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Administrative Law Survey: Transportation

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ADMINISTRATIVE LAW SURVEY: TRANSPORTATION

INTRODUCTION

The creation of administrative agencies indicates a need for expertise in various industries. Congress and the courts have shifted the responsibility of governing certain sectors to agencies, which are equipped to regulate the details of those sectors and are qualified to pay particular attention to an industry's operation.[1] Administrative power relieves the judicial and legislative processes of the details of regulation,[2] leaving the judiciary to define and interpret the limitations on agency power.[3]

While statutes and case law significantly restrict a court's ability to reverse agency determinations, the Federal Administrative Procedure Act ("APA")[4] permits a court to overturn agency action if the reviewing court finds the agency's conclusions to be "arbitrary and capricious,"[5] or unsupported by "substantial evidence."[6] While the APA sets forth other circumstances in which courts shall review agency action,[7] "substantial evidence"[8] review and "arbitrary and capricious"[9] review are the two standards most often used to review agency fact-findings.[10] Both of these standards are highly deferential to agency decision-making,[11] and regardless of whether the reviewing court would have reached the same decision as the agency, the standards dic-

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1. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23 (1938).

2. *Id.* at 46.

3. *See generally* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1194 (1986) (explaining that regulatory legislation "leav[es] an open field" for courts to delineate the "contours of administrative power").

4. 5 U.S.C. §§ 551-559, 701-706 (1994).

5. *See* 5 U.S.C. § 706(2)(A) (1994) (stating that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

6. *See id.* § 706(2)(E) (stating that courts shall utilize the substantial evidence test whenever they review formal agency action in accordance with §§ 556 and 557 of the APA).

7. *Id.* § 706(2)(B)-(D), (F).

8. The "substantial evidence" standard was well established before the APA was enacted in 1946. *See, e.g.*, Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938) (defining substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

9. Courts have struggled to define "arbitrary" and have relied on the Supreme Court's guidance when employing this standard. CHARLES H. KOCH JR., ADMINISTRATIVE LAW AND PRACTICE §§ 2.34-2.41 (1985).

10. *See, e.g.*, BERNARD SCHWARTZ, ADMINISTRATIVE LAW 597 (1984) (stating that since 1912 "the substantial evidence rule has been the touchstone for review of agency fact-findings"); Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 934 (1972-73) (stating that arbitrary and capricious review and substantial evidence review are the two most frequently invoked statutory bases for setting aside agency decisions).

11. For a discussion of how the Supreme Court has applied these standards, and how the standards have evolved, see Matthew J. McGrath, Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541 (1986).

tate that the reviewing court will uphold the agency's decision if the decision is reasonable.[12]

During the 1994 survey period,[13] the Tenth Circuit applied both the "substantial evidence" and "arbitrary and capricious" standards to review agency decision-making. This Survey focuses on the Tenth Circuit's application of these standards in two transportation law cases. In both cases, the Tenth Circuit deferred to agency expertise.

In *Board of County Commissioners v. Isaac*,[14] the Tenth Circuit determined that it could not review the Federal Aviation Administration's ("FAA") decision to withdraw approval of certain funding.[15] The court concluded that the decision was committed to the FAA, and held that the FAA's decision was not arbitrary and capricious.[16] This Survey will question the court's "arbitrary and capricious" review, given its holding that allocation of funding is unreviewable as a matter of law.[17]

In *Committee to Preserve Boomer Lake Park v. Department of Transportation*,[18] the Tenth Circuit deferred to the Secretary of Transportation's decision to provide federal funds for the construction of a highway.[19] Judge Brorby, writing for the court, held that the Secretary acted within the scope of his authority in reaching his decision,[20] and concluded that the Federal Highway Administration's findings were not arbitrary and capricious.[21]

In both *Issac* and *Boomer Lake*, the Tenth Circuit chose to defer to agency decision-making. It appears clear from these and other cases, that the Tenth Circuit will rarely upset or overturn agency decisions.

I. WHEN A COURT CANNOT DECIDE: JUDICIAL REVIEW VS. COMMITTED TO AGENCY ACTION: *BOARD OF COUNTY COMMISSIONERS V. ISAAC*[22]

A. *Background*

1. Judicial Review of Agency Decision-Making

Agencies are created by the legislature and are governed by the terms of

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12. *See generally*, Lujan v. National Wildlife Fed'n, 497 U.S. 871, 885 (1990) (illustrating that the arbitrary and capricious standard gives substantial deference to agency fact-finding); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (explaining that the scope of judicial review is narrow and that a court may not "substitute its judgment for that of the agency").

13. The Tenth Circuit Survey period includes cases decided from September 1993 to December 1994.

14. 18 F.3d 1492 (10th Cir. 1994).

15. *Id.* at 1498.

16. *Id.*

17. *Id.*

18. 4 F.3d 1543 (10th Cir. 1993).

19. *Id.* at 1550.

20. *Id.*

21. *Id.* at 1553.

22. 18 F.3d 1492 (10th Cir. 1994).

the agency's enabling act. The agency structure differs, depending on the size and form of the particular administration.[23] An agency's functions also vary depending on the ends that the agency pursues.[24] Such functions may include: producing public goods,[25] transferring wealth to individuals,[26] subsidizing particular activities,[27] regulating a sector of the economy,[28] administering a public resource,[29] establishing rules for other decision processes,[30] promoting health, safety, and social values,[31] and providing internal oversight.[32] Most agencies perform a number of these tasks and it is often difficult to identify the core function of an agency.[33]

While it is the legislature's prerogative to grant agencies authority to effectuate and interpret their enabling statutes, it is the responsibility of the judiciary to review agency decision-making.[34] In reality, however, only a small number of agency decisions are actually subject to judicial review,[35] and even fewer are in fact overturned.[36]

The APA's provisions concerning judicial review of agency actions[37] state that any person "adversely affected" by agency action[38] is entitled to judicial review as long as the agency action is final.[39] The reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . . "[40] A court, however, may not review agency action that is committed to the agency's discretion by law.[41] Even in cases where Congress has not explicitly rejected judicial review, "review is not to be

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23. James v. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 401 (1986).

24. *Id.*

25. Examples of goods and services include defense, highways, weather reports, air traffic control, and criminal justice. *Id.* at 402.

26. These functions include programs such as welfare and social security. *Id.*

27. For example, farm and housing subsidies aid individuals in transferring wealth. *Id.*

28. This includes regulating modes of transportation, banking, energy, securities and communications. *Id.*

29. Agencies manage resources such as forests, oil fields, and grazing land. *Id.*

30. An example of government regulation in this arena is anti-fraud laws. *Id.* at 402-03.

31. Agencies "further important social goals that the free market may undervalue." *Id.*

32. *Id.*

33. *Id.* at 403-04.

34. WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 21 (2d ed. 1992).

35. *Id.* at 241.

36. *Id.* For statistics on the number of agency decisions that are overturned by courts, see Carl McGowan, *A Reply to Judicialization*, 1986 DUKE L.J. 217, 220 (1986).

37. *See* 5 U.S.C. §§ 701-706 (1994).

38. *See id.* § 702 (1994). This section of the APA, however, is limited by section 701(a). In order for there to be judicial review of agency action, "a party must clear the hurdle of §701(a)." Federal Deposit Ins. Corp. v. Bank of Coushatta, 930 F.2d 1122, 1127 (5th Cir. 1991) (citing Heckler v. Chaney, 470 U.S. 821, 828 (1985)).

39. *See* 5 U.S.C. § 704 (1994).

40. 5 U.S.C. § 706 (1994).

41. *See* 5 U.S.C. § 701(a)(2) (1994). For a general discussion of section 701(a)(2)'s exceptions to judicial review of agency action, see Lawrence G. Baxter, *Administrative and Judicial Review of Prompt Corrective Action Decisions by the Federal Banking Regulators*, 7 ADMIN. L.J. AM. U. 505, 555-60 (1994); Charles H. Koch, Jr., *An Issue-Driven Strategy for Review of Agency Decisions*, 43 ADMIN. L. REV. 511, 548-58 (1991); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[42]

In *Heckler v. Chaney*,[43] the Supreme Court concluded that an agency's refusal to pursue an enforcement action was "presumed immune from judicial review under [5 U.S.C.] § 701(a)(2)."[44] In other words, the Court included agency refusals to institute investigative or enforcement proceedings within the "committed to agency discretion" exception of the APA.[45]

Lower courts have struggled in applying the presumption of unreviewability announced in *Chaney*.[46] It has been argued that *Chaney* has threatened the continued reviewability of agency action and has left the lower courts with some unanswered issues.[47]

Several years later, in *Franklin v. Massachusetts*,[48] the Court addressed the issue of final agency action under section 704 of the APA.[49] *Franklin* involved an action against the President of the United States, the Secretary of Commerce, Census Bureau officials, and the Clerk of the House of Representatives.[50] The appellees claimed that the manner in which federal employees serving overseas were counted for census purposes was erroneous.[51] The Supreme Court, however, held that the agency's determination was unreviewable

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42. Heckler v. Chaney, 470 U.S. 821, 830 (1985); *see also* Lincoln v. Vigil, 113 S. Ct. 2024, 2030-32 (1993) (explaining that there are circumstances when the agency can best determine its spending priorities); Webster v. Doe, 486 U.S. 592, 599-600 (1988) (holding that the court may not review the Director of the Central Intelligence Agency's decision to discharge employees under section 701(a)(2) of the APA); United States v. Varig Airlines, 467 U.S. 797, 820 (1984) (holding that judicial intervention into the FAA's decision-making "would require the courts to 'second-guess' the . . . judgments of an agency exercising its regulatory function"); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (demonstrating that governmental action is reviewable except where there is a statutory prohibition on review or where agency action is committed by law to the agency's discretion). Section 701(a)(1) and 701(a)(2) differ in that "[s]ubsection (a)(1) is concerned with whether Congress expressed an intent to prohibit judicial review; subsection (a)(2) applies 'in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Webster*, 486 U.S. at 599 (quoting *Overton Park*, 401 U.S. at 410).

43. 470 U.S. 821 (1985). *Chaney* involved prison inmates sentenced to die by lethal injection. The inmates petitioned the Food and Drug Administration ("FDA"), arguing that the injections had not been approved for use in human executions. *Id.* at 823. The inmates challenged the FDA in court when the FDA refused to act on the inmates complaint. *Id.* at 825. The FDA argued that its refusal to take enforcement action was unreviewable, and the Court agreed that it could not review the FDA's determination under section 701(a)(2) of the APA. *Id.* at 832.

44. *Id.*

45. *Id.* at 838.

46. *See* Levin, *supra* note 41, at 753 (noting that "lower courts reviewing agency inaction have had to struggle with [*Chaney*'s] manifest ambivalence"); Donald M. Levy, Jr. & Debra J. Duncan, Note, *Judicial Review of Administrative Rulemaking and Enforcement Discretion: The Effect of a Presumption of Unreviewability*, 55 GEO. WASH. L. REV. 596, 612 (1987) (noting that appellate courts have reached inconsistent results in reviewing administrative decisions).

47. Abner J. Mikva, *The Changing Role of Judicial Review*, 38 ADMIN. L. REV. 115, 134-40 (1986).

48. 112 S. Ct. 2767 (1992).

49. *Id.* at 2773. 5 U.S.C. § 704 states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of final agency action. . . . " *Id.*

50. *Franklin*, 112 S. Ct. at 2770.

51. *Id.*

because there was no "final agency action."[52]

Franklin established a two-pronged test to help determine whether agency action is final and thus subject to judicial review. The Court stated that lower courts must determine "whether the agency has completed its decision[-]making process, and whether the result of that process is one that will directly affect the parties."[53] Judicial review is only appropriate when both of these questions are answered in the affirmative.[54] Lower courts have generally agreed with the holding and reasoning of *Franklin*,[55] and have avoided addressing substantive claims when the two-pronged *Franklin* test is not satisfied.[56]

2. The Federal Aviation Act

The Federal Aviation Act was enacted in 1958.[57] Under this Act, the Secretary of Transportation (Secretary) was given authority to promulgate and enforce regulations on all matters relating to the use of "navigable airspace."[58] The Secretary, in turn, delegated this authority to the Administrator of the Federal Aviation Administration (FAA).[59] The FAA is thus responsible for the "promotion, regulation, and safety of civil aviation,"[60] as well as for securing the use of airspace.[61] Among other things, the FAA maintains air traffic control, creates and enforces standards that govern the certification of civilian aviators, prepares the National Plan of Integrated Airport Systems which identifies airports eligible to receive grant-in-aid planning and development funds, and develops airport facilities in accordance with standards it establishes.[62]

Throughout the 1960s, the number of aircraft in the United States rapidly accelerated, motivating the federal government to increase funding for air-

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52. *Id.* at 2773.

53. *Id.*

54. *Id.* at 2774.

55. Cohen v. Rice, 992 F.2d 376, 381 (1st Cir. 1993); *see also* Public Citizen v. United States Trade Representative, 5 F.3d 549, 551 (D.C. Cir. 1993) (discussing the "core question" of agency action requirement from *Franklin*); Charles E. Smith Management, Inc. v. Aspin, 855 F. Supp 852, 857 (E.D. Va. 1994) (employing *Franklin*'s two-pronged analysis of agency action).

56. *Cohen*, 992 F.2d at 377. For a discussion of *Franklin* and the consequences of its holding, see Bernard Schwartz, *Administrative Law Cases During 1992*, 45 ADMIN. L. REV. 261, 266-68 (1993).

57. 49 U.S.C. app. §§ 1301-1557 (1988 & Supp. V 1993).

58. 49 U.S.C. app. § 1348(a). 49 U.S.C. app. § 1301(29) defines "navigable airspace" as "airspace above the minimum altitudes of flight prescribed by regulations . . . includ[ing] airspace needed to insure safety in take-off and landing of aircraft."

59. 49 C.F.R. § 1.47 (1994). The FAA superseded the Federal Aviation Agency under the Department of Transportation Act of 1966. JOHN R. WILEY, AIRPORT ADMINISTRATION AND MANAGEMENT 11 (1986). When the Department of Transportation Act was enacted, "[a] major reshuffling of aviation agencies took place." ROBERT M. HARDAWAY, AIRPORT REGULATION, LAW AND PUBLIC POLICY 19 (1991). In addition to the Federal Aviation Agency becoming the Federal Aviation Administration, certain responsibilities of the Civil Aeronautics Board ("CAB") were transferred first to the Department of Transportation and then to the National Transportation Safety Board ("NTSB"). *Id.* For more information on the CAB and the NTSB see *id.* at 13-16, 19, 21.

60. WILEY, *supra* note 59, at 33.

61. *Id.*

62. *Id.*

ports.[63] The FAA was charged with administering the Airport and Airways Trust Fund.[64] The Trust Fund derives its proceeds from domestic air passenger ticket taxes, air cargo, and aviation fuel taxes.[65] Monies are allocated from the Fund for airport development and improvement, helping to reduce general congressional appropriation.[66]

In the past few decades, building new airports has become less of an option than developing and enhancing existing ones.[67] The lack of accessible land, and Congress's hesitation to distribute capital from the Airport Trust Fund, are just a few of the reasons why only one major airport is presently planned in the United States for the rest of the century.[68] Environmental considerations such as aircraft noise, traffic flow to and from airports, and the smell of aircraft fuel, have also been an issue in airport projects.[69] When the National Environmental Policy Act ("NEPA") passed,[70] environmental issues were given primary attention in airport planning.[71] These reasons, taken together, may account for the fact that Dia has been the only major airport built in the United States since 1974.[72]

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63. *See* HARDAWAY, *supra* note 59, at 19.

64. 26 U.S.C. § 9502 (1988 & Supp. V 1993).

65. *See id.* § 9502(b).

66. *See id.* § 9502(d) (stating that "[a]mounts in the Airport and Airway Trust Fund shall be available . . . for making expenditures . . . to meet those obligations of the United States . . . which are attributable to planning, research and development, construction, or operation and maintenance of—(i) air traffic control, (ii) air navigation, (iii) communications, or (iv) supporting services, for the airway system"); *see also* HARDAWAY, *supra* note 59, at 19-20. While the Fund was established to finance airport development projects, at least one critic has argued that "the fund is used as an accounting gimmick to artificially balance the [federal] budget." Pat Schroeder, *Colorado's New Airport Beginning to Take Wing*, ROCKY MTN. NEWS, Sept. 29, 1989, at 65.

67. Robert Hardaway, *Economics of Airport Regulation*, 20 TRANSP. L.J. 47, 52 (1991).

68. *Id.* That airport, the Denver International Airport, was scheduled to open back in 1993. Ann Carnahan, *3,000 Gather to Celebrate Start of Work on Airport*, ROCKY MTN. NEWS, Nov. 23, 1989, at 8. However, since 1993, DIA was forced to postpone the opening four times. *Business Aviation Briefs; Denver International Airport*, WKLY. BUS. AVIATION (McGraw-Hill, Inc., New York, N.Y.), Sept. 26, 1994, Vol. 59, No. 13. DIA did not open until February 28, beginning operations 16 months late and $3 billion over budget. Stephen J. Hedges et al., *A Taj Mahal in the Rockies*, U.S. NEWS & WORLD REPORT, Feb. 13, 1995, at 48.

69. *See* HARDAWAY, *supra* note 59, at 63; Wiley, *supra* note 59, at 125; *see also* MICHAEL J. MESHENBERG, PLANNING THE AIRPORT ENVIRONMENT 5, 7 (1968) (explaining that "noise is the most pervasive of the environmental effects of airports" and that jet emissions may cause concern).

70. 42 U.S.C. §§ 4321-4370 (1988 & Supp. V 1993). In NEPA, Congress declared:

> [I]t is the continuing policy of the Federal Government . . . to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and to fulfill the social, economic, and other requirements of present and future generations of Americans.

Id. § 4331(a) (1988).

NEPA requires federal agencies to prepare a detailed statement on the environmental impact ("EIS") of all major federal actions that will significantly affect the quality of the human environment. *Id.* § 4332(2)(C) (1988). Thus, airport planners must prepare an environmental assessment ("EA") in order to determine whether an EIS is necessary. C.A.R.E. NOW, Inc. v. FAA, 844 F.2d 1569, 1571-72 (11th Cir. 1988).

For an account of how NEPA has affected administrative law, see Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1284-88 (1986).

71. *See generally* HARDAWAY, *supra* note 59, at 74-75 (explaining that environmental issues were of paramount influence in the 1970s).

72. Denver International Airport was the first major airport built since Dallas/Ft. Worth

B. *Tenth Circuit Opinion*: Board of County Commissioners v. Isaac

1. Facts

In February of 1995, the city of Denver replaced Stapleton International Airport with a new airport ten miles northeast of Stapleton.[73] As a result, cargo carriers operating out of Stapleton were forced to relocate in order to continue their businesses.[74] Several carriers disapproved of and rejected the new site, Denver International Airport, because it did not provide the carriers with acceptable access to interstate highways.[75]

In 1991, Adams County, the Front Range Airport Authority ("FRAA"), and Centerport International, Inc., presented an offer to the FAA to expand a nearby aviation facility, Front Range Airport ("Front Range"), into an air cargo hub as an alternative to DIA.[76] Early in 1992, the FAA authorized the proposal,[77] and allocated $15 million under the Airport Improvement Program[78] to expand the facilities to serve mass air cargo traffic anticipated in the Denver metropolitan area.[79] Subject to certain revisions and bids from cargo carriers, the FAA informed the parties that it would allocate funds for fiscal year 1992. However, the FAA made no commitment to provide funds beyond 1992.[80]

Following FAA approval of FRAA's proposal and prospective granting of financial support, FRAA began soliciting cargo carriers to sign long-term lease options.[81] FRAA was successful in obtaining a small number of lease agreements while several companies expressed interest in the Front Range alternative providing the FAA committed to continual funding for the expansion.[82] FRAA then submitted applications for funding to the FAA.[83]

International Airport, which opened in 1974. Paul Stephen Dempsey, *The State of the Airline, Airport & Aviation Industries*, 21 TRANSP. L.J. 129, 168 (1992).

73. In late September of 1989, then Transportation Secretary Samuel Skinner furnished the city of Denver with a check for $60 million to begin construction on a new Denver regional airport project. Leslie Cowling & Suzanne Weiss, *Denver Gets 60 Million Check Federal Grant Goes for Airport; Some Construction Begins Today*, ROCKY MTN. NEWS, Sept. 28, 1989, at 6.

74. Board of County Comm'rs v. Isaac, 18 F.3d 1492, 1494 (10th Cir. 1994).

75. DIA's prospective cargo facilities were located at the airport's northern end, which carriers felt was inadequate. *Id.* at 1494.

76. Given DIA's inadequate facilities and Front Range's relatively close proximity to DIA, the parties thought this would provide a good alternative to the DIA site. *Id.*

77. The proposal was approved in the FAA's Record of Decision ("ROD"). *Id.*

78. Congress passed the Airport Improvement Program in 1982 to expand and improve the already existing Airport Development Aid Program ("ADAP"). WILEY, *supra*, note 59, at 123. *See generally* HARDAWAY, *supra* note 59, at 19-21 (giving an overview of airport and airway Acts). The Development Aid Program afforded support in terms of financial aid, hardware acquisition, and research and development. WILEY, *supra*, note 59, at 11.

79. *Isaac*, 18 F.3d at 1495.

80. The funding was allocated to Adams County and the FRAA, subject to revision after bids had been opened. *Id.*

81. *Id.*

82. In April of 1992, United Parcel Service and Federal Express were two major carriers who signed lease agreements with Front Range rather than DIA. At that time, a small number of secondary carriers also signed letters of intent to commit to Front Range. Steve Caulk, *Fedex Delivers Front Range Lease: Small Airport Becoming A Cargo Hub with Second Major Signing*, ROCKY MTN. NEWS, Apr. 9, 1992, at 52.

83. *Isaac*, 18 F.3d at 1495.

In August 1992, DIA requested FAA approval of cargo facilities on the southern end of the airport designed to give carriers ready access to interstate highways.[84] The FAA approved of DIA's decision to change the location of its cargo site, and as a result, carriers which had signed with Front Range abandoned their leases and entered into lease agreements with DIA.[85] The FAA withdrew their approval of the Front Range expansion,[86] concluding the changed circumstances had diminished "the previously perceived need for the Front Range expansion."[87] Shortly thereafter, the FAA endorsed DIA's southern end cargo facilities.[88] The Adams County Board of Commissioners and other interested parties appealed the FAA's decision to the Tenth Circuit.[89] They sought nullification of the FAA's reversal order and reinstatement of the funding for the Front Range expansion project.[90]

2. Opinion of the Court

In *Board of County Commissioners v. Isaac*,[91] the petitioners argued that the FAA had acted arbitrarily and capriciously because the reversal order was not supported by substantial evidence as required by 49 U.S.C. app. § 1486(e),[92] 5 U.S.C. § 706(2)(A), and 5 U.S.C. § 706(2)(E).[93] In support of this argument, the petitioners noted that the FAA failed to consider such attributes as Front Range's convenient transportation routes, prudent and competitive expansion/operating costs, investment opportunities, and long-term leases and assurances from cargo carriers that they would establish themselves at Front Range pending FAA funding.[94] Because the FAA declined to take these and other factors into account,[95] the petitioners claimed that the FAA had

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84. *Id.*

85. One such carrier was Federal Express. United Parcel Service was the only carrier who ended up signing with the FRAA. *Id.*

86. There was no longer a "purpose and need" for the Front Range project given "the viability of DIA as an alternative for air cargo operations." *Id.*

87. *Id.*

88. The FAA regional administrator concluded that the FAA's commitment to FRAA had been "contingent upon relocation . . . [at] DIA . . . for cargo operations from the north to the south side of the airport." *Id.*

89. *See* 49 U.S.C. app. § 1486(a) (1988 & Supp. V 1993) (stating that "[a]ny order . . . issued by the Board or Secretary of Transportation . . . shall be subject to review by the courts of appeals of the United States").

90. *Isaac*, 18 F.3d at 1495. Petitioners also brought a conflict claim "to justify the reinstatement of the original ROD and contend[ed] the FAA should be estopped from denying the money it initially promised." *Id.* Petitioner's charged that the FAA was aware of a conflict of interest stemming from FAA staff members' personal involvement in the Front Range and DIA projects. *Id.* at 1499. The petitioners claimed that this conflict of interest was left unresolved. *Id.*

91. 18 F.3d 1492 (10th Cir. 1994).

92. *See* 49 U.S.C. app. § 1486(e) (stating that "[t]he findings of facts by the Board or Secretary of Transportation, if supported by substantial evidence, shall be conclusive").

93. *See* 5 U.S.C. § 706(2)(A), 706(2)(E) (stating that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] unsupported by substantial evidence").

94. *Isaac*, 18 F.3d at 1495-96.

95. Petitioners also argued that the FAA played favorites instead of remaining neutral (the FAA supported DIA's tentative carrier leases but did not offer the same backing to FRAA). *Id.* at 1496.

acted arbitrarily and capriciously, resulting in a clear error of judgment.[96]

The Tenth Circuit exercised jurisdiction pursuant to 49 U.S.C. app. § 1486(a),[97] and affirmed the FAA's decision.[98] Upon review, the court considered whether the FAA, in making their final determination, had given credence to all of the pertinent factors.[99] Concluding that there was no apparent error of judgment, the court determined that the FAA's decision was not arbitrary and capricious.[100] Judge Moore emphasized that the FAA's initial support for the Front Range project was based on the presumption that "DIA was not a viable alternative to the expansion of Front Range. . . . "[101] Since there were substantial changes in DIA's economic viability after it switched its cargo location,[102] the Tenth Circuit ruled that the FAA was justified in later disapproving of FRAA's expansion.[103]

The *Isaac* court went on to determine that it could not review the FAA's decision to withdraw its tentative funding for the Front Range expansion.[104] The court read the language of 49 U.S.C. app. § 1349 to provide the court with no "justiciable standard of review,"[105] as "[t]he allocation of funds from a lump-sum appropriation is . . . traditionally regarded as committed to agency discretion."[106] Because an agency can best determine its spending priorities,[107] agencies have the flexibility to manage appropriations.[108] As long as the agency's allocation "meets permissible statutory objections," a court may not review the agency's expenditure.[109]

The Federal Aviation Act forbids judicial review "where objections were not first presented to the 'Board or Secretary of Transportation' unless 'reasonable grounds' excuse the failure to appeal to the agency."[110] Petitioners

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96. *Id.*

97. For the text of section 1486(a), see *supra* note 90.

98. *Isaac*, 18 F.3d at 1494.

99. *Id.* at 1497-98. The court considered the entire agency record in accordance with the "substantial evidence" standard of section 706(2)(E). Judge Moore explained that this standard required the FAA to have a "rational basis for drawing its conclusions from the facts." *Id.* at 1496 (citing City of Pompano Beach v. FAA, 744 F.2d 1529, 1540 (11th Cir. 1985)).

100. *Id.* at 1498.

101. *Id.* at 1497. In the FAA's original Record of Decision, the FAA determined that DIA was "'not as economical, efficient, and air cargo-oriented as Front Range Airport. . . . '" *Id.* This was due to such considerations as DIA's potentially high costs and inadequate ground transportation connections, long taxi distances and absence of low-priced land for private development. *Id.*

102. *Id.* at 1498.

103. *Id.* The court explained that various cargo carriers did attempt to persuade DIA to relocate its cargo site, despite their support for the Front Range project. It was therefore appropriate for the FAA to consider DIA's response to these efforts in determining the location of the Denver air cargo hub. *Id.* at 1497.

104. *Id.* at 1498.

105. *Id.* The court determined that the allocation of funds from a government appropriation is a determination better suited to an administrative agency. *Id.*

106. *Id.* (citing Lincoln v. Vigil, 113 S. Ct. 2024, 2031 (1993)).

107. *Heckler*, 470 U.S. at 831-32.

108. *Vigil*, 113 S. Ct. at 2031-32.

109. *Isaac*, 18 F.3d at 1498 (citing *Vigil*, 113 S. Ct. at 2032); *see also* International Union v. Donovan, 746 F.2d 855, 863 (D.C. Cir. 1984) (explaining that the court has no jurisdiction to review lump sum allocation of funds).

110. *Id.* at 1499 (citing 49 U.S.C. app. § 1486(e)). Section 1486(e) states:

failed to bring their conflict claim before the FAA and therefore it was within the court's discretion to exercise review regarding the issue.[111] The court concluded "[m]eaningful review is not possible . . . " and did not consider the matter.[112]

In response to the petitioners' claim asserting equitable estoppel, Judge Moore found no intentional misrepresentation or concealment by the FAA.[113] The Tenth Circuit based its finding on the fact that the FAA had conditioned funding for the Front Range expansion upon "factors ultimately left unsatisfied."[114] The court determined that this did not constitute affirmative misconduct.[115] Moreover, claiming "equitable estoppel against the government is an extraordinary remedy."[116] Judge Moore noted that an assertion of equitable estoppel against the government has yet to be upheld by the Supreme Court.[117]

3. Analysis

Much of the *Isaac* opinion focused on the two standards most often used to review agency action.[118] The court first discussed the "substantial evidence" standard.[119] After stating that substantial evidence meant "more than a mere scintilla but less than the weight of the evidence,"[120] the court examined the record, in its entirety, under that standard.[121] Next, the court examined the "arbitrary and capricious" standard and applied it to the facts.[122] Judge Moore noted that an agency acts arbitrarily and capriciously when "it relie[s] on factors deemed irrelevant by Congress, fail[s] to consider important aspects of the problem, [or] present[s] an implausible explanation or one contrary to the evidence."[123]

In Part II of the opinion, however, the court determined that the FAA's decision to withdraw its tentative funding was not reviewable.[124] This determination should have precluded any discussion of the merits of the case.[125]

> The findings of facts by the Board or Secretary of Transportation, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Secretary of Transportation shall be considered by the court unless such objection shall have been urged before the Board or Secretary of Transportation or, if it was not so urged, unless there were reasonable grounds for failure to do so.

49 U.S.C. app. § 1486(e) (1988 & Supp. V 1993).

111. *Isaac*, 18 F.3d at 1498 (citing Park County Resource Council, Inc. v. United States Dep't of Agric., 817 F.2d 609, 619 (10th Cir. 1987)).

112. *Id.*

113. *Id.* at 1499.

114. *Id.*

115. *Id.*

116. *Id.* at 1498 (citing Office of Personnel Management v. Richmond, 496 U.S. 414, 421-22 (1990)).

117. *Id.* at 1498-99.

118. *Id.* at 1496-98.

119. *Id.* at 1496.

120. *Id.*

121. *Id.* (citing City of Pompano Beach v. FAA, 744 F.2d 1529, 1539 (11th Cir. 1985)).

122. *Id.* at 1496-98.

123. *Id.* at 1497 (citing Quivira Mining Co. v. United States Regulatory Comm'n, 866 F.2d 1246, 1249 (10th Cir. 1989)).

124. *Id.* at 1498.

125. *Id.* at 1496. It has been said that no review means *no review*, for the APA cannot effect

Indeed, the Supreme Court has found that section 701(a)(2) of the APA gives the court no leave to intrude when an agency is allocating funds.[126] Moreover, the Supreme Court has held that it is error for a court to review the merits of a claim when governmental action is not reviewable under the Administrative Procedure Act.[127] Logically, the same reasoning should have applied in *Issac*.[128]

The doctrine of unreviewability has been controversial since the Supreme Court's decision in *Heckler v. Chaney*,[129] and the Tenth Circuit may have been motivated to discuss *Issac* on its merits in order to dissipate the apparent conflict between sections 701, 702 and 706 of the Administrative Procedure Act. Given the presumption of reviewability under section 702, and section 706's judicial review provision for an agency's abuse of discretion, the *Issac* court's examination of the FAA's determination acts to assuage petitioner's concerns of the validity of the FAA's order.[130]

The Tenth Circuit's holding reinforces the conclusion that courts may not exercise jurisdiction to review the allocation of agency funds.[131] While it was probably unnecessary for the court to examine the record to determine whether the FAA's decision was arbitrary and capricious,[132] the examination may well have been warranted given the Supreme Court's conviction that the "committed to agency discretion" exception remain a very narrow one.[133]

"something to which it does not apply." Kenneth C. Davis, *Administrative Arbitrariness Is Not Always Reviewable*, 51 MINN. L. REV. 643, 644 (1967).

126. *Vigil*, 113 S. Ct. at 2032.

127. *See* Franklin v. Massachusetts, 112 S. Ct. 2767, 2776 (1992) (holding the District Court erred in determining the merits of an APA claim when the governmental actions at issue were unreviewable under the APA).

128. Access to the courts is not permitted where there is no means for the court to review an action. *See* Abbott Lab. v. Gardner, 387 U.S. 136, 153 (1967). While the rationale underlying *Franklin* stems from agency finality and § 704 of the APA, the same result can be extended to reach § 702; if the APA does not permit review of an agency's actions, those actions are not reviewable for abuse of discretion. *Franklin*, 112 S. Ct. at 2775-76.

129. *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985); *see also* Sharon Werner, Note, *The Impact of* Heckler v. Chaney *on Judicial Review of Agency Decisions*, 86 COLUM. L. REV. 1247, 1248-49 (explaining that section 701(a)(2) has been the subject of confusion and controversy).

130. Some say judicial review should be guaranteed to test whether the agency has abused its discretion. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 359 (1965). For a discussion on the conflict between §§ 701(a)(2) and 706(2)(a) of the APA, see Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and its Consequences*, 45 VAND. L. REV. 743, 756 (1992).

131. *Isaac*, 18 F.3d at 1498.

132. *Id.* at 1496-97.

133. *See Overton Park*, 401 U.S. at 410. The Court noted that section 701 had been the subject of extensive commentary. *Id.* at 410 n.23.

II. HIGHWAY DECISION-MAKING AND DEFERENCE TO AGENCY ACTION: *COMMITTEE TO PRESERVE BOOMER LAKE PARK V. DEPARTMENT OF TRANSPORTATION*[134]

A. *Background*

There is a national policy to safeguard the unaffected beauty of public park and recreation lands.[135] Section 138 of the Federal-Aid Highway Act of 1968 ("FHA"),[136] and section 4(f) of the Department of Transportation Act of 1966 ("DTA"),[137] forbid the use of parkland for highway purposes unless there is no feasible and prudent alternative.[138] Thus, the Secretary of Trans-

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134. 4 F.3d 1543 (10th Cir. 1993).

135. *See* 23 U.S.C. § 138 (1988 & Supp. V 1993). That section states in pertinent part:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. . . . [T]he Secretary shall not approve any program or project . . . which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreation area, wildlife and waterfowl refuge, or historic site resulting from such use. . . .

Id.

136. *Id.*

137. 49 U.S.C. § 303 (1988 & Supp. V 1993). For a discussion on the implications section 4(f) has had on case law and on judicial interpretations of that section, see Barbara Miller, Comment, *Department of Transportation's Section 4(f): Paving the Way Toward Preservation*, 36 AM. U. L. REV. 633 (1987).

138. Section 4(f) states in relevant part:

> (a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the country-side and public park and recreation lands, wildlife, waterfowl refuges, and historic sites.
>
> . . . .
>
> (c) The Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—
>
> (1) there is no feasible and prudent alternative to using that land; and
>
> (2) the program or project includes all possible planning to minimize harm to the park, recreational area, wildlife and waterfowl refuge, or historic site resulting from the use.

49 U.S.C. § 303.

Section 138 of the Federal-Aid Highway Act adds:

> [i]n carrying out the national policy . . . the Secretary [of Transportation] . . . is authorized to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic trough or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas.

23 U.S.C. § 138.

Section 138 of the Federal Highway Act and section 4(f) of the Department of Transportation Act are so similar that courts often simply refer to section 4(f). *See, e.g., Overton Park*, 401

portation may approve the use of federal funds[139] to finance construction of highways[140] through public parks only when "alternative routes reach extraordinary magnitudes or . . . present 'unique problems.'"[141] If no alternative route is reasonable, the Secretary may approve and finance construction only in the event that highway construction considers "all possible planning to minimize harm to the park."[142]

In making this determination, the Secretary must take into account options that do not also effect the parkland.[143] If the alternative route uses even a small amount of protected area, section 4(f) is triggered.[144]

In 1971, the Supreme Court handed down the seminal *Overton Park*[145] decision. The decision is prominent for a number of reasons,[146] and clarified

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U.S. at 411 (explaining that the two sections are "clear and specific directives"); Eagle Foundation, Inc. v. Dole, 813 F.2d 798, 800 n.1 (7th Cir. 1987) (stating that section 138 does not "add anything to § 4(f)").

139. Federal funds for highway expenditures have declined since the 1980s. The Federal share of capital outlay was at its peak in the early 1980s, accounting for approximately 56 percent of the funds that finance highways across the United States. Since then, federal funding has accounted for 40 to 56 percent of highway financing. Report of the Secretary of Transportation to the United States Congress, *The Status of the Nations Highways, Bridges, & Transit: Conditions & Performance*, 68, 69 (1993).

140. For a discussion of the planning of federally funded highways and the basic federal-aid highway process, see Edward V.A. Kussy, *Environmental Considerations in Highway Planning*, C933 ALI-ABA 257 (1994).

141. Druid Hills Civic Ass'n, Inc. v. Federal Highway Admin., 772 F.2d 700, 715 (11th Cir. 1985) (quoting *Overton Park*, 401 U.S. at 411), *cert. denied*, 488 U.S. 819 (1988); *see also* Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 700 (2d Cir. 1972) (stating that a "feasible alternative route is one that is compatible with sound engineering") (citing *Overton Park*, 401 U.S. at 411). The *Monroe County* court then stated, "a prudent alternative route is one that does not present unique problems, that is, an alternative without truly unusual factors so that the cost or community disruption would reach extraordinary magnitudes. . . . " *Id.* (citing *Overton Park*, 401 U.S. at 412-13).

Prior to construction of a federal highway, the Federal Highway Administration is responsible for making sure the project complies with NEPA, which entails preparing an environmental impact statement ("EIS"). The EIS must "balance the environmental impacts and the benefits of the alternatives and select a preferred alternative." UNITED STATES GENERAL ACCOUNTING OFFICE, HIGHWAY PLANNING 2 (1994).

142. *Overton Park*, 401 U.S. at 411 (citing 23 U.S.C. § 138 and 49 U.S.C. § 303); *see also* Stop H-3 Ass'n v. Lewis, 538 F. Supp. 149, 183 (1982) (explaining that the record must show that "*all possible measures* have been taken to minimize harm") (emphasis added); *Monroe County*, 472 F.2d at 700 (stating that a "road must not take parkland, unless a prudent person, concerned with the quality of the human environment is convinced that there is no way to avoid doing so").

143. *Druid Hills*, 772 F.2d at 715.

144. *See* Louisiana Envtl. Soc'y, Inc. v. Coleman, 537 F.2d 79, 83-85 (5th Cir. 1976) (stating that section 4(f) "is applicable *whenever* parkland will be 'used for a highway project'") (emphasis added).

145. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

146. *Overton Park* is often cited for its contribution to our understanding of section 706 of the APA and the Court's determination that a reviewing court is required to make a thorough examination of the agency's entire record. This has become known as the "hard-look" doctrine. As the *Overton Park* Court explained, the reviewing court's inquiry has to be "thorough [and] probing. . . . " *Id.* at 415. In other words, courts must take a "searching and careful" look at the agency record. *Id.* at 416; *see also* Peter L. Strauss, *Revisiting Overton Park: Political & Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1261 (1992) (noting that *Overton Park* is the most frequently cited case in Administrative Law); Suzannah T. French, Comment, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929, 940-41 (1993) (stating that *Overton Park* is known for establishing the

the requirements of highway planners and courts reviewing the Secretary of Transportation's actions.[147] The language of the FHA and the DTA was interpreted loosely until *Overton Park* was decided.[148] Prior to 1971, the law did not require rigorous scrutiny of possible alternatives, nor did it require less damaging alternatives be chosen.[149] *Overton Park* made clear that Congress enacted section 4(f) of the Department of Transportation Act,[150] and section 18(a) of the Federal-Aid Highway Act,[151] to protect the "quality of our natural environment" and to "curb the accelerating destruction of our country's natural beauty."[152]

The *Overton Park* Court set forth a test that required courts to take a "hard look"[153] at the Department of Transportation's determination.[154] This test consists of a three-tiered analysis that now provides courts with a stringent evaluation in section 4(f) challenges.[155] In the aftermath of *Overton Park*, federal highway decision-making has no longer been fashioned "on a least-cost, political, and unreviewable basis."[156] Rather, the 4(f) standard has become a hard edged tool for preserving our nation's rustic surroundings.[157]

"hard-look" doctrine).

147. *See, e.g.*, Eagle Foundation, Inc. v. Dole, 813 F.2d 798, 800 (1987) (stating that the court and highway planners are guided by *Overton Park*); *Druid Hills*, 772 F.2d at 714 (conducting review under *Overton Park* analysis); *Stop H-3*, 538 F. Supp. at 159 (following the standard set forth in *Overton Park*).

148. *See generally* Oliver A. Houck, *The Secret Opinions of the United States Supreme Court on Leading Cases in Environmental Law, Never Before Published!*, 65 U. COLO. L. REV. 459, 477-85 (1994) (noting that prior to *Overton Park* section 4(f) "did not require that urban parks be spared" and apparently only required that "the Secretary of Transportation decide whether saving park land really merited alternative routes"). For insight into Justice Marshall's *Overton Park* opinion, see Jonathan Weinberg, *Thurgood Marshall and the Administrative State*, 38 WAYNE L. REV. 115 (1991).

149. Houck, *supra* note 148, at 479.

150. *See supra* note 138 and accompanying text.

151. *See supra* notes 135-38 and accompanying text.

152. *Overton Park*, 401 U.S. at 404.

153. *See supra* note 146.

154. *Overton Park*, 401 U.S. at 415-17.

155. *Id.* The first prong of the test explains:

> The court is first required to decide whether the Secretary acted within the scope of his authority [under section 4(f)]. . . . The reviewing court must consider whether the Secretary properly construed his authority to approve the use of parkland as limited to situations where there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems. And the reviewing court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives of that alternatives do not involve unique problems.

Id. at 415-16.

> The second and third *Overton Park* inquiries involve determining whether:
> [T]he actual choice made [by the Secretary] was not 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.' To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . The final inquiry is whether the Secretary's action followed the necessary procedural requirements.

Id. at 416-17 (citations omitted).

156. Houck, *supra* note 148, at 482.

157. *See id.* at 483 (stating that "[t]he effects of the *Overton Park* decision transcend highway decision-making and transportation law"); Melissa A. MacGill, Comment, *Old Stuff is Good Stuff: Federal Agency Responsibilities Under Section 106 of the National Historic Preservation Act*, 7 ADMIN. L.J. AM. U. 697, 722 (1994) (noting that "[i]nstead of raising mere procedural hurdles,

B. *Tenth Circuit Opinion*

1. *Committee to Preserve Boomer Lake Park v. Department of Transportation*[158]

a. *Facts*

One of the main issues in *Boomer Lake* was whether the Federal Highway Administration's decision to fund a four-lane highway through Boomer Lake Park in Stillwater, Oklahoma violated section 4(f) of the Department of Transportation Act.[159] After making a preliminary determination that the Secretary of Transportation had acted within the scope of his authority,[160] the *Boomer* court had to decide whether the Secretary's decision to fund the highway was founded on a "'consideration of the relevant factors,'"[161] and whether the Secretary had abused his discretion in making his decision.[162]

In 1988, the Oklahoma Department of Transportation ("ODOT") sought federal assistance from the Federal Highway Administration ("FHWA") to reconstruct a two-lane road (Lakeview Road) that had previously cut through the southern portion of Boomer Lake Dam,[163] which was located on Boomer Lake.[164] When the dam was reconstructed in the late 1970s,[165] the segment of Lakeview Road which had run on top of the dam was destroyed and not replaced.[166]

The City of Stillwater decided to erect a new Lakeview Road across Boomer Lake.[167] The City Commission planned to expand Lakeview into four-lanes, supplanting that section of the road which had been obliterated with the old dam.[168] A cost analysis was administered and the City voted in favor of a straight alignment across Boomer Lake.[169] The City's project was regarded as "a vital part" of the city's transportation efforts.[170]

Initially, the FHWA rejected ODOT's request for federal funds,[171] con-

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section 4(f) imposes a clear and affirmative duty upon the DOT to minimize harm to historic sites").

158. 4 F.3d 1543 (10th Cir. 1993).

159. *Id.* at 1547.

160. To determine this, the court followed the first inquiry of the three-pronged *Overton Park* analysis. *See supra* note 156.

161. *Boomer Lake*, 4 F.3d at 1547 (quoting *Overton Park*, 401 U.S. at 416).

162. *Id.*

163. *Id.* at 1548.

164. Boomer Lake made up approximately 220 acres of Stillwater, Oklahoma's 347-acre Boomer Lake Park. *Id.* at 1547.

165. The dam had been inspected in 1978, and at that time it was discovered that it was compositionally flawed and needed to be rebuilt. *Id.*

166. The road was not replaced "due to concerns that traffic would cause structural stress to the new dam. . . . " *Id.*

167. *Id.* The road was to be built on a raised causeway and bridge and would "eliminate congestion and accommodate present and projected traffic needs by providing a major east-west arterial route through the city." *Id.*

168. *Id.*

169. *Id.* at 1547-48.

170. *Id.* Other factors such as traffic safety and fire department response times were taken into consideration in the City's proposal. *Id.* at 1547.

171. *Id.* at 1548.

cluding that the ODOT had failed to consider whether the new Lakeview Road could have been built around Boomer Lake (instead of straight across it).[172] Additionally, ODOT failed to consider the idea of simply not building the road.[173] ODOT responded by submitting a second draft to the FHWA. This draft included three alternative projects: "(1) a no-build alternative; (2) a four-lane road with a straight alignment across Boomer Lake built upon a causeway and bridge (the causeway alternative); and (3) a four-lane road with an alignment around the southern end of Boomer Lake and the park (the avoidance alternative)."[174] Finding ODOT's causeway alternative most "feasible," the FHWA approved the second draft and granted ODOT federal funds for the proposed road project.[175] Following the FHWA's approval, the Committee to Preserve Boomer Lake Park ("Committee") was formed, and the proposed road project became the subject of the Committee's efforts.[176]

The construction was controversial because the City Commission elected to cross the lake and park with the new road.[177] The project appropriated roughly 3.3 acres of park-land and approximately 2.4 acres of Boomer Lake to construct the causeway and bridge.[178] The Committee filed suit challenging the project's funding.[179] The district court granted the Department of Transportation's motion for summary judgment,[180] and the Committee appealed to the Tenth Circuit.

On appeal, the Committee claimed section 4(f) of the Transportation Act was violated by the Federal Highway Administration.[181] The Committee maintained that permitting federal monies to fund a highway project that entailed destroying parkland violated the Act, and that there were alternatives which could have been used without affecting the Park.[182]

b. *Opinion of the Court*

In affirming the district court's opinion, the Tenth Circuit applied the three-pronged analysis promulgated by the Supreme Court in *Overton Park*.[183] The Tenth Circuit held that the Secretary of Transportation acted

172. *Id.*
173. *Id.*
174. *Id.* The FHWA also issued a finding of no significant impact in accordance with NEPA. For a discussion of NEPA, see *supra* note 70.
175. *Boomer Lake*, 4 F.3d at 1548.
176. *Id.* The Committee was made up of six residents of Stillwater living near Boomer Lake Park. *Id.*
177. *Id.*
178. *Id.* at 1547. The court did note that the City of Stillwater furnished 3.3 acres of commensurate land on another lake for public recreational use to make up for the 3.3 acres of Boomer Lake the construction project would relinquish. *Id.* at 1548 n.1.
179. The Committee's action challenged the federal funding of the road project in addition to the FHWA's failure to prepare an environmental impact statement. *Id.* at 1548.
180. *Id.* The court held that under section 4(f) of the Transportation Act, alternatives to the Lakeview Road highway decision conferred "uniquely difficult problems" such that the Federal Highway Administration did not err in rejecting them. *Id.*
181. *Id.*
182. *Id.* at 1549, 1551.
183. *See Overton Park*, 401 U.S. at 415-17.

within the scope of his authority under 4(f),[184] finding it reasonable for the Secretary to conclude that alternatives to the highway project involved "unique problems which rendered them imprudent."[185] While the Secretary failed to consider an alternative such as a two-lane road that would have avoided taking park-land,[186] and also failed to consider the potential use of existing roads when he rejected the "no-build alternative,"[187] the court determined that both options were incapable of "accommodating projected traffic volumes" and therefore were inadequate.[188]

Since the Department of Transportation failed to allege that the alternative routes were not feasible, the court restricted its review to whether the alternatives were imprudent.[189] The court found that there were several reasons why the suggested alternative routes were imprudent.[190] Moreover, the causeway alternative had several benefits that the other alternatives did not possess.[191] It enhanced fishing access,[192] it improved the quality of the water "by reducing the wind action on the lake"[193] and joined the east and west sides of the park.[194]

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184. *Boomer Lake*, 4 F.3d at 1550.

185. The court explained that "[t]he inability of an alternative to accommodate future traffic volumes is justification for rejecting [an] alternative." *Id.*; *see also* Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159, 164 (4th Cir. 1990) (explaining that alternatives which do not solve or fulfill the "transportation needs of the project" may properly be rejected by the Secretary as not prudent"); *Eagle Foundation*, 813 F.2d at 805 (indicating that an aggregate of modest problems "may add up to a sufficient reason to use § 4(f) lands"). *But see Overton Park*, 401 U.S. at 411-13, in which the Supreme Court stated:

> [C]onsiderations of cost, directness of route, and community disruption . . . [are not] on an equal footing with preservation of parkland. . . . Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary, but the very existence of the statutes . . . indicates that protection of parkland was to be given paramount importance.

Id. (footnotes omitted).

186. *Boomer Lake*, 4 F.3d at 1551.

187. *Id.*

188. *Id.* at 1552.

189. *Id.* at 1550.

190. *Id.* For example, if an alternative could not "accommodate future traffic volumes," that is sufficient for rejecting it as an alternative. *Id.* (citing Lake Hefner Open Space Alliance v. Dole, 871 F.2d 943, 947 (10th Cir. 1989)). Additionally, when an alternative route does not "satisfactorily fulfill the purposes of the project . . . [it] may be rejected." *Id.* (citing Arizona Past & Future Found., Inc. v. Lewis, 722 F.2d 1423, 1428 (9th Cir. 1983)). The court also cited *Eagle Foundation*, 813 F.2d at 804, 810, for the proposition that safety and costs are valid aims to keep in mind in rejecting alternative routes. *Boomer Lake*, 4 F.3d at 1550.

It was clear that the court accepted respondents several explanations as to why the alternatives were not prudent. The Environmental Assessment/4(f) statement declared the avoidance route problematic because it was found to have:

> (1) higher road user costs; (2) more traffic congestion; (3) substandard curves which in turn raised safety concerns; (4) failure to accommodate east-west traveling opportunities as well as a direct route across the lake; (5) more intersection modifications on existing roads; (6) more commercial and residential relocations; and (7) higher construction cost.

Id. The 4(f) statement also explained that "the no-build alternative, by failing to connect Lakeview Road, was considered worst with respect to problems 1-4, and was thought to eliminate a vital section line road that links the east and west sides of Stillwater." *Id.*

191. *Boomer Lake*, 4 F.3d at 1550.

192. *Id.*

193. *Id.* at 1550 n.5.

194. *Id.* at 1550.

As to the first *Overton Park* inquiry,[195] the court held that it was reasonable for the Secretary to believe that the alternative routes were imprudent.[196] Thus, it was within the scope of his authority to fund the highway project through Boomer Lake Park.[197] The court reasoned that an alternative may be forsaken if it does not effectuate the highway's original intentions.[198]

The second prong of the *Overton Park* test[199] required the court to determine whether all relevant factors were considered in the Secretary's decision.[200] Rejecting the Committee's suggestion that the Secretary should have considered a two-lane parkland avoidance alternative, the court held that "the decision concerning which alternatives to consider is necessarily bounded by a rule of reason and practicality."[201] The court also noted that the Committee did not explain why the two-lane alternative would have been better suited than the four-lane alternative that was previously rejected.[202] While reducing harm to the park, the two-lane alternative would not serve projected traffic volumes.[203] This fact, alone, was a sufficient a reason to reject the Committee's proposal.

The Committee made several other arguments against the 4(f) statement.[204] First, it argued that the Secretary did not consider existing roads as an alternative no-build option.[205] The court was convinced, however, that the Secretary did consider some of the roads already in existence,[206] and had concluded that they were inadequate.[207] The Committee did not submit evidence to suggest otherwise.[208] Although the Secretary did not consider "all" of the existing roads, the court, nevertheless, did not find the oversight arbitrary and capricious.[209]

The Committee also alleged that bad faith was involved in the final 4(f) statement.[210] It argued that the Secretary increased the estimated cost of the avoidance alternative in the final EA/4(f) statement.[211] Judge Brorby agreed with the district court, however, finding no evidence to support a bad faith

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195. *See supra* note 156.
196. *Boomer Lake*, 4 F.3d at 1550.
197. *Id.*
198. *Id.*
199. *See supra* note 156.
200. *Boomer Lake*, 4 F.3d at 1551. The second prong essentially requires the court to consider whether the Secretary made a clear error of judgment. *Id.* (citing *Overton Park*, 401 U.S. at 416).
201. *Id.*; *see also Hickory*, 910 F.2d at 164 (explaining that the record does not have to be utterly complete, but instead the government must apply the "rule of reason and practicality").
202. *Boomer Lake*, 4 F.3d at 1551.
203. *Id.*
204. *Id.* at 1551-55.
205. *Id.* at 1551.
206. The court found the submitted environmental documents evidence of the Secretary's consideration. *Id.* at 1551-52.
207. The record indicated that it was either unlikely existing roads could be widened into four lanes or could not accommodate projected traffic volumes. *Id.*
208. *Id.*
209. *Id.* at 1552. While the failure to make such a consideration was relevant, it was not sufficient to amount to an abuse of discretion. *Id.*
210. *Id.*
211. *Id.*

allegation.[212]

Finally, the Committee alleged that: (1) the Secretary's decision was not supported by the record;[213] (2) the Secretary's decision was in violation of the National Environmental Protection Act;[214] and (3) the Secretary erred by not filling out an Environmental Impact Statement ("EIS") and not issuing a finding of no significant impact ("FONSI").[215] The Tenth Circuit did not give credence to any of the Committee's allegations, and in affirming the district court, held that the Committee's claims were unsupported by the record.[216]

c. *Analysis*

In reviewing 4(f) determinations, courts are not entitled to substitute their own judgment for the judgement of the Federal Highway Administration.[217] The standard of review is very narrow.[218] The court must consider the FHWA's record the "focal point for judicial review."[219]

The legislative history of section 4(f) suggests that Congress intended to preserve the nation's natural beauty through careful highway planning.[220] Although the Supreme Court in *Overton Park* construed 4(f) to mean that the land must be preserved in all but the "most unusual situations,"[221] courts have found that several considerations can defeat the preservation of 4(f) lands.[222]

Since *Overton Park*, courts have unconditionally questioned the possibility of alternative routes in highway decision-making, ensuring highways are not built through protected lands unless there are no other feasible and prudent

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212. *Id.*

213. *Id.* at 1553. The Committee made this allegation to overrule the district court's granting of summary judgment in favor of the respondents. The Tenth Circuit determined that no reasonable juror could find the Secretary's determination arbitrary and capricious, and thus rejected the Committee's claim. *Id.*

214. *Id.* at 1554 (citing 42 U.S.C. § 4332(2)(c) (1988 & Supp. V 1993)). The court explained that NEPA obligates the agency to contemplate all environmental impacts of a proposed action and guarantees that the agency will "inform the public that it has indeed considered environmental concerns in its decision-making process." *Id.* (quoting Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 97 (1983)). The *Boomer Lake* court then held that the Secretary did not violate NEPA and was only required to consider possible environmental impacts in the decision process. *Id.*

215. The court held that the decision not to conduct an EIS and to issue a FONSI was best left to the agency's expertise, and therefore, found that the Committee's final arguments failed. *Id.* at 1555-56. The court concluded that the Committee's claims of adverse environmental effects were at best speculative. *Id.* at 1556.

216. *Id.* at 1553-56.

217. *Overton Park*, 401 U.S. at 416; *see also* Citizens to Preserve Foster Park, Inc. v. Volpe, 466 F.2d 991, 995 (7th Cir. 1972) (explaining that the court is not "empowered to substitute its judgment for that of the Secretary").

218. *Overton Park*, 401 U.S. at 416.

219. Camp v. Pitts, 411 U.S. 138, 142 (1973).

220. S. REP. NO. 1340, 90th Cong., 2d Sess. 18 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3482, 3500.

221. *Overton Park*, 401 U.S. at 411.

222. *See supra* note 185; *see also* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 197-98 (D.C. Cir. 1991) (finding that boosting a local economy is a reasonable consideration in eliminating alternatives that would not accomplish that goal).

alternatives.[223] While the Tenth Circuit upheld the Federal Highway Administration's decision to build a highway through Boomer Lake Park,[224] the court made it clear that there were no reasonable alternatives to the proposed highway.[225] While courts have vacillated in their approval of highway construction through protected areas,[226] the common thread throughout the circuits has been judicial deference to agency authority.[227]

Another commonality found in post-*Overton Park* 4(f) decisions is the application of the *Overton Park* three-pronged analysis.[228] While lower courts are continually guided by this three-tiered inquiry, they have nevertheless taken liberty to expand their interpretations of 4(f).[229] For example, it has been held that land can be protected and highway projects may be rejected if the land is "constructively" used in a transportation endeavor.[230] Courts identifying a constructive use of land have reduced *Overton Park*'s three-pronged inquiry to a two-step analysis.[231] This two-step standard considers: "(1) the proximity of the harm to the property, and (2) the nature of the effects of the harm on the property's historic value or significance."[232] Other lower courts have broadened 4(f) to include even minor uses of park land,[233] or have applied 4(f) to protect archaeological sites.[234]

Section 4(f) has been very successful "in preserving numerous . . . sites and thousands of acres of public parkland."[235] While there is an undeniable duty on the Secretary of Transportation to minimize harm to 4(f) land, the Tenth Circuit's decision in *Boomer Lake* is suitable given its unique circumstances.[236]

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223. Houck, *supra* note 148, at 482-83.

224. *Boomer Lake*, 4 F.3d at 1550.

225. *Id.*

226. *See, e.g.*, *Eagle Foundation*, 813 F.2d at 810 (affirming decision to build highway through 4(f) land); Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 784 (9th Cir. 1980) (holding that the Secretary had failed to contemplate all reasonable alternatives in making his 4(f) determination, and therefore, the parkland would be spared); *Stop H-3*, 538 F. Supp. at 181 (holding that the Secretary's determination must be set aside because the Secretary failed to consider alternatives which would minimize harm to the park).

227. *Boomer Lake*, 4 F.3d at 1549 (citing *Overton Park*, 401 U.S. at 415) (stating that "the Secretary's decision is entitled to a presumption of regularity"); *see also Eagle Foundation*, 813 F.2d at 803 (stating that "deferential review ensures that once the court is satisfied that the Secretary took a close look at the things that matter and made the hard decisions, those decisions stick").

228. *See supra* note 155.

229. Roger Nober, Note, *Federal Highways and Environmental Litigation: Toward a Theory of Public Choice & Administrative Reaction*, 27 HARV. J. ON LEGIS. 229, 249-50 (1990).

230. *See, e.g.*, Allison v. Department of Transp., 908 F.2d 1024, 1028 (D.C. Cir. 1990) (stating that an escalation in noise levels is sufficient to create constructive use); Adler v. Lewis, 675 F.2d 1085, 1092 (9th Cir. 1982) (stating that physical taking is not required to constitute use).

231. Miller, *supra* note 137, at 646.

232. *Id.*

233. Township of Springfield v. Lewis, 702 F.2d 426, 430 (3d Cir. 1983) (explaining that "[a]ny park use, regardless of its degree invokes section 4(f)") (citing Louisiana Envtl. Soc'y v. Coleman, 537 F.2d 79, 84 (5th Cir. 1976)).

234. *See* Stanley D. Olesh, Note, *The Roads Through Our Ruins: Archaeology and Section 4(f) of the Department of Transportation Act*, 28 WM. & MARY L. REV. 155, 163 (1986).

235. *See* Miller, *supra* note 137, at 636 n.13.

236. *See Overton Park*, 401 U.S. at 411 (stating that unique circumstances may include "considerations of cost, directness of route, and community disruption").

CONCLUSION

During the Tenth Circuit's survey period, the court handed down only a handful of transportation law decisions. Both *Issac* and *Boomer Lake* illustrate the considerable judicial deference given to agency decision-making, and the Tenth Circuit's regard for the FAA's and Department of Transportation's expertise. The court's use of the "substantial evidence" and "arbitrary and capricious" standards illustrate its willingness to uphold agency action.

Cases involving airport and highway development have historically been brought before courts to protest agency determinations. As with other transportation activities, the responsibility for airport improvement and development, as well as highway decision-making, has been delegated to administrative agencies, which are thought to be better equipped to deal with the details of aviation and road construction. Various agencies are created by the legislature to regulate transportation, and courts simply act as a check on the agencies power. The common law has stretched to provide solutions for principles previously not considered in the agencies' enabling acts, but for the most part, the Tenth Circuit has continued to apply deferential standards to agency findings.

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