courts will balance the benefit to the public of granting inspection against the harm which might result, keeping in mind that public policy generally favors the right of inspection of public records and documents. *Id.* at 798, 568 P.2d at 1244.

124. 106 N.M. 1, 738 P.2d 119 (1987).

exemption. In short, if an agency refuses to release certain information which the legislature has explicitly provided may be kept confidential, the court will not second-guess the decision.

In *Barber*, five staff members of the Western New Mexico Corrections Facility (WNMCF) tested positive for marijuana use after submitting to urinalysis.¹²⁵ The *Grants Daily Beacon* (*Beacon*) published two stories about the staff members, who were eventually terminated.¹²⁶ The *Beacon* sought review of the personnel files at WNMCF pursuant to the Inspection of Public Records Act to determine the identity of the five staff members.¹²⁷ McCotter, the Secretary of the New Mexico Corrections Department, refused the request.¹²⁸

On appeal,¹²⁹ the New Mexico Supreme Court upheld the decision of the Secretary. The court relied on the decision in *State ex rel. Newsome v. Alarid*.¹³⁰ In *Newsome*, the court construed the statutory exception to disclosure for "letters or memorandums which are matters of opinion in personnel files"¹³¹ to include "documents concerning disciplinary actions."¹³²

In *Barber*, release of the names of the former employees would amount to public disclosure of disciplinary records in violation of the personnel privilege as found in *Newsome*.¹³³ The court thus found that although, ordinarily, the names of public employees are available for inspection, in this case they had to be withheld to preserve the statutory privilege.¹³⁴ In doing so, the court rejected the *Beacon's* argument that the court balance the public interest in releasing the names against the assertion of confidentiality.¹³⁵

B. Rules and Rulemaking

There are two basic functions of administrative agencies: rulemaking

125. *Id.* Officials at WNMCF required the night staff to submit to urinalysis after hearing rumors of drug use among night shift employees. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 1-2, 738 P.2d at 119-20.

129. After the Secretary refused the request, the *Beacon* sought a writ of mandamus. *Id.* at 2, 738 P.2d at 120. The district court granted a permanent writ. The Secretary appealed. *Id.*

130. *Id.*; *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977).

131. The *Newsome* court interpreted the state public records provision which was then codified at N.M. STAT. ANN. § 71-5-1(c) (Supp. 1975). However, it reads the same as the provision in the current Public Records Act. See *supra* note 122.

132. *Newsome*, 90 N.M. at 794, 568 P.2d at 1240.

133. *Barber*, 106 N.M. at 2, 738 P.2d at 120.

134. *Id.*

135. *Id.*

and adjudication of disputes.¹³⁶ Rulemaking is the legislative-like function agencies use to formulate rules and regulations establishing agency policy.¹³⁷ There were three cases during the survey period which dealt with rulemaking. Two cases concerned requirements for promulgating and repealing regulations, while the third case involved allegedly vague language of a regulation.

In *State v. Grissom*,¹³⁸ the trial court dismissed several criminal charges against defendants arising out of the alleged violation of an emergency regulation promulgated by the New Mexico Savings and Loan Supervisor.¹³⁹ The court's dismissal was premised upon the alleged procedural invalidity of the regulation and the Supervisor's failure to specifically articulate in the regulation the factual basis for its promulgation.¹⁴⁰

The regulation at issue prohibited state savings and loan associations from investing in time-shares or funding loans collateralized by time-shares.¹⁴¹ The Savings and Loan Supervisor issued the regulation under his emergency powers.¹⁴² Five months later, he modified the regulation to allow savings and loan associations to make loans secured by time-shares under certain criteria.¹⁴³ Prior to the issuance of the emergency regulation, State Savings and Loan Association of Clovis, with whom defendants were associated, had time-share collateral of \$3 million, of which \$1 million had become delinquent.¹⁴⁴ Defendants were later charged with violating the emergency regulation with intent to defraud.¹⁴⁵

Defendants made three arguments in support of their claim that the emergency regulation was invalid. They contended that an emergency did not actually exist at the time the regulation was adopted and that the justification contained in the regulation was partially unsubstantiated.¹⁴⁶

136. 1980-81 *Administrative Law Survey*, *supra* note 1, at 21 & n. 124.

137. 1983-84 *Administrative Law Survey*, *supra* note 1, at 123-24.

138. 106 N.M. 555, 746 P.2d 661 (Ct. App. 1987).

139. *Id.* at 557, 746 P.2d at 663. Campbell, the New Mexico Savings and Loan supervisor, promulgated Emergency Regulation 83-3, discussed *infra* at text accompanying notes 143-145. 106 N.M. at 557, 746 P.2d at 663. The charges against the defendants arose out of the transfer to a Clovis savings and loan association of approximately \$28 million dollars of negotiable instruments from defendants and corporations in which defendants were officers. *Id.* The defendants were charged with fraud, embezzlement, securities fraud, conspiracy, and racketeering. *Id.*

140. *Id.* at 558, 746 P.2d at 664.

141. *Id.* at 557-58, 746 P.2d at 663-64.

142. *Id.* at 557, 746 P.2d at 663. The emergency powers are specified in N.M. STAT. ANN. § 58-10-83 (Repl. Pamp. 1986). The supervisor need not give notice or hearing prior to promulgating an emergency rule; however, he must hold a hearing within ten days after the effective date of the rule. *Id.*

143. 106 N.M. at 558, 746 P.2d at 664.

144. *Id.*

145. *Id.*

146. *Id.* at 559, 746 P.2d at 665.

Further, relying on the New Mexico Administrative Procedures Act, the defendants claimed that the basis for the issuance of the regulation was not adequately set forth in the regulation.¹⁴⁷

The New Mexico Court of Appeals rejected all three arguments, holding that the record supported the conclusion that an emergency existed and the facts set forth in the regulation provided a sufficient basis for its issuance.¹⁴⁸ Moreover, the court correctly held that the Administrative Procedures Act,¹⁴⁹ which required agency action to be set forth in writing prior to the issuance of an emergency rule, did not apply to the Savings and Loan Act.¹⁵⁰ Thus, the trial court erred in dismissing the charges arising out of the alleged violation of the emergency rules.¹⁵¹

Although it appears that the Supervisor designed the emergency regulation specifically to curb what was, for years previous, a legal activity by State Savings and Loan Association of Clovis and its officials, the defendants made no argument that such action was arbitrary, capricious, an abuse of discretion, or somehow estopped. The court of appeals correctly ruled against the arguments made in opposition to the procedure the Supervisor followed when he issued the emergency regulation.

In *Rivas v. Board of Cosmetologists*,¹⁵² the majority of a divided panel of the New Mexico Supreme Court found that if an agency acts to void one of its regulations for exceeding its statutory authority, the voidance is to be treated as a "repeal" for purposes of the applicability of any relevant administrative procedure law. In *Rivas*, the Cosmetology Board (Board) denied New's application for a license to practice cosmetology and suspended the ownership license of New's employer, Rivas, for employing an unlicensed cosmetologist.¹⁵³ When New applied for her cosmetology license, the Board had already "withdrawn" its Regulation 106, which would have granted New a license under reciprocity and would have protected Rivas from a charge of having employed an unlicensed cosmetologist.¹⁵⁴ The Board had withdrawn this regulation on

147. *Id.*

148. *Id.* After the emergency regulation was issued, the supervisor held a hearing on the regulation within the ten day period required under the Savings and Loan Act, N.M. STAT. ANN. § 58-10-83 (Repl. Pam. 1986). 106 N.M. at 558, 746 P.2d at 664. The supervisor adopted findings of fact, determining that an emergency existed and that there were serious financial problems involving timeshare loans which provided a sufficient basis for the regulation's issuance. *Id.*

149. N.M. STAT. ANN. §§ 12-8-1 to -25 (1978).

150. *Grissom*, 106 N.M. at 559, 746 P.2d at 665. The Administrative Procedures Act only applies to those agencies specifically placed under it. N.M. STAT. ANN. § 12-8-2(A) (1978). The Regulation and Licensing Department, of which the Supervisor is an official, has not been placed under the Act.

151. 106 N.M. at 560, 746 P.2d at 666.

152. 101 N.M. 592, 686 P.2d 934 (1984).

153. *Id.* at 593, 686 P.2d at 935.

154. *Id.*

advice of counsel that it exceeded the Board's statutory authority governing reciprocity.¹⁵⁵ The Board followed no rulemaking-type procedure in withdrawing Regulation 106.

The issue on appeal was whether the action of the Board in withdrawing the rule complied with statutory procedure.¹⁵⁶ The majority found that the Board engaged in rulemaking when it attempted to void its regulation.¹⁵⁷ The court characterized the withdrawal as a "repeal", thus making the agency's action subject to any applicable statutory procedure for repeal of rules.¹⁵⁸ The court held that the Board failed to file the repeal with the State Records Administrator as required by the State Rules Act.¹⁵⁹ The Board's repeal of the rule was thus invalid, and the Board's actions regarding New and Rivas were unlawful.¹⁶⁰ Justice Stowers, in his dissenting opinion, argued that Regulation 106 did exceed the Board's statutory authority.¹⁶¹ He therefore found that the Board acted properly in treating Regulation 106 as void.¹⁶²

The majority's findings are the better reasoned. Treating an agency's attempt to void an existing regulation as a repeal makes the repeal subject to the administrative procedures that were attendant to the issuance of the now-offensive regulation. This properly subjects the agency's new interpretation of its governing statute to the same procedure the agency followed in arriving at its original construction of the law. Indeed, persons who are relying on the existing regulation are arguably more entitled to the statutory rulemaking procedures, i.e. notice and comment, for an impending repeal, than are persons who would be affected by a new regulation. Additionally, it makes no sense to require an agency to follow rulemaking procedures when it repeals a rule because of a new *policy*, but not to follow any procedure when, as in *Rivas*, it repeals a rule because of a new *statutory interpretation*. In short, the majority was

155. *Id.* at 595, 686 P.2d at 937 (Stowers, J., dissenting).

156. *Id.* at 593, 686 P.2d at 935. The rulemaking amendments to the Uniform Licensing Act, N.M. STAT. ANN. §§ 61-1-1 to -33 (Repl. Pamph. 1986), extend all required procedures to the repeal of regulations. *Id.*

157. *Id.*

158. *Id.* For example, the rulemaking procedures in the Uniform Licensing Act, N.M. STAT. ANN. §§ 61-1-1 to -31 (Repl. Pamph. 1986), apply to repeal of rules by the Board, N.M. STAT. ANN. § 61-1-29(A) (Repl. Pamph. 1986); and the State Rules Act, N.M. STAT. ANN. §§ 14-3-24, 14-3-25, 14-4-1 to -9 (1978 and Cum. Supp. 1987), likewise applies. N.M. STAT. ANN. § 14-4-2 (A), (C) (1978).

159. 101 N.M. at 594, 686 P.2d at 936 (citing N.M. STAT. ANN. § 14-4-5 (1978)). In dicta, the court also discussed several requirements of the New Mexico Administrative Procedures Act for repeal of regulations. *Id.* at 593-94, 686 P.2d at 935-36. The dissent correctly pointed out that reliance on these provisions is in error since the Administrative Procedures Act does not apply to this agency. *Id.* at 594-95, 686 P.2d at 936-37. See *supra* note 150.

160. 101 N.M. at 594, 686 P.2d at 936.

161. *Id.* at 595, 686 P.2d at 937. The majority did not reach this issue.

162. *Id.*

correct in opposing the dissent's desire to, in effect, adopt a new category of administrative action—voidance of a rule—subject to no procedural constraints.

In *Climax Chemical Co. v. New Mexico Environmental Improvement Board*,¹⁶³ the court of appeals relied on a standard favoring the upholding of broadly written regulations to reject a void-for-vagueness challenge to environmental regulations. This case concerned an appeal of the revised Liquid Waste Disposal regulations promulgated by the Environmental Improvement Board (Board).¹⁶⁴ Climax claimed the provisions were unconstitutionally vague because they gave inadequate notice of the requirements for compliance, thus permitting arbitrary application.¹⁶⁵ Following the approach of the U.S. Supreme Court to similar cases involving a vagueness challenge, the court held that the complainant has the burden of showing that the law is impermissibly vague in *all* its applications in order to succeed on the claim.¹⁶⁶ In light of this, the court found that even though some terms were less than clear, the challenged regulations were not vague in all their applications.¹⁶⁷ In upholding the constitutionality of the regulations, the court emphasized that in the field of environmental protection, it is necessary for agencies to issue general standards to serve this developing discipline, rather than devising unworkably strict regulations.¹⁶⁸

The decision in this case is consistent with the New Mexico courts' tradition of upholding environmental regulations in the face of vagueness challenges.¹⁶⁹ The courts continue to agree that the agencies' need for

163. 106 N.M. 14, 738 P.2d 132 (Ct. App. 1987).

164. "The regulations require a person to obtain a permit issued by the Division before installing a new liquid waste system or modifying an existing one." *Id.* at 15, 738 P.2d at 133. Once an applicant files for a permit, the Division is required to grant or deny the permit within ten working days of receipt of the application. *Id.* The regulations also provide specific requirements as to lot size, setback and clearance. *Id.*

165. Climax objected to the following provision of the regulation:

D. If the division finds that specific requirements *in addition to or more stringent than* those provided in [a later section of the regulation] . . . are *necessary to prevent a hazard to public health* or the degradation of a body of water, the division may issue a permit conditioned on those more stringent or additional specific requirements.

Id. (emphasis added). Climax specifically objected to the term "in addition to or more stringent than" and "necessary to prevent a hazard to public health." *Id.* at 16, 738 P.2d at 134. Climax also challenged the term "under such conditions" which was included in the definition of public hazard in § 1-102(R): "the indicated presence in water or soil of parasite, bacterial, viral, chemical or other agents *under such conditions* that they may adversely impact human health[.]" *Id.* (emphasis added).

166. *Id.* at 17, 738 P.2d at 135 (citing *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982)) (emphasis added).

167. *Id.* The court found that the terms "more stringent" and "degradation of a body of water" provided clear and specific guidelines. Although the terms "additional" and "hazard to public health" were less clear, they were not fatal to the regulations. *Id.*

168. *Id.* at 18, 738 P.2d at 136.

169. The New Mexico courts, with one exception, have rejected vagueness challenges to envi-

some flexibility to achieve environmental protection is greater than the regulated entity's need for absolute certainty.¹⁷⁰

C. Orders and Adjudications

Adjudications involving a liberty or property interest require agencies to give parties procedural due process.¹⁷¹ The right of procedural due process includes the right to "timely" notice and the opportunity to be heard.¹⁷² The notice must also include adequate information about "procedural rights afforded and the substantive issues involved."¹⁷³

There was only one case during the survey period that dealt with the issue of whether notice of a hearing afforded due process. In *In re Electrical Service in San Miguel County*,¹⁷⁴ the appellants, two electric customers, claimed that the notice given them about a Public Service Commission (PSC) hearing was inadequate under PSC rules.¹⁷⁵ The hearing officer's procedural order modified the PSC rule regarding notice,¹⁷⁶ and the appellants received thirty-eight days' notice of the hearing date. The court found that the hearing examiner was entitled to change the notice period provided for in the rules¹⁷⁷ and that the due process requirements,¹⁷⁸ reasonable notice and an opportunity to be heard, had been met.¹⁷⁹

ronmental regulations. Claassen, *The Void-For-Vagueness Doctrine Applied to Environmental Regulation in New Mexico* (1988) (unpublished manuscript) [hereinafter cited as Claassen.] The exception was a toxic pollutant regulation found unconstitutionally vague in *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n*, 93 N.M. 546, 603 P.2d 285 (1979). This case, as well as the other cases in New Mexico involving environmental regulations challenged as being unconstitutionally vague, are discussed in Claassen.

170. For a discussion of the tension between the vagueness doctrine and the need for flexibility in the environmental regulatory context, see Claassen, *supra* note 169.

171. 1983-84 *Administrative Law Survey*, *supra* note 1, at 128.

172. *Id.*; see also *Jones v. New Mexico State Racing Comm'n*, 100 N.M. 434, 671 P.2d 1145 (1983).

173. 1983-84 *Administrative Law Survey*, *supra* note 1, at 128, text accompanying n.55.

174. 102 N.M. 529, 697 P.2d 948 (1985). For a discussion of the facts of the case, see *supra* note 112.

175. *Id.* at 532, 697 P.2d at 951. The plaintiffs alleged that the utility should have given notice in accordance with Rule 8-4 of the Rules of Practice and Procedure of the PSC. *Id.*

176. Rule 8-4 requires that notice of a rate change must be given no later than during the last full billing cycle prior to the first scheduled hearing on the increase. Rule 8-4 N.M.P.S.C. Second Revised Gen. Order No. 1 (1978). In the present case, the hearing examiner issued a procedural order on August 8, 1983, scheduling the public hearing for September 15, 1983. 102 N.M. at 531, 697 P.2d at 950. The court did not say how much additional notice would have been required if Rule 8-4 had been followed.

177. 102 N.M. at 532, 697 P.2d at 951. PNM had even exceeded the requirements of the procedural order by hand-delivering notice to 12 of the 14 customers affected, including the appellants. *Id.* at 532-33, 697 P.2d at 951-52.

178. The court did not say it was deciding a constitutional issue, but it necessarily did so since it had previously disposed of the statutory notice claim. See *supra* note 177 and accompanying text.

179. Plaintiffs were allowed to intervene even though they failed to file a timely petition, and they were able to question witnesses at the hearing and present their views. 106 N.M. at 533, 697 P.2d at 952.

D. Process of Proof

A concern of litigants at the hearing stage of a proceeding is the process by which the record is formed, upon which a final administrative decision will rest.¹⁸⁰ There were two cases during the survey period concerning evidentiary requirements at adjudicatory hearings. These cases are fact-specific and present no new legal principles regarding process of proof.

In *Varoz v. New Mexico Board of Podiatry*,¹⁸¹ the Board of Podiatry (Board) revoked Varoz's podiatrist license based on Varoz's criminal conviction on several counts of Medicare fraud.¹⁸² At the hearing before the Board, Dr. Varoz presented evidence that was not presented during his criminal trial.¹⁸³ This additional evidence was relevant to one of the eight fraud counts on which he was convicted.¹⁸⁴ Dr. Varoz claimed that the Board erred in basing its decision to revoke his license on his conviction on that count.¹⁸⁵ The New Mexico Supreme Court held, however, that Varoz's other criminal convictions also provided an adequate basis for revocation and the Board's decision, which rested on all the convictions, could stand.¹⁸⁶

In *Stephens v. Motor Vehicle Division*,¹⁸⁷ the New Mexico Motor Vehicle Department (MVD) revoked Stephens' driver's license after the agency found that Stephens was driving while intoxicated.¹⁸⁸ Section 66-8-111(C) of the Motor Vehicle Code¹⁸⁹ gives the MVD director the power to revoke a driver's license if certain requirements are met, including receipt of a notarized statement from a police officer stating the officer had reasonable grounds to believe the driver was intoxicated.¹⁹⁰ In *Stephens*, the arresting officer's statement was not notarized, but the police officer testified under oath at the MVD hearing about the incident.¹⁹¹

The district court held that "the fact that the original statement was

180. 1979-80 *Administrative Law Survey*, *supra* note 1, at 13.

181. 104 N.M. 454, 722 P.2d 1176 (1986).

182. *Id.* at 454-55, 722 P.2d at 1176-77. Dr. Varoz was convicted in federal district court on eight counts of Medicare fraud. *Id.* at 454, 722 P.2d at 1176. The Board then revoked Dr. Varoz's license. *Id.* at 455, 722 P.2d at 1177. After the Santa Fe District Court affirmed the Board's decision, the Tenth Circuit Court of Appeals reversed five of Varoz's convictions. *Id.*

183. *Id.* at 458, 722 P.2d at 1180.

184. One of Dr. Varoz's convictions involved a Medicare claim for a surgery which allegedly had never been performed. *Id.* at 455, 722 P.2d at 1177. At the Board hearing, Varoz presented evidence, including the videotaped testimony of the patient, that the surgery in question actually was performed. *Id.* at 458, 722 P.2d at 1180.

185. *Id.* at 458, 722 P.2d at 1180.

186. *Id.*

187. 106 N.M. 198, 740 P.2d 1182 (Ct. App. 1987).

188. *Id.*

189. N.M. STAT. ANN. § 66-8-111(C) (Repl. Pamp. 1987).

190. 106 N.M. at 198, 740 P.2d at 1182.

191. *Id.* at 198-99, 740 P.2d at 1182-83.

not under oath was cured by the subsequent testimony of both officers under oath at the hearing, so the possibility of prejudice to the Petitioner was removed."¹⁹² Stephens argued on appeal that because the officer failed to notarize the statement, MVD did not have authority to revoke her license.¹⁹³ The New Mexico Court of Appeals reversed the decision of the district court, finding that the requirement of a sworn statement was both mandatory and jurisdictional.¹⁹⁴ Without a sworn statement, MVD lacked jurisdiction to institute revocation proceedings.

E. The Decisionmaking Process

Many aspects of the decision-making process were litigated during the survey period. While not all the cases are discussed at length, this Article will discuss the most significant cases dealing with 1) timeliness of the hearing, 2) the importance of an impartial decisionmaker, 3) the standard of proof, 4) the discovery process, 5) a statement of reasons for the decision, 6) rejection of the decision of the hearing officer, and 7) subsequent proceedings on the same grounds.

1. Timeliness of the Agency Hearing and Final Order

During this survey period the courts strictly interpreted statutory provisions limiting the time within which agencies can hold hearings and issue final orders. In two cases, the court of appeals stressed the importance of the procedural protection of a speedy hearing for teachers who appeal their dismissals. A supreme court case strictly construed the time within which an agency decision must be rendered and signed under the Uniform Licensing Act.

The first of two cases involving the timeliness of a hearing on a teacher's termination was *Redman v. Board of Regents of New Mexico School for Visually Handicapped*.¹⁹⁵ *Redman* concerned an appeal hearing before the State Board of Education.¹⁹⁶ The applicable statute provided that the

192. *Id.* at 199, 740 P.2d at 1183.

193. *Id.* Stephens argued that the requirement of § 66-8-111(C) was mandatory. *Id.* MVD, on the other hand, argued that the statutory provision for a sworn statement was directory, rather than mandatory. *Id.* Even if the requirement were mandatory, MVD alleged that the requirement could be avoided in the absence of prejudice. *Id.*

194. *Id.* at 201, 740 P.2d at 1185.

195. 102 N.M. 234, 693 P.2d 1266 (Ct. App. 1984), *cert. denied*, 102 N.M. 225, 693 P.2d 591 (1985).

196. The Superintendent of the New Mexico School for the Visually Handicapped (NMSVH) dismissed Redman after determining that she authored four letters making false accusations of misconduct by NMSVH officials. *Id.* at 236, 693 P.2d at 1268. After a hearing, the Board of Regents upheld the dismissal. *Id.* Redman appealed to the State Board. *Id.*

hearing "shall be" held within sixty days of the notice of appeal.¹⁹⁷ The teacher is to receive a decision within 120 days of the notice.¹⁹⁸ In this case, Redman's hearing began the sixty-sixth day after the notice of appeal, and the decision was received more than 120 days after the notice.¹⁹⁹ The court held that the statute imposed a mandatory requirement that the Board hold the hearing within the prescribed time.²⁰⁰ The court explained that this mandatory requirement provided important protections to tenured teachers, as well as to the schools and their students.²⁰¹ The court did find that the right to a timely hearing could be waived, although it was not waived in this case.²⁰²

A year later, the court of appeals applied its holding in *Redman* to *Board of Education of Taos Municipal Schools v. Singleton*.²⁰³ *Singleton* involved the timeliness of the initial hearing held by a local school board after a notice of termination.²⁰⁴ Citing *Redman*, the court ruled that the time specified in the statute for conducting a dismissal hearing is mandatory,²⁰⁵ unless waived by the parties or unless a continuance is sought

197. N.M. STAT. ANN. § 22-10-20(D) (Repl. Pamp. 1984). Section 22-10-20(D) was repealed after *Redman* and comparable provisions are found at N.M. STAT. ANN. §§ 22-10-14 to -14.1 (Repl. Pamp. 1986). The general principles established by *Redman*, however, would apply as well to the new statutory provisions.

198. N.M. STAT. ANN. § 22-10-20(I) (Repl. Pamp. 1984) (repealed by 1985 N.M. Laws, Ch. 33 § 33).

199. *Redman*, 102 N.M. at 236, 239, 693 P.2d at 1268, 1271. A hearing was originally scheduled within 60 days of the notice of appeal. The hearing was rescheduled, however.

200. *Id.* at 238, 693 P.2d at 1270.

201. The court found that expeditious review protects teachers from "arbitrary and capricious delay" and from monetary injury. *Id.* at 239, 693 P.2d at 1271.

202. *Id.* A State Board regulation stated that the time limits for a hearing could be waived by the parties in writing. *Id.* The State Board found that the parties had waived the time limits during an unrecorded and untranscribed conference call between the hearing officer and the attorneys, but the court held this oral consent did not satisfy the regulation requiring a written waiver. *Id.*

203. 103 N.M. 722, 712 P.2d 1384 (Ct. App. 1985), *cert. denied*, 103 N.M. 740, 713 P.2d 556 (1986).

204. The Taos School Board discharged Singleton after the district superintendent informed the Board that Singleton lacked recertification of her teaching certificate. *Id.* at 724, 712 P.2d at 1386. The Board took the position that it did not have to give Singleton notice and a hearing on her dismissal. *Id.* at 727, 712 P.2d at 1389. The Board ultimately lost this argument in the New Mexico Supreme Court. *Id.* Thus, the Board did not give Singleton a hearing on her discharge until two years after the date of her discharge. *Id.* at 725, 712 P.2d at 1387. The applicable statute, N.M. STAT. ANN. § 22-10-17 (Repl. Pamp. 1984), required the local board to conduct a hearing on the dismissal not more than 15 days from the date of service of the notice of discharge. *Id.* at 727, 712 P.2d at 1389.

In 1986, Section 22-10-17 was completely rewritten. See N.M. STAT. ANN. § 22-10-17 (Repl. Pamp. 1986). The section still provides, however, that a teacher may request a hearing within five days from the date the termination notice is served, and the school board must hold the hearing within ten days after receiving the teacher's request. *Id.* § 22-10-17(B)-(C).

205. The applicable statute reads as follows:

A local school board may discharge certified school personnel . . . only according to the following procedure:

and obtained for good cause.²⁰⁶ In this case, the Taos Board had made no showing of good cause for delay in giving Singleton a hearing.²⁰⁷

In *Foster v. Board of Dentistry of New Mexico*²⁰⁸ the supreme court held that the Board lost jurisdiction over Foster because it failed to comply with the statutory deadline for rendering and signing a decision suspending Foster's dental license for fourteen days.²⁰⁹ Section 61-1-13(B) of the Uniform Licensing Act states that the Board must render and sign any decision based on a hearing within ninety days after the hearing.²¹⁰ Section 61-1-14 of the Act provides that the Board must serve the applicant or licensee with the decision within fifteen days after it is rendered and signed.²¹¹ In this case, the Board rendered and signed its decision ninety-five days after the completion of the hearing.²¹² The Board served its decision on Foster two days later.²¹³ On appeal, Foster argued that the ninety-day requirement is mandatory and jurisdictional.²¹⁴ The Board contended that the requirement was merely procedural and Foster was not prejudiced by the violation since he received a final decision within ninety-seven days of the completion of his hearing.²¹⁵ The supreme court agreed with Foster. Without elaboration, it found that the words of Section 61-1-13(B) are clearly mandatory.²¹⁶ Since the Board failed to comply with the ninety day provision, the court ruled its decision void.²¹⁷

B. stating in the notice of discharge the following:

- (2) a place within the school district or state agency and a date not less than five days nor more than fifteen days from the date of service of the notice of discharge for a hearing before the local school board or the governing authority of the state agency[.]

N.M. STAT. ANN. § 22-10-17 (Repl. Pamp. 1984).

206. *Singleton*, 103 N.M. at 728, 712 P.2d at 1390.

207. *Id.*

208. 103 N.M. 776, 714 P.2d 580 (1986).

209. *Id.* at 777, 714 P.2d at 581.

210. N.M. STAT. ANN. § 61-1-13(B) (Repl. Pamp. 1986) provides in pertinent part:
A decision based on the hearing shall be made by a quorum of the board and signed by the person designated by the board within sixty days after the completion of the preparation of the record or submission of a hearing officer's report, whichever is later. In any case the decision must be rendered and signed within ninety days after the hearing.

211. N.M. STAT. ANN. § 61-1-14 (Repl. Pamp. 1986).

212. *Foster*, 103 N.M. at 776, 714 P.2d at 580.

213. *Id.* at 777, 714 P.2d at 581.

214. *Id.* at 776, 714 P.2d at 580.

215. *Id.* at 777, 714 P.2d at 581.

216. *Id.*

217. *Id.*

2. Impartial Decisionmaker

It is a requirement of due process in any adjudicatory administrative proceeding that the decisionmaker be impartial.²¹⁸ *Board of Education of Melrose Municipal Schools v. New Mexico State Board of Education*²¹⁹ involved an allegation of bias on the part of the decisionmaker.²²⁰ In that case, a hearing officer appointed by the State Board upheld the Local Board's decision to discharge a teacher.²²¹ Before the State Board voted on the hearing officer's findings, the Board was subjected to a "blizzard of oral and written communications" from the Melrose community, most of which supported the teacher.²²² The State Board rejected the hearing officer's findings and found that the Local Board did not establish that cause existed for the teacher's discharge.²²³ In making this finding, the State Board looked at neither the transcript of the Local Board's hearing nor that of its own hearing officer's hearing.²²⁴

The Melrose School Board appealed and argued that the State Board decision should be reversed because, *inter alia*, the State Board members had received ex parte communications from the Melrose community.²²⁵ While the court did not decide the case based on this issue,²²⁶ the court was concerned enough about the appearance of bias to feel "compelled to comment."²²⁷ The court emphasized that when a board operates in a quasi-judicial manner (as a fact finder in an adjudicatory hearing), the board must be cautious to protect itself from contacts which could interfere with its adjudicatory responsibilities.²²⁸

218. 1979-80 *Administrative Law Survey*, *supra* note 1, at 15.

219. 106 N.M. 129, 740 P.2d 123 (Ct. App. 1987).

220. One other case decided during the survey period involving the possible bias of the decisionmaker was *Varoz v. New Mexico Bd. of Podiatry*, 104 N.M. 454, 722 P.2d 1176 (1986), discussed *supra* notes 181-86 and accompanying text. Dr. Varoz claimed bias because the Board chairman had previously reviewed for Medicare payment the claims with which Varoz's various convictions were concerned. *Varoz*, 104 N.M. at 458, 722 P.2d at 1180. The court, however, held that Varoz had not preserved the issue for appeal. *Id.* Varoz did not directly question the Chairman about his prior participation, failed to move to disqualify the Chairman, and did not raise the issue in his petition for judicial review. *Id.*

221. *Melrose Mun. Schools*, 106 N.M. at 130, 740 P.2d at 124. The teacher coach, Wilkinson, was discharged for "immorality and other good and just cause." *Id.* The Local Board "found that Wilkinson had engaged in immoral conduct with one of the students at Melrose High School and attempted to engage in similar conduct with others." *Id.*

222. *Id.*

223. *Id.*

224. *Id.* This issue is discussed *infra* at notes 256-62 and accompanying text.

225. 106 N.M. at 132, 740 P.2d at 126.

226. *Id.* The court did not decide the case on this issue because the court had earlier found that the record *did* support the Local Board's decision to fire Wilkinson. *Id.* Thus, the court reversed the State Board's decision on the latter ground. *Id.*

227. *Id.*

228. *Id.*

3. Standard of Proof

In *Foster v. Board of Dentistry of New Mexico*,²²⁹ the New Mexico Supreme Court reiterated that the standard of proof to be applied in administrative proceedings, with few exceptions, is preponderance of the evidence.²³⁰ A higher burden of proof (clear and convincing) is allowed in civil cases only where allegations such as fraud are involved or where the clear and convincing burden has been established by statute.²³¹ Foster argued that the charges against him should have been proven at the hearing by clear and convincing evidence.²³² The court was unwilling to take any judicial action to enlarge the area of exceptions requiring a higher standard of proof.²³³

It is unclear whether the appellant-dentist in this case argued that the due process clauses of the New Mexico and United States constitutions require a higher burden of proof. This is the context in which arguments for a higher burden of proof have been made.²³⁴ The court did not make the context of the argument clear, perhaps because it disposed of the case in Foster's favor on jurisdictional grounds²³⁵ and only offered its discussion of burden of proof in this case as dicta to guide future cases.²³⁶

4. Discovery

Certain statutes specifically authorize the use of discovery during ad-

229. 103 N.M. 776, 714 P.2d 580 (1986). Foster's dentistry license was suspended by the Board of Dentistry, as discussed *supra* notes 208-17 and accompanying text.

230. 103 N.M. at 777, 714 P.2d at 581.

231. *Id.* at 778, 714 P.2d at 582. The court supplied three instances where the legislature has provided for a clear and convincing standard. This standard must be met by the Board of Dentistry and the Board of Medical Examiners to temporarily suspend the license of a dentist or physician, respectively, without a hearing, for unfitness to practice. N.M. STAT. ANN. §§ 61-5-31(D) and 61-7-8(D) (Repl. Pamph. 1986). It must also be met in any proceeding to terminate parental rights. N.M. STAT. ANN. § 32-1-55(H) (Repl. Pamph. 1986). The requirement that a petitioner seeking to terminate parental rights prove its case by clear and convincing evidence is mandated by the decision in *Santosky v. Kramer*, 455 U.S. 745 (1982). In *Santosky*, the Court struck down a New York statute which required the State to prove its allegations only by a "fair preponderance of the evidence." *Id.* at 748, 758; N.Y. FAM. CT. ACT § 622 (McKinney 1975 and Supp. 1981-1982). The majority held that due process requires at least a "clear and convincing" burden of proof. 455 U.S. at 747-48. The four dissenters argued that whether a "clear and convincing" standard be applied should be decided on a case-by-case basis. *Id.* at 773. See Brief Note, *Santosky v. Kramer: Clear and Convincing Evidence in Actions to Terminate Parental Rights*, 36 U. OF MIAMI L. REV. 369 (1982).

232. *Foster*, 103 N.M. at 777, 714 P.2d at 581.

233. *Id.* at 778, 714 P.2d at 582.

234. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *supra* note 231; and *Hicks ex rel. Feiock v. Feiock*, 108 S.Ct. 1423 (1988) (holding that a statutory presumption that an obligated parent remains able to make required child support payments—which reduces the state's burden of proof in a contempt proceeding against the non-paying parent—comports with due process if the contempt proceeding is civil, not criminal, in nature.)

235. See discussion *supra* notes 208-17 and accompanying text.

236. *Foster*, 103 N.M. at 778, 714 P.2d at 582.

judicatory hearings.²³⁷ Others do not. In *Redman v. Board of Regents of New Mexico School for Visually Handicapped*,²³⁸ the court of appeals held that the State Board of Education had the authority to adopt regulations permitting discovery proceedings during adjudicatory hearings, even though the enabling act did not specifically grant this power to the State Board.²³⁹ Courts traditionally view the implied powers of agencies broadly.²⁴⁰ In *Redman*, however, the court had to deal with the additional argument that the statute prohibited discovery because the law specifically said that the Rules of Civil Procedure and Evidence would not apply to de novo hearings.²⁴¹ The court, though, reasonably interpreted this language to mean the legislature intended to facilitate discovery and presentation of evidence by not *limiting* the agency to these Rules.²⁴² The court, appropriately, did not reach the constitutional issue whether procedural due process would require the right to conduct discovery prior to an informal adjudicatory hearing.²⁴³

On the other hand, courts are likely to be unimpressed by parties who fail to take advantage of discovery procedures and later claim that they were denied the right to discovery. In *New Mexico Industrial Energy Consumers v. New Mexico Public Service Commission*,²⁴⁴ NMIEC, an intervenor in a PSC task force, claimed that formal discovery procedures were unavailable during the inquiry and that the group was thus denied

237. See, e.g., N.M. STAT. ANN. § 61-1-8 (Repl. Pamp. 1986) (Uniform Licensing Act); N.M. STAT. ANN. § 72-2-13 (Repl. Pamp. 1985) (in matters pertaining to public waters pending before the state engineer).

238. 102 N.M. 234, 693 P.2d 1266 (Ct. App. 1984). See *supra* notes 195-202 and accompanying text.

239. 102 N.M. at 237, 693 P.2d at 1269. Redman denied the Board's authority to issue the regulation authorizing discovery (SBE Reg. 78-3(III)(B)) on the theory that the regulation was inconsistent with statutory language in N.M. STAT. ANN. § 22-10-20(E) (Repl. Pamp. 1984) that "[t]he Rules of Civil Procedure shall not apply to the de novo hearing." *Id.* The court held that the Agency's powers included implied authority to issue regulations appropriate to its stated statutory functions, including that of reviewing local board actions. *Id.*

240. *Id.* (citing *Wimberly v. New Mexico State Police Board*, 83 N.M. 757, 497 P.2d 968 (1972)).

241. See *supra* note 239.

242. *Redman*, 102 N.M. at 238, 693 P.2d at 1270.

243. *Id.* at 240, 693 P.2d at 1272. See, e.g., *New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 104 N.M. 565, 568, 725 P.2d 244, 247 (1986) where the court says, in dicta, that procedural due process mandates the right to conduct discovery, citing *In re Miller*, 88 N.M. 492, 542 P.2d 1182 (Ct. App.), *cert. denied*, 89 N.M. 5, 546 P.2d 70 (1975). In *Industrial Energy Consumers*, the court does not characterize the agency action at issue as either adjudication or rulemaking. Thus it is unclear whether the court was talking about the right to discovery in both an adjudicatory and rulemaking context. It is unlikely that the court would have meant to include the latter. The *Miller* case involved a hearing before a county valuation protest board which denied the protesting taxpayer the right to discovery by deposition of the County Assessor and of the State Property Appraisal Department. *Miller*, 88 N.M. at 495, 542 P.2d at 1185.

244. 104 N.M. 565, 725 P.2d 244 (1986).

procedural due process.²⁴⁵ The court held that NMIEC had a continuous opportunity to demand discovery and failed to do so.²⁴⁶ Furthermore, NMIEC failed to show how formal discovery procedures would have gained the group any more information than was available through the Task Force.²⁴⁷

5. Statement of Reasons

Agencies conducting adjudicatory hearings are required to enter findings of fact and conclusions of law.²⁴⁸

The practical reasons for requiring *administrative findings* . . . have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdictions.²⁴⁹

A case decided during the survey period that illustrates these principles is *Padilla v. Real Estate Commission of New Mexico*.²⁵⁰ The Real Estate Commission (Commission) revoked Padilla's license to sell real estate due to representations Padilla made on Commission forms filed prior to taking the real estate licensing exam.²⁵¹ The Commission concluded that

245. *Id.* at 568, 725 P.2d at 247. PNM proposed an "inventoried capacity methodology" to deal with the issue of rate treatment of excess capacity of electricity generating stations. *Id.* at 566, 725 P.2d at 245. NMIEC intervened and became a member of the Task Force created by the PSC to study the question and propose an appropriate ratemaking methodology. *Id.* The Task Force arrived at a Stipulation which NMIEC did not sign. *Id.* The Commission approved the Stipulation, and NMIEC filed an application for rehearing, which was not granted. *Id.* NMIEC then appealed. *Id.*

246. *Id.* at 568, 725 P.2d at 247.

247. *Id.*

248. This principle was reaffirmed during the survey period in *Cibola Energy Corp. v. Roselli*, 105 N.M. 774, 778, 737 P.2d 555, 559 (Ct. App. 1987). See *infra* notes 249-50. *Cibola* involved a protest of valuation made by the Valencia County Assessor. 105 N.M. at 775, 737 P.2d at 556. The court set aside the valuation, finding it unsupported by substantial evidence and arbitrary. *Id.* at 778, 737 P.2d at 559. *Cibola* had also complained that the Board's refusal to enter findings of fact and conclusions of law was contrary to law. *Id.* The court did not need to reach this issue to decide the case, but it nevertheless addressed it "as an aside." *Id.* Although the court found in this case that it was able to make a determination regarding the Board's findings, it went out of its way to emphasize the necessity for an agency to "indicate [its] reasoning . . . and the basis on which it acted." *Id.* (quoting *First Nat'l Bank v. Bernalillo County Valuation Protest Board*, 90 N.M. 110, 115, 560 P.2d 174, 179 (Ct. App. 1977)).

249. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.05 at 444 (1958), quoted in *Cibola*, 105 N.M. at 778, 737 P.2d at 559.

250. 106 N.M. 96, 739 P.2d 965 (1987); see also *Cibola*, 105 N.M. 774, 778, 737 P.2d 555, 559 (expense to parties and Board incurred in entering findings of fact and conclusions of law not valid reason for failure to enter same).

251. *Padilla*, 106 N.M. at 97, 739 P.2d at 966. The following question appeared on the registration forms: "Do you have any unpaid liens or judgments filed against you?" Padilla answered "No" on the forms. *Id.* At the time, there were outstanding judgments against Padilla to recover payment of student loans. *Id.*

the representations were false or fraudulent in violation of the Uniform Licensing Act.²⁵² The Commission failed to enter findings of fact and conclusions of law as to each element of fraud, however, and the court was unable to resolve whether Padilla actually committed fraud.²⁵³ In addition, the Commission findings failed to show the court that the misrepresentations were "substantial," which was an essential element of false representation and which would allow the Board to revoke Padilla's license.²⁵⁴ Therefore, the court remanded the case to the Commission with directions to enter proper findings of fact and conclusions of law.²⁵⁵

6. Rejection of Decision of Hearing Officer

In a significant case overruling earlier precedent, the New Mexico Court of Appeals, in *Board of Education of Melrose Municipal Schools v. New Mexico State Board of Education*,²⁵⁶ considered the process by which a state board may adopt a decision contrary to a hearing officer's recommendations.²⁵⁷ In *Melrose Municipal Schools*, the State Board of Education rejected the findings of its hearing officer without reviewing the transcript of either the Local Board hearing or the hearing conducted by its hearing officer.²⁵⁸ In an earlier case with similar facts, *Board of Education of Alamogordo Public Schools District No. 1 v. Jennings*,²⁵⁹ the court had held that the State Board did not have to hear new evidence, review the transcript of the hearing before the hearing officer or defer to the hearing officer's decision.²⁶⁰ Citing Judge Donnelly's dissent in *Jennings*, the *Melrose* court overturned the *Jennings* decision to the extent that the court now requires that before the State Board rejects the decision of its hearing officer, at the very least, the Board must review enough of the transcript of the proceedings before the hearing officer to support its decision.²⁶¹ The court pointed out that this requirement rises to the level

252. *Id.* The Uniform Licensing Act provision is N.M. STAT. ANN. § 61-29-12 (Repl. Pamph. 1983 & Cum. Supp. 1986).

253. The Commission's findings did not resolve whether Padilla intended to deceive and to induce the Commission to act in reliance upon a misrepresentation of a fact known by Padilla to be untrue, which are the elements of a fraudulent misrepresentation. *Padilla*, 106 N.M. at 97-98, 739 P.2d at 966-67.

254. *Id.* at 98, 739 P.2d at 967.

255. *Id.*

256. 106 N.M. 129, 740 P.2d 123 (Ct. App. 1987). See *supra* notes 219-28 and accompanying text.

257. 106 N.M. at 131-32, 740 P.2d at 125-26.

258. *Id.* at 130, 740 P.2d at 124.

259. 98 N.M. 602, 651 P.2d 1037 (Ct. App. 1982).

260. *Melrose Mun. Schools*, 106 N.M. at 130-31, 740 P.2d at 124-25 (citing *Jennings*, 98 N.M. 602, 651 P.2d 1037).

261. *Id.* at 131, 740 P.2d at 125. This may require review of the entire record, but does not mean "that each Board member individually inspect every line of the record as compiled by the Board and the hearing examiner." *Id.* (quoting from *Megill v. Board of Regents of Fla.*, 541 F.2d 1073, 1080 (5th Cir. 1976)).

of constitutional due process whenever the credibility of a witness is at issue.²⁶² The *Jennings* decision was left intact insofar as it holds the State Board need not take new evidence to reverse the decision of its hearing officer, even on points turning on the credibility of witnesses.

7. Subsequent Proceedings

In *Board of Education of Santa Fe Public Schools v. Sullivan*,²⁶³ the issue was whether termination proceedings against a teacher could be reinstated after the original termination proceedings were reversed on procedural grounds.²⁶⁴ The New Mexico Supreme Court held that where the original termination proceedings were reversed due to a procedural defect, the Local Board of Education could reinstate termination proceedings, correct the procedural defect, and rely upon the same alleged acts of misconduct that had been relied upon in the original proceedings.²⁶⁵

F. Enforcement of Rules

There were two cases decided during the survey period relating to whether agencies can enforce the rules they promulgate. One involved the question whether disciplinary prison rules need be filed with the State Records Administrator to be enforceable. The other was a case of first impression regarding when an agency rule may be stayed pending appeal.

Under the State Rules Act,²⁶⁶ certain rules and regulations must be filed with the State Records Administrator to be effective.²⁶⁷ In *Johnson v. Francke*,²⁶⁸ inmates at the New Mexico State Penitentiary in Santa Fe brought an action against the Secretary of Corrections seeking a declaratory judgment that rules and regulations governing conduct and discipline of prisoners were unenforceable because they had not been filed in

262. "Where, as in this case, the ultimate decision rests upon the credibility of . . . major witnesses, a review of the hearing officer's report, without review of the entire record in the case, does not accord the fundamental due process." *Id.* (quoting from *Jennings*, 98 N.M. at 614, 651 P.2d at 1049 (Donnelly, J., dissenting)).

263. 106 N.M. 125, 740 P.2d 119 (1987).

264. During the first termination proceeding, the Santa Fe Board of Education terminated Sullivan's teaching contract on the grounds of incompetence and insubordination. *Id.* The State Board reversed the termination based upon the Local Board's failure to comply with the Open Meetings Act. *Id.* The Local Board then recommenced termination proceedings against Sullivan. *Id.* The Board relied on the same alleged misconduct that was relied upon in the previous proceeding and again terminated Sullivan. *Id.* The State Board reversed this termination on the ground that the Local Board's reliance upon the same misconduct in subsequent proceedings was a prejudicial departure from required procedures. *Id.*

265. *Id.* at 126, 740 P.2d at 120.

266. N.M. STAT. ANN. §§ 14-3-24, 14-3-25, 14-4-1 to -9 (1978 and Cum. Supp. 1987).

267. *Id.* See also *Rivas v. Board of Cosmetologists*, 101 N.M. 592, 686 P.2d 934 (1984), *supra* notes 152-62 and accompanying text (repeal of regulation invalid for failure to file with State Records Administrator).

268. 105 N.M. 564, 734 P.2d 804 (Ct. App. 1987).

accordance with the State Rules Act.²⁶⁹ The Corrections Department Act provides that "[a]ll rules and regulations shall be filed in accordance with the State Rules Act."²⁷⁰ The State Rules Act provides that no rule will be enforceable until it is filed in the state's record center.²⁷¹ The Act, however, defines "rule" to exclude "rules relating to the management, confinement, discipline or release of inmates of any penal or charitable institution."²⁷²

The New Mexico Court of Appeals interpreted both Acts and held that the Corrections Act means that filing of rules must be conducted consistent with the entirety of the State Rules Act and in a manner not repugnant to any of the latter Act's provisions.²⁷³ Because the State Rules Act specifically exempts disciplinary prison rules, the Correction Secretary can enforce those rules without filing them with the State Records Administrator.²⁷⁴

In *Tenneco Oil Co. v. New Mexico Water Quality Control Commission*,²⁷⁵ the court of appeals announced a standard for courts to follow, in the absence of any statutory provision, in deciding whether to grant a stay of an agency regulation during its appeal. In *Tenneco*, the plaintiffs appealed from a Commission order adopting amendments to certain regulations²⁷⁶ and applied to stay enforcement of the regulatory amendments during the pendency of their appeal.²⁷⁷ While there was no specific statute governing the granting of such a stay, the court held that it had implied power to grant the stay incident to its power to review final administrative orders.²⁷⁸

The court announced a preliminary-injunction-like test to determine whether a stay in such a case should be granted: 1) is it likely that the applicant will prevail on the merits of the appeal, 2) will the applicant suffer irreparable harm unless the stay is granted, 3) will no substantial harm result to other interested persons, and 4) will no harm ensue to the public interest.²⁷⁹ In *Tenneco*, the plaintiffs had not alleged specifically

269. *Id.* at 564-65, 734 P.2d at 804-05.

270. *Id.* at 566, 734 P.2d at 806 (quoting N.M. STAT. ANN. § 9-3-5(E) (Repl. Pam. 1983)).

271. N.M. STAT. ANN. § 14-4-5 (1978).

272. *Johnson*, 105 N.M. at 566, 734 P.2d at 806 (quoting N.M. STAT. ANN. § 14-4-2(C) (1978)).

273. *Id.*

274. *Id.* at 567, 734 P.2d at 807.

275. 105 N.M. 708, 736 P.2d 986 (Ct. App. 1986), *cert. denied*, 106 N.M. 714, 749 P.2d 99 (1988).

276. The amendments set more stringent numerical standards for discharge of substances which are controlled by the Commission. *Id.* at 709, 736 P.2d at 987.

277. *Id.* The case was joined with another case, *Navajo Refining Co. v. New Mexico Water Quality Control Comm'n*, 105 N.M. 708, 736 P.2d 986 (1986). Both Navajo and Tenneco applied for the stay. *Id.*

278. *Id.*

279. *Id.* at 710, 736 P.2d at 988. The court adopted the test articulated in *Associated Sec. Corp.*

in what manner irreparable harm would result unless a stay was granted. The court found insufficient cause to grant the stay under the above standard.²⁸⁰

IV. JUDICIAL CONTROL OF ADMINISTRATIVE POWER

Judicial review is an independent guarantee of the legality of administrative action. As one commentator has put it,

From the point of view of an agency, the question of the legitimacy of its action is secondary to that of the positive solution of a problem. It is for this reason that we, in common with nearly all of the Western countries, have concluded that the maintenance of legitimacy requires a judicial body independent of the active administration.²⁸¹

During this survey period, there were many cases elucidating the following precepts of judicial review: the appropriate timing of review, the appropriate standard of review, the limitations on review imposed by both the legislature and the judiciary, and the cost of appeal.

A. Timing of Judicial Review

There were three cases during the survey period which dealt with the timing of judicial review. One case involved the issue of whether an order was final and thus appealable; two cases concerned the timeliness of an appeal; and one of the latter cases also dealt with notification of the appeal procedure.

1. Judicial Review of Final Action

*Harris v. Revenue Division of Taxation & Revenue Department*²⁸² presented a conflict between an agency order that purported to be appealable and a statute that provided clearly that the order was not appealable. In *Harris*, an administrative hearing officer dismissed the Harris' administrative appeal of the denial of a solar rebate on their state tax return.²⁸³ Mr. and Mrs. Harris appealed the dismissal of their case.²⁸⁴ The statute governing the taxpayers' appeal contemplated that a final and appealable

v. Securities & Exchange Comm'n, 283 F.2d 773 (10th Cir. 1960), and *Teleconnect Co. v. Iowa State Commerce Comm'n*, 366 N.W.2d 511 (Iowa 1985). *Id.*

280. *Tenneco*, 105 N.M. at 710, 736 P.2d at 988.

281. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 323 (1965).

282. 105 N.M. 721, 737 P.2d 80 (Ct. App. 1987).

283. The Harrises filed a protest about the denial, but failed to comply with the deadline for filing their brief. *Id.* at 722, 737 P.2d at 81. The Taxation & Revenue Department filed a motion to dismiss, which the hearing officer granted. *Id.* The Harrises filed a motion to reconsider the order of dismissal. It was denied. *Id.*

284. The Harrises filed an appeal from the hearing officer's order of dismissal and denial of their motion to reconsider. *Id.*

order would be one signed by the Department director.²⁸⁵ The order that was the subject of the appeal was not approved or signed by the director, and therefore was not an appealable order under the statute.²⁸⁶ However, the order itself did instruct the Harrises that they could appeal it.²⁸⁷ The court, nevertheless, easily held the order not to be final or appealable because it had not been submitted to a superior for approval.²⁸⁸ The court remanded the case to the Department to have the director take some action on the order.²⁸⁹

2. Timeliness of Appeal

The court in *James v. New Mexico Human Services Department, Income Support Division*²⁹⁰ has painted a bright line for deciding whether the court rule or the statute governs when they both purport to rule an aspect of the appeal of an agency decision but they are inconsistent. In *James*, a supreme court rule provided that notwithstanding any other provision of law, a notice of appeal must be filed within thirty days from the date of an order.²⁹¹ The statute, however, provided that a party could take an appeal within thirty days of "receiving written notice of the decision."²⁹² The court found that because the provisions at issue dealt with a time limitation on the right to appeal, the New Mexico Supreme Court rule governed over the inconsistent statute.²⁹³ In so finding, the court pointed out that the holding would be otherwise if the provisions at issue dealt with the right to appeal or the appropriate court to hear the appeal.²⁹⁴

285. N.M. STAT. ANN. § 7-1-25 (Repl. Pamp. 1983) reads as follows:

If the . . . claimant is dissatisfied with the action and order of the director after a hearing, he may appeal to the court of appeals for further relief[.] . . . All such appeals . . . shall be taken within thirty days of the date of mailing or delivery of the written decision and order of the director to the protestant or claimant . . .

105 N.M. at 722, 737 P.2d at 81 (emphasis added). During the appeal, this section was amended and the word "director" was changed to "secretary." *Id.* at 722 n.1, 737 P.2d at 81 n.1.

286. *Id.* (citing N.M. STAT. ANN. § 7-1-24(H) (Repl. Pamp. 1983)).

287. *Id.*

288. *Id.*

289. *Id.* at 722-23, 737 P.2d at 81-82.

290. 106 N.M. 318, 742 P.2d 530 (Ct. App.), cert. quashed, 106 N.M. 353, 742 P.2d 1058 (1987).

291. *Id.* at 319, 742 P.2d at 531. SCRA 1986, 12-601(A) provides that "[n]otwithstanding any other provision of law, direct appeals from orders, decisions or actions of boards, commissions, administrative agencies or officials shall be taken by filing a notice of appeal . . . within thirty (30) days from the date of the order, decision or action appealed from."

292. N.M. STAT. ANN. § 27-3-4(A) (Repl. Pamp. 1984).

293. *James*, 106 N.M. at 319, 742 P.2d at 531.

294. The plaintiffs had relied on the case of *In Re Application of Angel Fire Corp.*, 96 N.M. 651, 634 P.2d 202 (1981), to argue that the statute should govern. 106 N.M. at 319, 742 P.2d at 531. In that case the court held that where a statute establishes which orders may be appealed and the procedure for taking a case out of the administrative framework and into court, the statutory

These provisions, it said, are jurisdictional, while time limits have long been held to be peculiarly within the power of the judiciary to set.²⁹⁵

3. Notification of Appeal Procedure

The plaintiff in *James*²⁹⁶ also contended that the Human Services Department (HSD) was required to notify her directly of her right to appeal and that the notification must include accurate advice about the time for taking an appeal.²⁹⁷ The administrative decision told James that she could appeal within thirty days of receipt of the notice.²⁹⁸ However, this information was based on the agency's belief that the statutory time for appeal applied, rather than the supreme court rule's time for appeal. As a result of the court's decision that the supreme court rule applied,²⁹⁹ the information the agency gave James was incorrect, and James' appeal was filed too late to comply with the supreme court rule.³⁰⁰ The court rejected James' argument, finding the statute only required notification of the right to review.³⁰¹ The court would not imply an additional requirement that the agency provide complete advice concerning the right to judicial review.³⁰² Furthermore, the court held that it had no discretion to suspend the application of the offending rule.³⁰³

B. Scope of Review

The scope of review available to courts is traditionally broad. A court may review and uphold, or set aside, agency findings of fact, agency conclusions of law, and agency actions. There are, however, different standards which the courts must follow depending on what aspect of the agency decision is being appealed. Cases decided during this survey

process must be complied with, even though the statute conflicts with a court rule. *Angel Fire*, 96 N.M. at 652, 634 P.2d at 203. The *James* court distinguished its case from *Angel Fire* by stating that *James* dealt with a time limitation on the right to appeal rather than a method of appealing, which is jurisdictional. *James*, 106 N.M. at 319, 742 P.2d at 531. The *James* court also cited *American Auto. Ass'n v. State Corp. Comm'n*, 102 N.M. 527, 697 P.2d 946 (1985), in support of its holding. 106 N.M. at 319, 742 P.2d at 531. In *American Auto. Ass'n*, there was a conflict between N.M. STAT. ANN. § 65-2-120(G) (Repl. Pamp. 1981), which gave parties in motor carrier cases 60 days to appeal, and N.M.R. Civ. App. 3(a) (Repl. Pamp. 1984), which allowed the parties only 30 days to appeal. *American Auto. Ass'n*, 102 N.M. at 528, 697 P.2d at 947. The court held that the applicable rule was the court rule. *Id.* at 528, 697 P.2d at 947.

295. *James*, 106 N.M. at 319, 742 P.2d at 531.

296. *Id.* at 318, 742 P.2d at 530.

297. *Id.* at 320, 742 P.2d at 532.

298. *Id.*

299. Discussed *supra* notes 290-95 and accompanying text.

300. *James*, 106 N.M. at 320, 742 P.2d at 532.

301. *Id.* at 320, 742 P.2d at 532.

302. *Id.* The court noted that other details of obtaining review were also not included in the notice, such as filing a notice of appeal. *Id.*

303. *Id.*

period show how courts decide which standard to apply during their review, and show how the courts apply the contrary to law and substantial evidence standards.

1. Appropriate Standard of Review

There are generally three accepted standards for review of administrative decisions: substantial evidence, arbitrary and capricious, and "otherwise not in accordance with law."³⁰⁴ The determination of which standard to apply in a given case can be unclear.³⁰⁵ The following case reads like a textbook example of how courts properly choose and apply the appropriate standard of review.³⁰⁶

In *Perkins v. Department of Human Services*,³⁰⁷ the court of appeals used all three standards of review in analyzing the case. Plaintiff Thompson was employed as county office manager and plaintiff Perkins was employed as a supervisor for the Human Services Department's (HSD) Dona Ana County office.³⁰⁸ HSD terminated Perkins and Thompson for various charges arising out of the sexual and physical abuse of a teenage girl whom HSD had placed in a foster home.³⁰⁹ The State Personnel Board affirmed the decision of HSD and the district court upheld the decision of the Board.³¹⁰ On appeal, the court of appeals first applied the substantial evidence rule³¹¹ and determined that substantial evidence supported the findings of fact by the Personnel Board and the district court.³¹² The court then reviewed the Board decision and applied the arbitrary and capricious standard.³¹³ The court's role on appeal under this standard is to review

304. 1983-84 *Administrative Law Survey*, *supra* note 1, at 145.

305. *See id.* at 145 n.164.

306. *But cf.* *Elliott v. New Mexico Real Estate Comm'n*, 103 N.M. 273, 275, 705 P.2d 679, 681 (1985), also discussed *supra* text accompanying notes 100-09, where the court affirmed the lower court's statutory interpretation, citing to the substantial evidence test:

Elliott argues that the Commission had no jurisdiction over the parties or the subject matter of the proceeding because the legislative grant of authority . . . does not include the sale of a real estate contract. We disagree. The district court found that Elliott is a real estate broker as defined in Section 61-29-2(A) and that he represented himself as such and acted in that capacity. Furthermore, the contract itself indicated that Elliott was being employed in a broker's capacity. He also received a commission for the transaction. Under these facts, there was substantial evidence to support the district court's judgment.

307. 106 N.M. 651, 748 P.2d 24 (Ct. App. 1987).

308. *Id.* at 652, 748 P.2d at 25.

309. *Id.*

310. *Id.* at 653, 748 P.2d at 26.

311. The court used the whole record substantial evidence standard as outlined in *Trujillo v. Employment Sec. Dep't*, 105 N.M. 467, 734 P.2d 245 (Ct. App. 1987), discussed *infra* notes 336-52 and accompanying text. *Perkins*, 106 N.M. at 654, 748 P.2d at 27.

312. *Perkins*, 106 N.M. at 655, 748 P.2d at 28.

313. *Id.*

the record to determine whether there has been unreasoned action without proper consideration for the facts and circumstances.³¹⁴ Where the court could form two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration.³¹⁵ Because the findings in *Perkins* were supported by substantial evidence, those findings, in turn, supported the conclusions of the Board and the district court.³¹⁶

The court then applied the "not in accordance with law" standard.³¹⁷ Plaintiffs claimed that they did not know of the alleged abuse of the HSD ward and that they were not the proper officials to report the abuse.³¹⁸ Therefore, plaintiffs argued, they could not be held responsible for the abuse and their dismissal was not in accordance with law.³¹⁹ The court found, however, that both employees had a duty to oversee and supervise, in a reasonably diligent manner, the safety of children entrusted to HSD in their county.³²⁰ The court found they had breached this duty.³²¹ Therefore, the decision of the agency was in accordance with law and the appeals court affirmed the decisions of the district court and the Personnel Board.³²²

2. Question of Law; Statutory Interpretation

Most of the statutory interpretation cases the courts decided during the survey period add little to an administrative law survey because they dealt only with the substantive law.³²³ The substantive law interpreted in *Varoz v. New Mexico Board of Podiatry*,³²⁴ however, is the statute of limitations

314. *Id.*

315. *Id.*

316. *Id.* at 656, 748 P.2d at 29.

317. *Id.* The term "not in accordance with the law" involves agency action which is based on an error of law, is arbitrary and unreasonable, or is based on conjecture and is inconsistent with established facts. *Id.*

318. *Id.* At this point, the court did review evidence which was contrary to the decision of the hearing officer appointed by the State Personnel Board.

319. *Id.* at 656, 748 P.2d at 29.

320. *Id.*

321. *Id.*

322. *Id.* at 657, 748 P.2d at 30.

323. See, e.g., *Perkins*, 106 N.M. at 651, 748 P.2d at 24 (duty of HSD employees); *Public Serv. Co. of New Mexico v. New Mexico Pub. Serv. Comm'n*, 106 N.M. 622, 747 P.2d 917 (public utility law); *New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 104 N.M. 565, 725 P.2d 244 (1986) (public utility law); *In re Electrical Serv. in San Miguel County*, 102 N.M. 529, 697 P.2d 948 (public utility law); *Climax Chemical Co. v. New Mexico Env'tl Improvement Bd.*, 106 N.M. 14, 738 P.2d 132 (environmental law); *Patterson v. Env'tl Improvement Div.*, 105 N.M. 320, 731 P.2d 1364 (Ct. App. 1986) (environmental law); *In re Proposed Revocation of Food & Drink Purveyor's Permit for House of Pancakes*, 102 N.M. 63, 691 P.2d 64 (Ct. App. 1984) (environmental law); and *Grauerholtz v. New Mexico Labor and Indus. Comm'n*, 104 N.M. 674, 726 P.2d 351 (1986) (labor law). For a discussion of how courts use agency interpretations of the laws they administer, see *supra* notes 58-120 and accompanying text.

324. 104 N.M. 454, 722 P.2d 1176 (1986).

provision of the Uniform Licensing Act, which does have implications for administrative law. In this case, the Board revoked Dr. Varoz's license to practice podiatry based on Varoz's criminal conviction on fraud charges.³²⁵ Dr. Varoz argued that the statute of limitations for an action to revoke a professional license had run with respect to all of his convictions except one.³²⁶ The court interpreted the statute of limitations provision of the Uniform Licensing Act³²⁷ which limits the time within which an agency can revoke, suspend or withhold renewal of a license. Under this provision, the limitation period begins to run from the date of the licensee's culpable conduct.³²⁸ The court held that such "conduct" does not include a criminal conviction.³²⁹ Thus, the board can pursue license revocation for criminal conduct if it does so within two years of the conduct, but it cannot rely on the licensee's criminal conviction for such conduct as a basis for otherwise extending the two year statute of limitations.³³⁰ With respect to the three convictions which the Tenth Circuit upheld in Varoz's case, the limitation period had completely expired on one of Varoz's convictions. The Board should not have considered that conviction and the underlying conduct.³³¹ The Board's action on the convictions under the other two counts, however, occurred well within the statute of limitation time period.³³²

3. Question of Fact; Substantial Evidence

The substantial evidence standard is the most frequently used in judicial

325. See *supra* notes 181-85 and accompanying text.

326. *Varoz*, 104 N.M. at 455, 722 P.2d at 1177. § 61-8-11(B) of the Podiatry Act, N.M. STAT. ANN. §§ 61-8-1 to -17 (Repl. Pamp. 1981), listed ten "reasons" for which a license could be suspended or revoked, including "conviction of a crime involving moral turpitude." *Varoz*, 104 N.M. at 455, 722 P.2d at 1177.

327. N.M. STAT. ANN. § 61-1-3.1 (Repl. Pamp. 1986). It provides:

A. No action which would have any of the effects specified in Subsections D, E or F of Section 61-1-3 NMSA 1978 may be initiated by a board later than two years after the conduct which would be the basis for the action.

B. The time limitation contained in Subsection A of this section shall be tolled by any civil or criminal litigation in which the licensee or applicant is a party arising from substantially the same facts, conduct, transaction or transactions which would be the basis for the board's action.

Subsections D, E and F of N.M. STAT. ANN. § 61-1-3 (Repl. Pamp. 1986), referred to in subsection A, above, deal with board hearings (1) to withhold the renewal of a license for any cause other than failure to pay the required renewal fee; (2) to suspend a license; and (3) to revoke a license, respectively.

328. *Varoz*, 104 N.M. at 455, 722 P.2d at 1177.

329. *Id.*

330. The court also pointed out that N.M. STAT. ANN. § 61-1-3.1(B) (Repl. Pamp. 1986) provides that the two year period is tolled by any criminal litigation arising from the same conduct. *Id.* at 456-57, 722 P.2d at 1178-79. Assuming there is a conviction, this criminal litigation is final pending appeal. *Id.* at 457, 722 P.2d at 1179.

331. *Id.* at 458, 722 P.2d at 1180.

332. *Id.*

review of administrative findings of fact.³³³ During the last survey period, in *Duke City Lumber Co. v. New Mexico Environmental Improvement Board (Duke City II)*,³³⁴ the supreme court adopted the "whole record" scope of review for review of agency findings of fact under the substantial evidence test. Previously, New Mexico's scope of review under this test required the court to view the evidence in the light most favorable to the agency, ignoring any contrary evidence.³³⁵ During this survey period, the court of appeals in *Trujillo v. Employment Security Department*³³⁶ sought—a bit unsuccessfully—to clarify the new "whole record review" test.³³⁷

The *Trujillo* court was concerned with two aspects of the substantial evidence test enunciated in *Duke City II* and subsequently applied by the supreme court. First, it was confused whether some language in *Duke City II*, taken from an earlier case, authorized New Mexico courts to make independent findings in agency review cases where the court nevertheless found the agency decision supported by substantial evidence.³³⁸ The court noted that the holding in that earlier case was to the contrary.³³⁹ Therefore, the *Trujillo* court concluded, the "true meaning" of this dicta was that a court *could not* make an independent finding if the agency's finding was supported by substantial evidence (using the new scope of review) but that a court *could* make an independent finding if the agency finding was unsupported by substantial evidence.³⁴⁰

333. For cases decided during the survey period using the substantial evidence standard, see *State Dep't of Transp., Motor Vehicle Div. v. Romero*, 106 N.M. 657, 748 P.2d 30 (Ct. App. 1987); *Cibola Energy Corp. v. Roselli*, 105 N.M. 774, 737 P.2d 555 (Ct. App. 1987); *Board of Educ. of Melrose Municipal Schools v. New Mexico Bd. of Educ.*, 106 N.M. 129, 740 P.2d 123 (Ct. App. 1987); *New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 104 N.M. 565, 725 P.2d 244 (1986); *Board of Educ. of Taos Municipal Schools v. Singleton*, 103 N.M. 722, 712 P.2d 1384 (Ct. App. 1985); *Attorney Gen'l of State of New Mexico v. New Mexico Pub. Serv. Comm'n*, 101 N.M. 549, 685 P.2d 957 (1984).

334. 101 N.M. 291, 681 P.2d 717 (1984). For a discussion of this case and its significance, see 1983-84 *Administrative Law Survey*, *supra* note 1, at 148-50 and Browde, *Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution*, 18 N.M. L. REV. 525 (1988) [hereinafter cited as *Substantial Evidence Reconsidered*].

335. *Trujillo v. Employment Sec. Dept.*, 105 N.M. 467, 469, 734 P.2d 245, 247 (Ct. App. 1987); 1983-84 *Administrative Law Survey*, *supra* note 1, at 149 n.179.

336. 105 N.M. 467, 734 P.2d 245.

337. The discussion of the new substantial evidence standard in *Duke City II* was quite confusing. See *infra* notes 338-46 and accompanying text and *Substantial Evidence Reconsidered*, *supra* note 334, at 530-35. The post *Duke City II* supreme court decisions have also "fail[ed] to resolve what the whole record standard is supposed to mean." *Substantial Evidence Reconsidered*, *supra* note 334, at 539.

338. 105 N.M. at 469, 734 P.2d at 247. In *Duke City II*, the court had said, "Because of the minor departure from the customary substantial evidence rule in reviewing administrative decisions where the record as a whole must be considered, the reviewing court may act on other convincing evidence in the record and may make its own findings based thereon." 101 N.M. at 294, 681 P.2d at 720 (quoting *New Mexico Human Servs. Dep't v. Garcia*, 94 N.M. 175, 177, 608 P.2d 151, 153 (1980)).

339. *Trujillo*, 105 N.M. at 469, 734 P.2d at 247. The *Garcia* court's holding permitted independent findings only if the Board's findings were not supported by substantial evidence. *Id.*

340. *Id.* at 469-70, 734 P.2d at 247-48.

Although the court is undoubtedly correct in its former interpretation, its latter pronouncement is of concern.³⁴¹ This pronouncement calls into question the relative roles of the judiciary and the administrative agency. The court of appeals seems to imply that if a variety of conclusions can be drawn from a given record, a court can properly draw the one it wishes (if the agency has already drawn one incorrectly). It seems inappropriate for the court to assume the fact-finding power that the legislature has delegated to the agency.³⁴² The better course would be for the court to remand the case to the agency to make a new finding of fact supported by substantial evidence. The appellate court would still be able to void any arbitrary finding of the agency on appeal.

The second concern of the *Trujillo* court was that the supreme court in *Duke City II*, and in subsequent decisions, stated that in applying the new whole record scope of review, it would "view the evidence in the light most favorable to the decision" by the agency.³⁴³ The *Trujillo* court found this approach contrary to the supreme court's adoption of the whole record scope of review.³⁴⁴ Apparently, the *Trujillo* court felt that in rejecting the old scope of review (which required the courts to view the evidence in the light most favorable to the agency, ignoring contrary evidence³⁴⁵), the court could no longer look at *any* of the evidence in the light most favorable to the agency. Therefore, the *Trujillo* court concluded that what the supreme court really meant was that the court had to view the evidence "in light of the entire record" rather than in the light most favorable to the agency.³⁴⁶

In a recent case, however, the supreme court, without citing the *Trujillo* case, rejected this interpretation of its adoption of whole record review.³⁴⁷ Rather, the supreme court reaffirmed that it would "view the evidence in the light most favorable to the agency decision," while emphasizing that it would "not view favorable evidence with total disregard to contravening evidence."³⁴⁸ Although these two positions may at first blush seem contradictory, it is not too difficult to see how they may be rec-

341. For further discussion on this point, see *Substantial Evidence Reconsidered*, *supra* note 334, at 544-49.

342. For a case decided during the survey period in support of this view see *Tapia v. City of Albuquerque*, 104 N.M. 117, 717 P.2d 93 (Ct. App. 1986) (district court had the power to set aside administrative order but exceeded its authority by modifying the order).

343. *Trujillo*, 105 N.M. at 470, 734 P.2d at 248.

344. *Id.* For further discussion on this point, see *Substantial Evidence Reconsidered*, *supra* note 334, at 540-44.

345. *Trujillo*, 105 N.M. at 470, 734 P.2d at 248.

346. *Id.*

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

348. *Id.* at 282, 756 P.2d at 562.

onced. First, the court may merely be stating that it is not going to substitute its judgment for that of the agency if the agency's conclusion is supported by substantial evidence. Second, the supreme court may be saying that it is going to defer to the weight given to particular facts by the agency and to inferences drawn by the agency from the facts presented.³⁴⁹ These are long-standing practices in federal courts operating under the whole record scope of review.³⁵⁰

While it is laudable that the *Trujillo* court sought to clarify whole record review, it may be that Professor Davis is correct in observing that "scope of review may have infinite dimensions that can be sensed but not articulated."³⁵¹ Davis' message is that, "Everyone—legislators, judges, practitioners, and critics—should learn from the experience of the past quarter of a century that refining the verbalisms about scope of review is not merely unprofitable but harmful."³⁵² In keeping with this admonition, we move without adieu to our next section.

C. Limitations on Judicial Review

The legislature, or the court itself, may impose limitations on judicial review. All the cases decided this survey period involve legislatively imposed limitations, including restriction of the right to judicial review, the requirement of exhaustion of administrative review prior to judicial review, the requirement of district court review prior to appellate court review, statutory criteria for standing and provisions limiting venue.

1. Lack of Jurisdiction

Before judicial review occurs, a court must have proper jurisdiction. In several cases during the survey period, the appeal was dismissed by the district court or a higher appellate court because there was no statutory authority to bring an appeal.³⁵³ Illustrative of these cases is *United Nuclear Corp. v. Fort*.³⁵⁴ The Environmental Improvement Division denied United Nuclear Corp.'s (UNC) request for an exemption from certain radiation

349. See, e.g., *Tapia*, 104 N.M. at 120, 717 P.2d at 96 ("The trial court does not reweigh evidence nor does it substitute its judgment for that of the administrative factfinder," citing *Mutz v. Municipal Boundary Comm'n*, 101 N.M. 694, 688 P.2d 12 (1984)).

350. See, e.g., ADMINISTRATIVE LAW TREATISE, *supra* note 65, § 29:25 at 448-51; ADMINISTRATIVE LAW AND REGULATORY POLICY, *supra* note 65, at 207 ("For most judges, the greater the apparent importance of specialized agency experience in evaluating data, the greater the deference they will accord to agency factual conclusions.").

351. ADMINISTRATIVE LAW TREATISE, *supra* note 65, § 29:27 at 460.

352. *Id.* § 29:27 at 457.

353. See, e.g., *State ex rel. Pilot Dev. Northwest, Inc. v. State Health Planning & Dev. Bureau*, 102 N.M. 791, 701 P.2d 390 (Ct. App. 1985) (nursing home had no right to appeal hearing officer's denial of motion to reconsider denial of application).

354. 102 N.M. 756, 700 P.2d 1005 (Ct. App. 1985).

regulations.³⁵⁵ UNC appealed and filed suit in district court.³⁵⁶

The district court dismissed the action, concluding that it had no jurisdiction over the matter because the Division actions were not "licensing actions" which would give the court jurisdiction.³⁵⁷ The New Mexico Court of Appeals, however, reversed and held that the Agency's denial of an exemption from Division regulations did constitute a licensing action, and thus, the district court did have appellate jurisdiction to review the Division's denial of UNC's exemption request.³⁵⁸

2. Exhaustion

In order to obtain judicial review, appellants may be required to exhaust potential administrative remedies. In *Madrid v. Department of Insurance*,³⁵⁹ the supreme court interpreted the Bail Bondsmen Licensing Law³⁶⁰ and the Uniform Licensing Act³⁶¹ and concluded that the correct avenue of appeal from an order of the Superintendent of Insurance revoking a bail bondsmen license is by petition to the State Corporation Commission.³⁶² Only after a hearing by the Commission can the licensee appeal to the district court.³⁶³

3. Second-Tier Review

On occasion, statutes provide that appellants must first appeal to a district court and then may appeal to higher courts (sometimes called second-tier judicial review).³⁶⁴ For example, in *Eastern Indemnity Co. of*

355. UNC applied to the Division for an exemption from radiation regulations that required UNC to stabilize and provide liquid treatment for uranium tailings and tailings ponds. *Id.* at 758, 700 P.2d at 1007.

356. *Id.*

357. *Id.* The court determined the actions were not "licensing actions" within the meaning of N.M. STAT. ANN. § 74-3-9(E) (Repl. Pamp. 1983). *Id.* Section 74-3-9(E) reads as follows:

Any person who is or may be affected by licensing action of the agency may appeal for further relief to the district court in which the subject facilities or activities are located. All such appeals shall be upon the agency's administrative records. . . .

358. *United Nuclear*, 102 N.M. at 759, 700 P.2d at 1008.

359. 102 N.M. 442, 697 P.2d 125 (1985).

360. N.M. STAT. ANN. §§ 59-51-1 to -19 (1984).

361. N.M. STAT. ANN. §§ 61-1-1 to -31 (Repl. Pamp. 1986).

362. *Madrid*, 102 N.M. at 443, 697 P.2d at 126. The Superintendent of Insurance suspended *Madrid's* property bondsman and limited surety agency licenses. *Id.*

363. *Id.* In the revision of the Insurance Code effective January 1, 1985, a licensee may appeal to the district court after a hearing before either the Corporation Commission or the Insurance Board. *Id.* at 444, 697 P.2d at 127. Even under the new statute, a direct appeal to the court from an order of the superintendent is not authorized. *Id.* at 444-45, 697 P.2d at 127-28.

364. For a criticism of second-tier substantial evidence review see 1983-84 *Administrative Law Survey*, *supra* note 1, at 150-52. *Tapia v. City of Albuquerque*, 104 N.M. 117, 717 P.2d 93 (Ct. App. 1986), is a survey period case involving second-tier review.

Maryland v. Heller,³⁶⁵ the court of appeals held that there was no provision of law which allowed the court to directly review a wage claim determination of the Labor and Industrial Commission.³⁶⁶ Rather, the aggrieved party must first appeal to district court and then could appeal the district court's decision to the court of appeals.³⁶⁷

4. Standing

Appellants must have standing to invoke the power of the court.³⁶⁸ The question of standing relates to whether the litigant is entitled to have the court decide the merits of the appeal.³⁶⁹ In two cases decided during the survey period, the courts decided that the plaintiffs lacked standing to appeal the agency decision in their case.

In *Webb v. Fox*,³⁷⁰ F&W Enterprises (F&W) applied to the Dona Ana County Planning Commission for a special use permit for property which was owned by C.L. Crowder Investment Co. and which F&W intended to buy.³⁷¹ The Commission denied the application.³⁷² F&W then appealed the denial to the County Board of Zoning Appeals.³⁷³ The Board reversed the decision of the Commission and granted F&W a special use permit.³⁷⁴ F&W subsequently purchased the Crowder property.³⁷⁵

Plaintiffs, owners of residential property near the land in question, appealed the decision of the Board.³⁷⁶ Plaintiffs contended that the Board lacked jurisdiction to hear F&W's appeal from the Commission decision because F&W was not an "aggrieved person" who had standing to appeal under the statute.³⁷⁷ The court interpreted "aggrieved person" to mean a

365. 102 N.M. 144, 692 P.2d 530 (Ct. App. 1984).

366. *Id.* at 145, 692 P.2d at 531.

367. *Id.* at 146, 692 P.2d at 532. *See also In re Twining Water & Sanitation Dist.*, 101 N.M. 738, 688 P.2d 775 (1984) (appeal from order of PSC approving rates set by a water district must first be brought in district court).

368. *Allen v. Wright*, 468 U.S. 737 (1984).

369. *Id.* at 750-51.

370. 105 N.M. 723, 737 P.2d 82 (Ct. App. 1987).

371. *Id.* at 724, 737 P.2d at 83. F&W intended to purchase the land and develop it in three phases. *Id.* The first phase involved construction of storage lockers and recreational vehicle parking spaces. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* The special use permit was for phase one of the project but was for a different site than previously requested.

375. *Id.*

376. The plaintiffs filed a petition for certiorari to the district court. *Id.* The district court dismissed the petition. *Id.* The plaintiffs then appealed the district court decision to the court of appeals. *Id.*

377. *Id.* at 724-25, 737 P.2d at 83-84. N.M. STAT. ANN. § 3-21-8(B) (Repl. Pam. 1985) permitted an appeal from the planning commission's decision to the board of appeals "by any person aggrieved . . . or affected" or "by the applicant or by any other interested party." *Id.* at 725, 737 P.2d at 84.

zoning applicant who has a recognizable right or interest in the property at issue.³⁷⁸ Because F&W did not have either a legal or equitable interest in the property during the pendency of the zoning application,³⁷⁹ the court properly found that F&W lacked "standing" to appeal the decision of the Commission to the Board.³⁸⁰ The court of appeals ordered the trial court to enter an order reversing the decision of the Board and affirming the decision of the Commission.³⁸¹

In *State ex rel. Department of Human Services v. Manfre*,³⁸² Manfre appealed an order the Human Services Department (HSD) entered which affirmed its earlier submission of Manfre's name to the Internal Revenue Service to have his income tax refund intercepted so it could be applied to unpaid child support arrearages.³⁸³ The New Mexico Court of Appeals dismissed the case on the grounds that Manfre did not have standing to appeal the adverse decision of HSD.³⁸⁴ The statute limits appeals from fair hearing decisions of HSD to applicants or recipients of services or assistance from HSD.³⁸⁵ Because Manfre's hearing had nothing to do with his applying for, or receiving, assistance or services, the court held that it had no jurisdiction over Manfre's appeal.³⁸⁶

5. Venue

Another consideration for a court is whether there is proper venue—has the suit been brought in the proper place.³⁸⁷ In a matter of first impression in New Mexico, the court of appeals, in *United Nuclear Corp. v. Fort*,³⁸⁸ also decided the issue of venue when multiple claims are alleged

378. *Id.*

379. The court recognized that a prospective purchaser under an executed contract to purchase would have standing as would a prospective purchaser whose contract is conditioned upon receiving the zoning change. *Id.* Apparently F&W had neither. F&W argued that it had an equitable interest in the property by virtue of its application and an unsigned and undated warranty deed granting the property to F&W. *Id.* at 726, 737 P.2d at 85. The court did not view the record as supporting F&W's claims. *Id.*

380. *Id.*

381. *Id.* To hold to the contrary would arguably allow any stranger to a particular piece of land to seek a zoning change to it and appeal a denial.

382. 102 N.M. 241, 693 P.2d 1273 (Ct. App. 1984).

383. *Id.* at 241-42, 693 P.2d at 1273-74. The Child Support Enforcement Bureau submitted Manfre's name to the IRS for the interception of his federal income tax refund to partially reimburse the Department for Aid to Families with Dependent Children (AFDC), which had granted aid to Manfre's children. *Id.* Manfre appealed the agency's action but a fair hearing officer affirmed the agency determination. *Id.*

384. *Id.* at 243, 693 P.2d at 1275.

385. *Id.* at 242, 693 P.2d at 1274 (citing N.M. STAT. ANN. § 27-3-4 (Repl. Pamph. 1984)).

386. The court stated that its decision in *Manfre* did not leave Manfre without a remedy. 102 N.M. at 243 n.2, 693 P.2d at 1275 n.2. The court suggested Manfre could pursue a declaratory judgment in district court or apply for a writ of certiorari. *Id.* at 244, 693 P.2d at 1276.

387. 1980-81 *Administrative Law Survey*, *supra* note 1, at 33.

388. 102 N.M. 756, 700 P.2d 1005 (1985). See *supra* text accompanying notes 354-58.

and each claim is governed by a different venue statute. In this case, United Nuclear Corp. (UNC), which held a license to operate a uranium mill, filed suit after the Environmental Improvement Division denied UNC's request for an exemption from Division radiation regulations.³⁸⁹ In its complaint, UNC brought a claim against the Division Director, alleging she acted illegally, and also brought claims regarding the Division's licensing actions. Two venue statutes applied here. Section 38-3-1(G)³⁹⁰ required venue in Santa Fe County for claims against state officials. The court held this applied to UNC's claims against the Division Director.³⁹¹ Section 74-3-9(E)³⁹² allowed claims by persons affected by "licensing actions" to be brought in the county where the facilities or activities are located (McKinley County in the present case).

The court announced that when, as in this case, separate causes of action have different venue provisions, venue will lie where venue would be proper for the principal claim.³⁹³ Furthermore, a permissive venue statute must yield to a mandatory venue provision.³⁹⁴ The court interpreted Section 38-3-1(G) as a mandatory venue statute that controls as to every action brought against state officials.³⁹⁵ Thus, joinder of the several claims in UNC's complaint, in the interest of judicial economy, required the suit be brought in Santa Fe County.³⁹⁶

D. Cost of Appeal

In *Southern Pacific Transportation Co. v. Corporation Commission*,³⁹⁷ the supreme court held that the court, not the Corporation Commission, had the authority to determine who should bear the cost of preparing the appellate record on appeal.³⁹⁸ The Commission had assessed the cost to the appellants.³⁹⁹ Appellants objected to the assessment, arguing, *inter alia*, that the cost was unwarranted.⁴⁰⁰ Appellants pointed out that the

389. *Id.* at 758, 700 P.2d at 1007. UNC had sued in district court in McKinley County. The district court dismissed the appeal on the grounds that venue was improper and the Division action did not constitute a "licensing action." Thus, the court concluded it lacked jurisdiction. *See supra* text accompanying note 357.

390. N.M. STAT. ANN. § 38-3-1(G) (Cum. Supp. 1984) since amended by 1988 N.M. Laws, ch. 8 § 1; *see* N.M. STAT. ANN. § 38-3-1(G) (Cum. Supp. 1988).

391. *United Nuclear*, 102 N.M. at 761, 700 P.2d at 1010.

392. N.M. STAT. ANN. § 74-3-9(E) (Repl. Pamph. 1983).

393. 102 N.M. at 761, 700 P.2d at 1010.

394. *Id.*

395. *Id.*

396. *Id.*

397. 105 N.M. 145, 730 P.2d 448 (1986).

398. *Id.* at 150-51, 730 P.2d at 453-54.

399. *Id.* at 150, 730 P.2d at 453. The Commission said its authority to assess the appellants lay in Rule 64 of the Commission's Rules of Procedure. The Commission did not include this regulation in the record.

400. *Id.* The assessment was for \$1,589.00.

Commission is statutorily required to keep three copies of every transcript of every proceeding.⁴⁰¹ The Commission incurs no additional cost when a case is appealed by removal to the supreme court because it simply hands over these transcripts to the court.⁴⁰²

The court held that in cases where a transcribed record is already available on appeal, it, not the Commission, will determine who will bear the cost on removal.⁴⁰³ In this case, it found that since the appellants had prevailed on more claims than the Commission, it would be unfair to shift the cost of an already prepared record to them.⁴⁰⁴ The court stated in its opinion that the Commission's assessment for costs it had already paid had a "chilling effect" on appeals.⁴⁰⁵ Nevertheless, it declined to adopt any general rule prohibiting the shifting of this cost to appellants in all cases.

V. CONCLUSION

As the foregoing discussion of appellate cases decided from April 1, 1984, through January 31, 1988, shows, there were significant developments in each area of New Mexico administrative law during the survey period. Several decided cases also underscore the fact that some areas of New Mexico administrative law remain in need of clarification. In the area of authority of agencies to act, the supreme court rejected the public/private rights approach to determining the constitutionality of adjudicatory power delegated to administrative agencies, but it did not announce an alternative standard.⁴⁰⁶ In a case involving a statute purporting to delegate legislative power to private individuals, the court of appeals correctly held the statute to be unconstitutional. In doing so however, the court inappropriately used a test designed to prohibit unconstitutionally broad delegations of legislative power to administrative agencies. The use of this test threatens to hamper the appropriate adjudication of similar issues in future cases.⁴⁰⁷ Although the court of appeals and the supreme court decided many cases during the survey period involving statutes which had been interpreted by the agency designated to execute them, the courts left us with no clear guidance as to when they will defer to an agency's

401. N.M. STAT. ANN. § 63-7-13 (1978) requires the Commission to keep a file of the evidence and testimony, transcribed in triplicate, from each proceeding.

402. N.M. STAT. ANN. § 63-7-14 (1978) requires the clerk of the Commission to transmit to the supreme court the file of the proceeding being appealed from.

403. *Southern Pacific*, 105 N.M. at 151, 730 P.2d at 454.

404. *Id.*

405. *Id.* at 150, 730 P.2d at 453.

406. See *supra* text accompanying notes 8-35.

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

interpretation.⁴⁰⁸ Finally, despite well intentioned judicial attempts at elucidation, the now five-year-old “whole record review” test for reviewing agency findings of fact under the substantial evidence standard remains murky.⁴⁰⁹

408. *See supra* text accompanying notes 82-120.

409. *See supra* text accompanying notes 333-52.