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Delegation of Legislative Authority on the State Level: Environmental Protection in New Mexico: Public Service Co. of New Mexico et al. v. New Mexico Environmental Improvement Board

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DELEGATION OF LEGISLATIVE AUTHORITY ON THE STATE LEVEL; ENVIRONMENTAL PROTECTION IN NEW MEXICO: PUBLIC SERVICE CO. OF NEW MEXICO et al. v. NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD[1]

THE CASE

For over a decade the State of New Mexico, the Federal government, and power companies of New Mexico, Texas, California and Arizona have argued over the appropriate standards which could be adopted to assure New Mexico "clean air," and still allow the operation of coal gas fired electrical generating power plants in the Four Corners area. In 1975, the New Mexico Environmental Improvement Board attempted to enforce an amendment adopted by the Board in December, 1974,[2] which was aimed at lowering the allowable level of sulfur dioxide emissions of existing coal burning equipment.

The previous regulation,[3] adopted in 1972, simply placed a numbered level amount[4] of emissions which when reached meant any owner or operator of coal burning equipment in that area was then in violation of the standards and regulations. The 1972 regulation meant operators of existing coal burning equipment in the Four Corners Area could run their plants at the near maximum allowed pollutant levels, effectively preventing operation of any additional equipment. The new regulation attempted to conform to existing federal air quality standards as well as placing an equal burden upon the power companies as to the amount of emissions allowed for each particular piece of equipment. The action of the Board in adopting the amendment prompted appeals by the public service companies. Alleging the Board's enactment of the regulation was not in accordance with the law, the companies appealed seeking judicial review

1. PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico Corporation, and Tucson Gas and Electric Company, an Arizona Corporation, v. New Mexico Environmental Improvement Board, and ARIZONA PUBLIC SERVICE COMPANY, El Paso Electric Company, Public Service Company of New Mexico, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company and Tucson Gas and Electric Company v. Environmental Improvement Board, State of New Mexico, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

2. New Mexico Environmental Improvement Board, Ambient Air Quality Standards and Air Quality Control Regulations, § 602, adopted December 13, 1974.

3. New Mexico Health and Social Services Board, Ambient Air Quality Standards and Air Quality Control Regulations, § 602, adopted March 25, 1972.

4. *Id.* "... no person owning or operating ... coal burning ... equipment ... shall permit, cause, suffer or allow sulfur dioxide emissions ... in excess of one pound per million British Thermal Units of heat input."

of the Board's ruling. Two separate suits were filed which were later consolidated by the Court of Appeals.[5]

At the appellate review, the Board gave the following reasons for adopting the amendment:

A. To require 65% and 85%, and later in 1979, 90% sulfur dioxide control on existing smaller and larger coal burning equipment, respectively, will protect welfare, property, and the public interest by reducing the significance of air quality as a limiting factor to economic growth. By reducing the amount of sulfur dioxide permitted in the air from existing sources, more room will be made available, up to the state sulfur dioxide standard, for new industry in the Four Corners area.
B. The United States Environmental Protection Agency has required 70% sulfur dioxide control on coal burning equipment at Four Corners. In order for New Mexico to regain control over its air in the Four Corners region, the State must promulgate its own regulations, which must be approved by the Environmental Protection Agency. Those state regulations must be at least as strict as the E.P.A.'s under the requirements of the Federal Clean Air Act.
C. The 70% sulfur dioxide control required by the United States Environmental Protection Agency is technically practicable and economically reasonable.
D. The 65%, 85% and 90% emission controls have been shown to be technically practicable and economically reasonable and are attainable within the time frames set forth by the extension of time for reaching 90% control to two years.
E. By extending the time limitations for reaching 90% control to 1979, the Board feels industry will have the time it needs to test its equipment and get it properly working.
F. There is evidence to describe how a single source may preempt other sources if it is allowed to contaminate up to the standards.
G. There is evidence to show that a higher controlled efficiency is necessary because of the effects of visibility.[6]

Judge Hernandez, writing the majority opinion for the Court of Appeals, questioned the legality of each of the six reasons in turn. Reasons "A," "B," and "F," he found, arise from the Board's recognition of the likelihood of more development in the Four Corners area. Because of that development, the Board considered that a reduction in the present sulfur dioxide standards would allow the accommodation of new industry. Judge Hernandez found there is

5. Cause No. 1922 and No. 1923.
6. *Supra* note 1.

nothing in the Board's mandate which would give it authority to plan for this future development. He states:

> The authority granted an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy—*Carrol v. Tarburton, 209 A.2d 86 (Del. 1965).* However, such an approach to construction does not warrant allowing an administrative agency to amend or enlarge its authority under the guise of making rules and regulations.[7]

Judge Hernandez considered reasons "D" and "E" relevant, but only if it could be shown necessary to adopt the modification of the Regulation. After reviewing the testimony of the expert witnesses for both sides, Judge Hernandez noted that: " . . . it is not a court's function to substitute its opinion for that of the administrative boards. . . . However, this is in situations where there is a difference or a conflict in the evidence, not a complete absence."[8]

After referring to § 12-12-12, N.M.S.A., 1953,[9] Judge Hernandez decided that there was no evidence in the record to show any necessity or "need," for changing the present statute. As to reason "C," Judge Hernandez found "no relevancy in this context."[10]

Judge Hernandez summarily dismissed reason "G," finding nothing in the record to support the Board's final reasoning. He refers to Webster's Dictionary[11] finding that sulfur dioxide is a "heavy colorless, nonflammable gas" and then concludes that the record contains no evidence to show that the gas can combine with other elements to become visible.

After having reviewed the dissenting opinion of Judge Lopez, Judge Hernandez attempts to elucidate his opinion "lest others become confused."[12]

> The board having set a standard is bound by it. . . .[13] It has the continuing authority to change the standard, after proper notice and hearing, and to adopt regulations to implement or explain it. However, it may not set a new standard or adopt regulations implementing or explaining it for any reason other than to "prevent or abate air pollution.

7. *Supra* note 1, at 642.

8. *Supra* note 1, at 644.

9. § 12-12-13, N.M.S.A. 1953 (Repl. Vol. 3, Supp. 1975) states in part: "Upon appeal, the Court of Appeals shall set aside the regulation only if found to be . . . not supported by substantial evidence in the transcript."

10. *Supra* note 1, at 642.

11. As cited in the opinion: "Webster's Third International Dictionary, Unabridged (1971)."

12. *Supra* note 1, at 645.

13. The opinion cites Pellman v. Herms, 87 N.M. 410, 534 P.2d 112 (Ct. App. 1975) and Davis v. Dept. of Health and Social Services, 87 N.M. 79, 499 P.2d 1001 (Ct. App. 1972).

In closing, Judge Hernandez refers to the dissenting opinion and offers further explanation of the reasoning followed by the Court. But, even with this reference, it is impossible to reconcile the two opinions. Within the first paragraph of Judge Lopez's dissent, a confusion between the two sides is apparent. The minority opinion states that the majority has failed to review the relevant statutory authority given to the Board and that statutory authority can be found for the Board to make such regulation amendments for the reasons the board has given in presenting its case.[14]

Judge Lopez states[15] that pursuant to § 201 of the Air Quality Control Regulations,[16] standards are not designed to "provide a sharp dividing line between air of satisfactory quality and air of unsatisfactory quality." Under the Federal Clean Air Act,[17] New Mexico must submit a plan specifying how the State will meet the national standards for sulfur dioxide emissions.[18] He points out that New Mexico's plan was rejected insofar as it related to sulfur dioxide emission controls in the Four Corners area because it failed to meet stricter standards adopted by the Federal Environmental Protection Agency. The Federal Environmental Protection Agency had proposed acceptance of the amendment that was the subject of this litigation.

Continuing to rely upon the New Mexico Air Quality Control Act[19] and the record before the Court, Judge Lopez reviews the Board's reasons for adopting the amendment. He notes that the Board has the authority to deny a permit for any new sources which emit any hazardous air pollutant.[20] This is also backed by the federal provision[21] which provides new permits must be denied if granting them will allow pollutants at a level above the standard applied by the Board.

Defining the fundamental issue of the case to be the substantive manner in which emission regulations are measured and defined, Judge Lopez states his view of the Board's position:

> The standard does not control the emissions regulations; different factors were stressed in arriving at a standard than in arriving at a permissible emission level. The Board argues that its statutory

14. *Supra* note 1, at 646-47.
15. *Supra* note 1, at 645-46.
16. New Mexico Air Quality Control Act, § 12-14-1 N.M.S.A. 1953 (Repl. Vol. 3, Supp. 1975).
17. 42 U.S.C. § 1957 *et seq.* (1976).
18. 42 U.S.C. § 1857 c-5(a)(1) (1975).
19. *Supra* note 16.
20. *Supra* note 16, § 12-14-7(C)(3).
21. 42 U.S.C. § 1857 c-5(a)(2)(D) (1976).

> mandate requires it to set the emission regulation after examination of various considerations; *it is not directed to merely select a standard and then tailor the emissions regulation to fit it.*[22] (emphasis added)

Judge Lopez then finds support for the Board's position directly from the enabling statute.[23] Pointing out that the term "regulations" includes "standards," he concludes that the legislative intent was to require the Board to consider the public interest as well as social and economic factors before making both regulations and standards. This is buttressed by the definition of "air pollution" as defined in the Act:[24] "air contaminants in such quantities and duration as may with reasonable probability injure human health, animal or plant life, . . ." Since the Board "prevents and abates"[25] air pollution, it can therefore enforce regulations that are concerned with air pollution of less hazardous properties than that which will "with reasonable probability injure human health, animal or plant life." Also, further indication of this legislative intent can be found in the statute[26] and in case law which indicates that local boards may promulgate stricter regulations than those established by the state.[27]

After showing the Board is not compelled to set regulations to meet the standard, the remaining task, according to Justice Lopez is whether the Board acted in accordance with the law. Referring to reasons "A" and "F" given by the Board, which concerned the proposed pollutant level requirements and the fact that under the present standards one source could preempt all other sources, Judge Lopez recognizes the problem addressed by the Board: The present 1972 regulations allow pollution up to the level of the standards, thus preventing any new industry which produces any pollution. While the majority opinion contends the Board has no authority to regulate on that basis, Judge Lopez finds that authority in the enabling statute.[28] The definition of "public interest" is broad enough, in his view, "to permit the Board to weigh how the public will best be served" and to consider the social and economic value of the new

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22. *Supra* note 1, at 646.

23. § 12-14-5 N.M. Stat. Ann. (Repl. Vol. 3 Supp. 1975) reads in part: "In making its regulations, the Board shall give weight it deems appropriate to all facts and circumstances including but not limited to . . . (b) the *public interest*, including the *social* and *economic value* of the sources and subjects of air contaminants." (emphasis added)

24. *See* § 12-14-2 (B) N.M. Stat. Ann. (Repl. Vol. 3, Supp. 1975).

25. *See* § 12-14-5 (B) (1) N.M. Stat. Ann. (Repl. Vol. 3, Supp. 1975).

26. § 12-14-2 (B) N.M. Stat. Ann. (Repl. Vol. 3, Supp. 1975).

27. Citing Wylie C.C. v. Albuquerque-Bernalillo C.A.C.B, 80 N.M. 633, 459 P.2d 159 (Ct. App. 1969).

28. § 12-14-2 (B) (1) (b) N.M. Stat. Ann. (Repl. Vol. 3, Supp. 1975).

industries which the area expects to attract.[29] Judge Lopez warns that none of these considerations are limited in time and furthermore that "the Board *could be considered derelict* in its duties if it did *not* plan for the future effect of the decisions it makes today."[30] (emphasis added)

As to reason "B," Judge Lopez cites again to the statutes[31] and adds:

> Practical reasons dictate that the Board is justified in acting to obtain control over New Mexico's air. Unless the Board regains this authority, the legislative intent that a new New Mexico agency deal with questions of air quality, as indicated by establishing this Board, will be frustrated. Further, if the Board continues to promulgate regulations below the federal requirements, its actions will be without effect, a result we cannot assume the legislature desired.[32]

As to the majority opinion regarding the interpretation of the conflicting evidence, Judge Lopez feels the Court has overstepped the boundaries of appellate review. He cites testimony from the record which refutes that relied on in the majority opinion and concludes that there is substantial evidence to support the Board's findings.

Finally, in reference to the majority opinion's reliance on the dictionary in order to show sulfur dioxide as a colorless gas, Judge Lopez cites testimony given by the New Mexico Lung Association and the Air Pollution Primer[33] and introduced by the Board, which supported its position that sulfur dioxide control is necessary to prevent interference with visibility.

DELEGATION OF LEGISLATIVE POWERS

THE LAW:

On the federal level, it has long been established that Congress may delegate legislative powers.[34] Because of disparities in the

29. *Supra* note 1, at 645.

30. *Id.*

31. § 12-14-3 N.M. Stat. Ann. (Repl. Vol. 3, Supp. 1975) states in part: "The Board is the state air pollution control agency . . . and may take all action necessary to secure this state . . . the benefits of such federal acts." *See also* 42 U.S.C. 1857 c-2(a) (1975), which gives primary responsibility to each state to maintain the air quality standards in that state.

32. *Supra* note 29.

33. Citing National Tuberculosis and Respiratory Disease Association, New York, New York 1971.

34. There are only two cases that have reached the U.S. Supreme Court in which congressional delegation was ruled invalid for reasons of inadequacy and vagueness. Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241 (1935) and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837 (1935). The Court has specifically held the phrases "public interest" and "public convenience or necessity" as adequate "standards"

economic, social and political factors in state governments, any development of meaningful standards to support delegation at the state level has failed.[35] Professor Davis, in his Administrative Law Treatise, states:

> Typically a regulatory agency must decide many *major* questions that could not have been anticipated at the time of the statutory enactment; typically, legislators are unable to write meaningful standards that will be helpful in answering such major questions; and typically, *the protections lie much less in standards than in frameworks of procedural safeguards plus executive, legislative or judicial checks.*[36]

Delegation on the state level, while not differing greatly in theory from the federal level, has been much slower in gaining acceptance by the courts. While some courts have adopted the federal view,[37] the New Mexico Court of Appeals decision falls in the category described by Professor Davis as "typical."[38] Proponents of a non-delegation theory at the state level, such as Judge Hernandez, may be able to justify their argument, by pointing to the lack of legislative intent to delegate rule-making powers. The State Legislature in New Mexico meets on a part-time basis, and because of personal schedules, may not be able to devote the time necessary to develop standards to properly grant law-making powers. Legislative drafting may be less skilled than that on the federal level, and all too often closing hours of sessions bring about the "last-ditch" efforts of special interest groups[39] slowing the legislative efficiency.

Here, however, the New Mexico Court of Appeals has ignored the guidance of the United States Supreme Court concerning whether authority has been delegated. As pointed out by Judge Lopez, the

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for delegation. New York Central Securities Corp. v. United States, 287 U.S. 12, 53 S.Ct. 45 (1932) and Federal Radio Comm. v. Nelson Bros. Bond and Mortgage Co., 289 U.S. 266, 53 S.Ct. 627 (1933).

35. K. DAVIS, ADMINISTRATIVE LAW, CASES-TEXTS-PROBLEMS 36-37 (5th ed. 1973).

36. *Id.*

37. Barry and Barry v. Department of Motor Vehicles, 81 Wash.2d 155, 500 P.2d 540 (1972). Matz v. Curtis Cartage Co., 132 Ohio 237, 7 N.E.2d 220 (1937).

38. *Supra* note 35, at 39-40:

> The typical state court opinon strings together some misleading cliches about standards and announces the conclusion. . . . (It) fails to say anything about (1) the reasons for the legislative choice to make the particular delegation, (2) the practical consequences of allowing the legislature to do what it is trying to do . . . (5) the need for protection against unfairness, arbitrariness, and favoritism, (6) the importance of procedural safeguards . . . or (7) the need for providing help to the Legislature in its search for practical and efficient ways of accomplishing (its) objectives.

39. *Id.*

same enabling phrase which has permitted delegation on the federal level for over forty years,[40] Section 12-14-5(b) of the New Mexico Statutes Annotated,[41] grants the Board the power to concern itself with "public interest." The majority opinion becomes tangled in the web of standards and regulations, failing to review the legislative intent, the procedural safeguards of the agency, or the practical consequences of upholding the Board's decision. Finally, it falls short of teaching the legislature a method of accomplishing its intent.

CONCLUSION

In reading the two opinions of the case, one must wonder how the two could be concerned with the same case. Because the majority fails to meet head-on with the dissent, they do not form the two sides of a legal argument. Judge Lopez, by dealing directly with the statutes delegating authority to the Board, finds many areas in the record which the majority refuses to address.

One must question the energy companies which spend thousands of dollars each year to continue their legal battles for lower, less restrictive standards, the same standards that have resulted in the air pollution problem in the Four Corners area.

Finally, we must question the Court of Appeals for its "typical" opinion in this case. Professor Davis first published his views on state delegation in 1958, but the Courts have been slow in adopting any of them. With more applications for new coal-fired electrical power industries on the desks of the New Mexico Environmental Improvement Agency, the Environmental Improvement Board plans to return to the courts in the near future. Thus, arguments concerning air pollution control authority in the Four Corners area will continue.

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40. *Supra* note 34.

41. *Supra* note 23.

*In the 33rd Legislative Session of the State of New Mexico 1977 House Bill #199, introduced by William E. Warren and Frank M. Bond, proposed an amendment to the Air Quality Control Act. The amendment added one sentence to the Act which read: "Regulations prescribing air contaminant limitations applicable to sources, may be more restrictive than necessary to meet air standards." The House General Session defeated the bill.