Opinion No. 65-38

March 2, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Roy G. Hill, Assistant Attorney General

TO: Honorable Hoyt Pattison, State Representative, Curry County State Capitol, Santa Fe, New Mexico

QUESTION

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Is the provision contained in Subsection B of House Bill No. 436, which provides that new or additional evidence may be submitted to the District Court on an appeal from a decision of the State Engineer, constitutional?

CONCLUSION

No.

OPINION

*{*64}* ANALYSIS

Subsection B of House Bill No. 436 is not substantially different from the present de novo provision in Section 75-6-1, N.M.S.A., 1953 Compilation. The provision for a de novo proceeding contained in the present section would include the provision contained in the new language of Subsection B regarding the submission of new or additional evidence by the parties. **In re Pine's Estate,** Ill. App., 149 N.E.2d 787, 16 Ill. App.2d 584; **Hiner v. Wenger,** 91 S.E.2d 637, 639, 197 Va. 869.

The Supreme Court of New Mexico in **Kelley v. Carlsbad Irrigation District,** 71 N.M. 464, held that regardless of the de novo provisions in 75-6-1, supra, a district court in reviewing a decision of the State Engineer could not hear new or additional evidence. Prior to the **Kelley** decision the Supreme Court had indicated in several cases that it would, when presented with the question of the proper scope of review of a decision of an administrative body by a district court, hold as it did in **Kelley.** The court finally so held in **Continental Oil Co. v. Oil Conservation Commission,** 70 N.M. 310 and it was this decision that controlled the **Kelley** case.

In the **Continental** case the court had to decide whether or not the Oil Conservation Commission in concerning itself with the protection of correlative rights was acting in an administrative or judicial capacity. The court concluded that this was an administrative matter because the protection of correlative rights is so closely related to prevention of

waste. The court was concerned with this question because it was faced with determining the scope of review of the district court over a ruling of the Oil Conservation Commission. After determining that protection of correlative rights was an administrative function the court pointed out that if such protection was not so closely related to prevention of waste the Commission would probably be acting in a judicial capacity and grave constitutional problems would arise. The court then followed with its discussion of the district court's scope of review. This discussion was quoted and relied on in Kelley, supra, and since it controls the answer to your question we quote it here:

". . . For the same reason, it must follow that, just as the commission cannot perform a judicial function, neither can the court perform an administrative one. See, Omeara v. Union Oil Co. of California, 1948, 212 La. 745, 33 So.2d 506; Fire Department of City v. City of Fort Worth, 1949, 147 Tex 505, 217 S.W.2d 664; Bartkowiak v. Board of Supervisors, 1954, 341 Mich. 333, 67 N.W.2d 96; and Cicotte v. Damron, 1956, 345 Mich. 528, 77 N.W.2d 139. This is the net effect of the admission and consideration by the trial court of the additional evidence in *{*65}* this case. **Such a procedure inevitably leads to the substitution of the court's discretion for that of the expert administrative body. We do not believe that such procedure is valid constitutionally.** See Johnson v. Sanchez, 1960, 67 N.M. 41, 351 P.2d 449, and the cases cited therein. **Insofar as § 65-3-22(b), supra, purports to allow the district court, on appeal from the commission, to consider new evidence to base its decision on the preponderance of the evidence or to modify the orders of the commission, it is void as an unconstitutional delegation of power,** contravening art. III, § 1, of the New Mexico constitution . . ." (Emphasis added.)

In a very recent decision the New Mexico Supreme Court again discussed the problem of the scope of review of a district court of an appeal from an administrative body, reaffirmed its previous position and discussed therein the **Kelley** decision. **Llano, Inc. v. Southern Union Gas Co.,** Supreme Court No. 7508 issued December 21, 1964. Following is the language used by the court in **Llano,** supra, in speaking of the holding in **Kelley,** supra:

". . . In Kelley v. Carlsbad Irrigation District, supra, the statute purporting to allow the court to consider new evidence and to exercise its independent judgment on the record before the administrative agency was held to be void as an unconstitutional delegation of power contravening Art. III, § 1 of the New Mexico Constitution."

In view of the very clear decisions of the New Mexico Supreme Court in the cases noted above, it is our opinion that Subsection B of House Bill No. 436 is legally the same provision contained in Section 75-6-1 as it presently reads and as such is an unconstitutional provision.