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# Administrative Law

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# ADMINISTRATIVE LAW

## INTRODUCTION

Nearly all of the federal agency decisions reviewed by the Tenth Circuit Court of Appeals during the last year evidenced the federal court's tendency to give substantial deference to administrative agency decision-making. While favoring broad judicial review in administrative law cases, the Tenth Circuit continued this deferential trend in 1991. Part I of this Article discusses Tenth Circuit decisions that applied the "substantial evidence" standard of review, the general standard for judicial review of formal agency action. Part I also discusses two cases that applied the "arbitrary and capricious" standard of review, the highly deferential standard for agency appeals. Part II examines the Tenth Circuit's comprehensive analysis in *Franklin Savings Ass'n v. Director, Office of Thrift Supervision*,[1] which also reflects the continuing federal judicial practice of giving substantial deference to administrative rulings. This Article highlights the *Franklin* decision because the Tenth Circuit's in-depth analysis illustrates the federal courts' approach to reviewing administrative actions more comprehensively than any other case the court decided in 1991.

## I. STANDARDS OF REVIEW

The Administrative Procedure Act (APA)[2] completely excludes review of agency decisions when review is prohibited by a particular agency statute or when "committed to agency discretion by law."[3] However, in recent years, courts held "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review."[4] The appropriateness of judicial review of agency decision-making was thus strongly presumed.[5] The APA outlines specific standards a reviewing court must apply in determining whether an agency decision is valid.[6] The purpose of these standards is to ensure "the courts do not improperly usurp the prerogatives of the legislature" to administer the activities of agencies or take away authority properly entrusted in the agency.[7] The scope of judicial review is meant to reflect the scope of authority delegated to the particular agency, including the extent to which it was empowered by statute to make discretionary determinations.[8] Both the substantial evidence and arbitrary and capricious standards of review are based upon "reasona-

1. 934 F.2d 1127 (10th Cir. 1991).
2. 5 U.S.C. §§ 500-706 (1988).
3. *Id.* § 701(a)(2).
4. Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).
5. JEREMY RABKIN, JUDICIAL COMPULSIONS 132 (1989).
6. 5 U.S.C. § 706 (1988).
7. ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULE MAKING 580 (1986).
8. *Id.* at 583.

bleness" and both require a sufficient factual basis be present in the adminstrative record to support the agency's decision.[9]

A. *The Substantial Evidence Standard of Review*

Despite the similarities in the judicial review standards, the Supreme Court indicated the substantial evidence standard may impose a greater burden on the reviewing court by requiring it to take a "harder look" at the record than it would otherwise.[10] In some agency statutes, Congress has required the substantial evidence standard so courts will engage in a more rigorous review.[11] Courts use the "substantial evidence" test to review agency fact finding in proceedings determined on the basis of a formal agency record.[12] This standard "goes to the reasonableness of what the agency did on the basis of the record before it, for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body."[13] The substantial evidence standard's intended purpose is to limit an appellate court's power to overturn an agency's fact findings.[14] The general view is that this rationality test must be based upon the record as a whole,[15] although originally substantial evidence meant merely "more than a mere scintilla," or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[16] Thus, the substantial evidence standard is a more diffi-

9. *See* Association of Data Processing Serv. Orgs. v. Board of Governors, Fed. Reserve Sys., 745 F.2d 677, 683-84 (D.C. Cir. 1984) (since the APA's scope of review provisions are cumulative, agency action supported by required substantial evidence may be, in another regard, arbitrary, capricious, an abuse of discretion, or otherwise unlawful).

10. MICHAEL ASIMOW & ARTHUR E. BONFIELD, STATE AND FEDERAL ADMINISTRATIVE LAW 625 (1989); *see also* American Paper Inst. Inc. v. American Elec. Power Serv. Corp., 461 U.S. 402, 412 n.7 (1983) (in the absence of a statutory requirement to employ a specific review standard, the court must review agency action under the more easily satisfied arbitrary and capricious standard, which the APA requires for judicial review of informal rulemaking).

11. BONFIELD, *supra* note 6, at 625.

12. *See* 5 U.S.C. § 706(2)(E) (1988).

13. *Id.*

14. BONFIELD, *supra* note 6, at 573.

15. § 706 of the APA provides that a court shall set aside agency action "unsupported by substantial evidence" and that "[i]n making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. §§ 706(2) & (2)(E) (1988).

16. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), which states that:

> Even though the whole record may have been canvassed in order to determine whether the evidentiary foundation of a determination by the Board was "substantial," the phrasing of this Court's process of review readily lent itself to the notion that it was enough that the evidence supporting the Board's result was "substantial" when considered by itself. . . . Protests against "shocking injustices" and intimations of judicial "abdication" with which some courts granted enforcement of the Board's orders stimulated pressures for legislative relief from alleged administrative excesses. . . . [Thus,] Congress . . . made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

*Id.* at 477-79, 488.

cult one for the agency to meet than the arbitrary and capricious test.

The Tenth Circuit applied the substantial evidence standard in four cases discussed in this Article, affirming two Immigration and Naturalization Services (INS) decisions supported by substantial evidence. However, applying the same standard, the court reversed both Health and Human Services decisions due to the lack of supportive evidence.

1. The Immigration and Naturalization Services Decisions

Both *Kapcia v. INS*[17] and *Rivera-Zurita v. INS*[18] involved claimants charged with deportability pursuant to the Immigration and Nationality Act (Act).[19] The Immigration and Naturalization Services denied the applications for asylum and suspension of deportation in both cases and the Board of Immigration Appeals affirmed. The Tenth Circuit held the factual findings of the Board of Immigration Appeals (BIA) were supported by substantial evidence.

*Kapcia* involved a claim by petitioners that they were eligible for asylum because of past and future persecution arising from membership in the Solidarity movement in Poland. The BIA found petitioners did not show the fear of persecution required to merit relief nor did they satisfy the more difficult eligibility standard required for withholding of deportation to meet the burden of proof for asylum.[20] The Tenth Circuit reviewed the BIA's factual findings as to whether an alien is a refugee under the substantial evidence standard.[21] The court placed significance on the fact that this standard does not "weigh the evidence or evaluate the witness' credibility."[22] Even if the court disagreed with the BIA's position, it should not reverse if the BIA's conclusions were "substantially reasonable."[23]

The BIA found petitioners ineligible for statutory asylum because they did not meet their burden of establishing refugee status. An applicant for asylum " 'must present "specific facts" through objective evidence to prove either past persecution or "good reason" to fear future persecution.' "[24] Part of the BIA's reasoning was based on the fact that political changes in Poland made persecution less likely. The BIA took administrative notice of the changed political situation and inferred the new government would not persecute members of Solidarity. It therefore found no specific facts to establish a well-founded fear of

17. 944 F.2d 702 (10th Cir. 1991).
18. 946 F.2d 118 (10th Cir. 1991).
19. 8 U.S.C. §§ 1101-1503 (1988).
20. *Kapcia*, 944 F.2d at 703.
21. *Id.* at 707.
22. *Id.* (quoting Sorenson v. National Transp. Safety Bd., 684 F.2d 683, 685 (10th Cir. 1982)).
23. *Id.*
24. *Id.* (quoting Aguilera-Cota v. INS, 914 F.2d 1375, 1378-79 (9th Cir. 1990)). *See also* Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984) (requiring either specific facts showing past persecution or evidence that they will be singled out for future persecution).

persecution.[25]

In reviewing the BIA's conclusions, the Tenth Circuit agreed that petitioners did not establish the credible, direct or specific evidence necessary to establish an objectively well-founded fear.[26] Therefore, the court did not have to examine the petitioners' subjective fears, and given the fact the BIA's findings were "substantially reasonable,"[27] the Tenth Circuit easily found substantial evidence in the record to support its denial of asylum.

*Rivera-Zurita* involved an alien charged with deportability after finding him precluded from establishing good moral character. Rivera's deportation hearing was held before an Immigration Judge (IJ), who denied him relief because he found petitioner had recently spent more than 180 days in prison. Consequently, he was statutorily ineligible for either suspension of deportation or voluntary departure.[28] The Act mandates an alien who seeks these forms of discretionary relief must show "good moral character"[29] for a specified period of time.[30]

Rivera contended the IJ and the BIA erred in finding he had spent more than 180 days in jail. Rivera alleged he testified incorrectly during his deportation hearing regarding his incarceration period because he lacked understanding of the law.[31] However, based upon Rivera's testimony and the documentary evidence of record, the IJ and the BIA found he spent more than 180 days in confinement during the time relevant to suspension of deportation and voluntary departure.[32] In reviewing the BIA's decision, the Tenth Circuit found Rivera failed to meet his burden to prove he was not incarcerated for more than 180 days. Because substantial evidence existed in the record to support the BIA's conclusion, the Tenth Circuit affirmed the BIA's decision.[33]

2. The Health and Human Services Decisions

Both *Hill v. Sullivan*[34] and *Pacheco v. Sullivan*[35] involved claimants

25. *See Kapcia*, 944 F.2d at 704-05.
26. *Id.* at 707.
27. *Id.*
28. Rivera-Zurita v. INS, 946 F.2d 118, 120 (10th Cir. 1991). For suspension of deportation, the alien must show he "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character." 8 U.S.C. § 1254(a)(1) (1988). For voluntary departure, the alien must show he can depart at his own expense and has been "a person of good moral character for at least five years immediately preceding his application for voluntary departure." *Id.* at § 1254(e)(1).
29. The Act states that good moral character will not be found where a conviction resulted in 180 days or more of confinement during the specific period when good character is required. 8 U.S.C. § 1101(f)(7) (1988).
30. The Act requires good moral character for either seven or ten years depending on the specific deportation suspension invoked. *Id.* at § 1254(a).
31. 946 F.2d at 121-22.
32. *Id.* at 120.
33. *Id.* at 122.
34. 924 F.2d 972 (10th Cir. 1991).
35. 931 F.2d 695 (10th Cir. 1991).

seeking review of the Department of Health and Human Services'(HHS) denial of benefits. The Tenth Circuit applied the substantial evidence standard to these cases as it did in the INS cases, but here the appellate court reversed the agency's decision in both instances.

In *Hill*, the claimant appealed the decision of the Secretary of HHS denying her supplemental security income benefits.[36] Hill claimed the Secretary's determination that she was not disabled was not supported by substantial evidence.[37] Hill contended the Secretary neglected to develop the record fully and fairly by failing to have her possible chronic depression evaluated.[38] The Secretary rendered his decision "on the ground that her impairment did not prevent her from returning to her past relevant work and, therefore, she was not disabled."[39] The Tenth Circuit found the Secretary failed to follow proper procedure in evaluating the claimant's potential mental impairment and reversed.[40]

An administrative determination of fact made by the Secretary is to be considered "conclusive" on judicial review if supported by substantial evidence.[41] However, if the Secretary ignores overwhelming evidence to the contrary, the substantial evidence test is not met.[42] The Secretary argued Hill's potential mental impairment was not related to her claim for disability and there was no duty to inquire about it.[43] However, the record upon which the Secretary based his opinion contained evidence of a mental impairment, which allegedly prevented Hill from working, and the Secretary should have followed procedure for evaluating the potential medical problem.[44] The Tenth Circuit found the Secretary had not carefully considered all relevant evidence since the record contained evidence of a mental impairment. Therefore, his decision was not supported by substantial evidence.[45]

*Pacheco v. Sullivan*[46] involved the termination of disability benefits by the Secretary after finding the claimant could perform "other work in the national economy."[47] Pacheco complained the Secretary's finding was not supported by substantial evidence because evidence showed

36. *Hill*, 924 F.2d at 973.
37. *Id.*
38. *Id.* at 974.
39. *Id.* at 973. The Administrative Law Judge's decision became the final decision of the Secretary because the Appeals Council denied claimant's request for review. The district court affirmed the Secretary's decision and this appeal followed. *Id.*
40. *Id.*
41. 42 U.S.C. § 405(g) (1988).
42. Knipe v. Heckler, 755 F.2d 141, 145 (10th Cir. 1985).
43. *Hill*, 924 F.2d at 974.
44. *Id.* at 975. The court invoked § 8(a) of the Reform Act, which provided that:
> An initial determination . . . that an individual is not under a disability, in any case where there is evidence which indicates the existence of a mental impairment, shall be made only if the Secretary has made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment.

42 U.S.C. § 421(h) (1988).
45. *Hill*, 924 F.2d at 975.
46. 931 F.2d at 695 (10th Cir. 1991).
47. *Id.* at 697.

Pacheco needed treatment to render him able to work in the future.[48] Pacheco's physician evaluated his injuries and determined he required knee surgery before he could perform any work, but the Secretary failed to consider his determination.[49]

The Tenth Circuit discussed four requirements that must be met before a claimant's failure to undergo treatment may terminate his benefits[50] and determined the Secretary had not made a finding with respect to any of them.[51] By not applying the correct legal standards, the Secretary's finding that Pacheco was not disabled could not have been based on substantial evidence, and was therefore improper.[52] Remanding the case to the Secretary, the court emphasized the fact it did "not mean to preclude the Secretary from acting in his proper role as factfinder."[53] But the court recognized that, even without additional evidence to determine whether Pacheco unjustifiably refused treatment, the physician's report contained substantial evidence to support a finding Pacheco was disabled.[54]

### B. *The Arbitrary and Capricious Standard of Review*

The "arbitrary and capricious" standard allows a court to set aside an agency action only if it is "so far outside the range of action expected from responsible decision makers that it cannot successfully be defended as an exercise of reasoned judgment."[55] The standard is highly deferential to the agency. Thus, only if the agency acted irrationally or illogically may the court set aside its decision.[56] The arbitrary and capricious provision is a "catch-all" standard under which administrative misconduct is reviewed if it is not covered by the other more specific standards.[57] To find a decision arbitrary and capricious, the court must consider whether the decision was based upon all relevant factors and decide whether the agency made a clear error of judgment.[58] The ultimate standard of review is a narrow one, however, and the court may

48. *Id.* at 696-97.

49. *Id.* at 697.

50. The court stated that " '(1) the treatment must be expected to restore the claimant's ability to work; (2) the treatment must have been prescribed; (3) the treatment must have been refused; (4) the refusal must have been without justifiable excuse.' " *Id.* at 697-98 (quoting Teter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985)).

51. *Id.* at 698.

52. *Id.*

53. *Id.*

54. *Id.*

55. BONFIELD, *supra* note 6, at 575.

56. WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 258 (1991).

57. Association of Data Processing Serv. Orgs., Inc. v. Board of Governors, Fed. Reserve Sys., 745 F.2d 677, 683 (D.C. Cir. 1984).

58. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). The Supreme Court has defined "substantial inquiry" as whether the Secretary acted within his authority, whether the decision was within the range of available choices, and whether the decision that there were no feasible alternatives was reasonable. The reviewing court must find the agency choice was not capricious, arbitrary, an abuse of discretion, or otherwise unlawful. *Id.* at 413-16.

not substitute its judgment for the agency's.[59]

1. *Sierra Club v. Lujan*

*Sierra Club v. Lujan*[60] involved an action brought against the Department of Interior to enjoin a proposed road improvement project that passed through federal lands bordering a wilderness study area in southern Utah.[61] In an earlier appeal,[62] the Tenth Circuit determined there was a "major federal action" and remanded the case to the Bureau of Land Management (BLM) for an environmental assessment.[63] Based on BLM's findings of no significant impact, the district court lifted its injunction against construction on the areas bordering the wilderness study area on the western twenty-eight miles of Burr Trail. The Sierra Club again appealed.[64]

On the second appeal, the court narrowed its focus to the factual matters "derived from the limited scope of the BLM action."[65] It reviewed only those matters challenged in the district court regarding the "Harper Contract," an agreement to improve the western twenty-eight miles of Burr Trail from a one-lane dirt road to a two-lane gravel road.[66] BLM was required to consider the environmental impacts and unavoidable adverse effects associated with this project, and either issue a finding of no significant impact, or issue an environmental impact statement (EIS).[67] After careful review of the impacts of the proposed project, the BLM determined there was no significant impact. An EIS was therefore unnecessary.

The court applied the arbitrary and capricious test as handed down by the Supreme Court in *Marsh v. Oregon Natural Resources Council*.[68] In adopting this test and rejecting the "reasonableness" standard, *Sierra Club* followed the trend set by other circuits.[69] After examining the record, the Tenth Circuit was satisfied the agency took a "hard look" at the environmental impacts the proposed contract would have on the wilder-

59. *Id.* at 416.
60. 949 F.2d 362 (10th Cir. 1991).
61. *Id.* at 364.
62. *See* Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) (although BLM's actions regarding the county's road construction proposal neither exceeded its right-of-way through public lands nor constituted a "major federal action" within the National Environmental Policy Act, BLM's duty to prevent unnecessary degradation of adjoining wilderness study areas under the Federal Land Policy and Management Act did constitute a "major federal action".
63. 949 F.2d at 364.
64. *Id.*
65. *Id.* at 367.
66. *Id.* at 364.
67. *Id.*
68. 490 U.S. 360 (1989). The court invoked the arbitrary and capricious scope of review pursuant to 5 U.S.C. § 706(2)(A) (1988).
69. *See* Goos v. Interstate Commerce Comm'n, 911 F.2d 1283 (8th Cir. 1990) (court applied the arbitrary and capricious standard to an agency's decision not to prepare an Environmental Impact Statement); *see also* North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538 (11th Cir. 1990) (holding that the arbitrary and capricious standard is appropriate when appellate court reviews agency action under the National Environmental Policy Act).

ness study area, and thus determined the decision to forego an EIS was not arbitrary and capricious.[70]

2. *Rives v. Interstate Commerce Commission*

*Rives*[71] concerned employees of railroad subsidiaries affected by consolidation, who sought review of an Interstate Commerce Commission (ICC) decision, which denied them labor protective conditions under the Interstate Commerce Act. The petitioners claimed the ICC erred in determining they were not entitled to labor protection.[72] The Tenth Circuit held the enabling statute was silent on the issue. Thus, since ICC's decision denying the employees labor protection was not arbitrary and capricious, it was not subject to judicial review.[73]

The ICC imposed labor protective conditions to protect those railroad employees affected by consolidation.[74] Petitioners who were terminated after consolidation were denied benefits, because under the ICC's interpretation of the statute, they were not railroad employees.[75] The ICC construed the statute as applying only to employees the rail carrier directly employed, so petitioners employed by non-rail subsidiaries were excluded.[76]

The Tenth Circuit applied the "two-step" analysis employed by the Supreme Court in *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*[77] Applying the first step in the analysis, the Court determined Congress had not "unambiguously expressed an intent that employees of a motor carrier subsidiary [were] entitled to the mandatory protections afforded in § 11347."[78] Since Congress had not specifically defined "employee," the court administered the second prong of the *Chevron*

70. *Sierra Club*, 949 F.2d at 369.

71. Rives v. Interstate Commerce Comm'n., 934 F.2d 1171 (10th Cir. 1991).

72. *Id.* at 1172.

73. *Id.* at 1174.

74. *Id.* at 1173. These conditions included such benefits as dismissal or dismissal allowances and continuation of benefits for a specific time period. *Id.* at 1173 n.1.

75. The statute governing labor protective conditions states:

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

49 U.S.C. § 11347 (1988).

76. *Rives*, 934 F.2d at 1173-74.

77. *Id.* at 1174. The court held that:

> First, if Congress has directly spoken to the precise question at issue and its intent is clear, 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' If Congress has not addressed directly the precise question at issue, the reviewing court 'does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'

*Id.* (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (citations omitted)).

78. *Id.* at 1174.

test to determine whether the ICC's interpretation of § 11347 was permissible.[79] The court found, despite the possibility of a more reasonable interpretation of the statute, it must uphold the agency's interpretation so long as it was reasonable or permissible. Bound by this standard, the Tenth Circuit declined disturbing it on review.[80]

## II. SUBSTANTIAL DEFERENCE TO AGENCY ACTION: *FRANKLIN SAV. ASS'N V. DIRECTOR, OFFICE OF THRIFT SUPERVISION*

The Tenth Circuit's decision in *Franklin Sav. Ass'n v. Director, Office of Thrift Supervision*,[81] an exhaustive analysis of the applicable law, reflects the judicial practice of giving substantial deference to administrative agency rulings. In *Franklin*, the Tenth Circuit provides a comprehensive discussion of the standards for judicial review of administrative actions as well as a model approach to appeals of federal agency decisions.

### A. *Facts*

Franklin operated as a traditional savings and loan association for approximately eighty years before it was acquired by new ownership in 1973.[82] The new ownership group brought marked changes to Franklin by expanding services to include eight branches and adopting novel marketing strategies and pursuits.[83] Franklin's asset base changed as it had acquired numerous forms of mortgage backed securities.[84] Ultimately, mortgage backed securities and junk bonds made up more than thirty-five percent of Franklin's assets.[85] While Franklin's earnings and working capital declined, it continued aggressive expansion without a corresponding growth in capital.[86]

The Director of the Office of Thrift Supervision had several concerns about Franklin's capital structure. The Director expressed his concerns by telling Franklin the savings association's net interest margin had been decreasing, and was actually negative for the past three quarters.[87] However, Franklin failed to comply with repeated agency directives to remedy its financial situation. On February 15, 1990, the Director determined Franklin's condition was too unsafe and unsound to transact business and appointed the Resolution Trust Corporation as conservator.[88]

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79. *Id.* at 1174-75.
80. *Id.* at 1175-76.
81. 934 F.2d 1127 (10th Cir. 1991).
82. *Id.* at 1133.
83. *Id.*
84. A mortgage backed security is a security that entitles the holder to share in the payments (cash flow) from a fixed pool of mortgage loans. *Id.*
85. *Id.*
86. *Id.* at 1134.
87. *Id.*
88. *Id.* at 1135.

B. *District Court Proceedings*

The district court initially established its jurisdiction by noting that Congress specifically provided for judicial review of a regulator's appointment of a conservator in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA).[89] However, the court also noted the FIRREA provision that allows judicial review of the Office of Thrift Supervision (OTS) neglects to define the scope or standard of review.[90]

The court outlined in detail the appropriate standard of review for an administrative agency's action. It consulted the APA, which provides that if the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," it must be set aside.[91] This standard entitles the agency's decision to a presumption of validity, and the party challenging the agency action must show the agency decision lacked any basis in fact or law, or was arbitrary, capricious or an abuse of discretion.[92]

The district court then discussed the Director's contention that the administrative agency limited its review and concluded evidence outside the record could be properly considered. It based its finding on the conclusion that an "on the merits" review should provide Franklin with the opportunity to submit evidence outside the administrative record in support of its case.[93] The court differentiated its "hybrid standard of review"[94] from a de novo review, and determined an examination

89. Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C §§ 1461-1470 (1988). The relevant portion of FIRREA specifically states:

> The Director shall have exclusive power and jurisdiction to appoint a conservator or receiver for a Federal savings association. If, in the opinion of the Director, a ground for the appointment of conservator or receiver for a savings association exists, the Director is authorized to appoint ex parte and without notice a conservator or receiver for the savings association. In the event of such appointment, the association may, within 30 days thereafter, bring action in the United States district court for the judicial district in which the home office of such association is located . . . for an order requiring the Director to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Director to remove such conservator or receiver.

12 U.S.C.A. § 1464(d)(2)(E) (West Supp. 1991). *See* Franklin Sav. Ass'n v. Director, Office of Thrift Supervision, 742 F. Supp. 1089, 1094 (D. Kan. 1990), *rev'd and vacated*, 934 F.2d 1127 (10th Cir. 1990).

90. *Franklin*, 742 F. Supp. at 1095. The court mentioned that appropriate relief should be granted "upon the merits," but also noted that such language concerns the *scope* of reviewable evidence rather than the *standard* of review. *Id.* at 1095 n.3 (emphasis added).

91. *Id* at 1095 (quoting 5 U.S.C. § 706(2)(A) (1988)).

92. *Id.* at 1096.

93. *Id.* at 1096-97.

94. The hybrid standard of review was first discussed in Collie v. Federal Home Loan Bank Bd., 642 F. Supp. 1147, 1150-52 (N.D. Ill. 1986). The *Collie* court determined that the "upon the merits" language allowed the court to continue to apply the arbitrary and capricious standard of review, but that the record on which such review was to be based was expanded:

> 'Upon the merits' contrasts with the more usual 'on the record.' Congress must not have intended for judicial review always to be confined to an administrative record. . . . [T]he challenging association should have the opportunity to submit evidence whether or not that evidence was considered by the Board, and to develop any facts bearing on the question of whether any of the statutory grounds

"upon the merits" allowed the court to expand the record on which its review was based.[95]

After reviewing the administrative record and the evidence presented to it by both Franklin and the Director, the district court accepted and considered evidence outside the administrative record.[96] The court found the regulator acted wrongly in imposing conservatorship and the Director lacked any factual basis to justify the appointment of Resolution Trust.[97] The court determined the Director acted "arbitrarily and capriciously" in making the appointment and ordered the Director to remove the conservator.[98] Director appealed and the Tenth Circuit stayed the order of removal pending appeal.

### C. *Tenth Circuit Decision*

The Tenth Circuit engaged in a detailed review of the applicable statutes, legislative history and case law concerning the review of administrative agency decisions by the federal courts. The court first defined the proper scope of review for a reviewing court when it examined a director's decision to appoint a conservator for a savings and loan association.[99] It concluded the plain language of FIRREA, while authorizing judicial review of the Director's decision, failed to delineate the scope of review.[100]

The court noted a reviewing court may examine information outside of the administrative record for limited purposes only.[101] Moreover, in cases where Congress provided for judicial review without setting forth the necessary standards or procedures, the Supreme Court has ruled such review should be confined to the administrative record.[102] The Tenth Circuit found the lower court erred in adopting the reasoning set forth in *Collie v. Federal Home Loan Bank Board*, and rejected the district court's application of a hybrid scope of review.[103] Although the Tenth Circuit did not place strict limitations on the admission of evidence by the reviewing court, it noted the district court made extensive, independent findings. The court concluded the reviewing court

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existed. 'Upon the merits' means that both parties to the reviewing action have the right to develop the judicial record.

*Id.* at 1151 (citations omitted).

95. *See* 742 F. Supp. at 1097.

96. *Id.* at 1099.

97. *Id.* at 1126-27.

98. *Id.* at 1126.

99. *Franklin*, 934 F.2d at 1136-40.

100. *Id.* at 1137.

101. *Id.* An example of such a limited purpose would be: where the administrative record fails to disclose the factors used by the agency, a reviewing court may require additional findings or testimony from agency officials to determine if the action was justified. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

102. *Franklin*, 934 F.2d at 1137. *Accord* Camp v. Pitts, 411 U.S. 138 (1973); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); United States v. Carlo Bianchi & Co., Inc., 373 U.S. 709 (1963); Woods v. Federal Home Loan Bank Bd., 826 F.2d 1400 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); Guaranty Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 794 F.2d 1339 (8th Cir. 1986).

103. *Franklin*, 934 F.2d at 1138.

should confine its review to the information available to the Director at the time the appointment decision was made.[104]

The Tenth Circuit also held the appropriate standard of review specified in the APA should be applied in this situation. The APA provides that an appointment decision may be set aside only if found arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.[105] Although the district court articulated the correct standard, the Tenth Circuit concluded the lower court misapplied it.[106] The Tenth Circuit then noted the reviewing court must defer to the Director where a reasonable person considering the matter, as presented to the agency, could find a rational basis to arrive at the same judgment made by the Director.[107] The Tenth Circuit determined the district court was not justified in fact-finding to test the Director's decision to appoint a conservator.[108] It found the Director's decision supported by substantial evidence, not arbitrary, capricious, nor an abuse of discretion.[109] The Tenth Circuit thus reversed and vacated the decision of the district court, remanding it with instructions to dismiss the action.[110]

D. *Analysis*

A court reviewing an agency action is sometimes compared to an appellate court reviewing trial court findings; because the appellate court is distanced from the entire trial process, the trial court's decision should be given deference. Agency decisions are, however, different from trial court decisions. The reasoning and expertise behind agency decisions are apt to be even less familiar to a reviewing trial court than trial court decisions are to appellate courts.[111] Thus, reviewing courts give more deference to agency decisions than to trial court decisions. Also, agency policy choices are traditionally afforded considerable deference; they are generally approved if they have a "reasonable basis in the law." The reasoning behind this policy is the expertise of the agency is foreign to the courts and should therefore be afforded some deference.[112]

104. *Id.* at 1140.

105. *Id.* at 1142.

106. *Id.* The court of appeals found that the lower court had actually conducted a de novo review. *Id.*

107. *Id.* Employing language used in Webb v. Hodel, 878 F.2d 1252 (10th Cir. 1989), the court constructed a standard for appellate review of district court review of agency actions. The appellate court must review the agency decision independently, based on the same administrative record the district court utilized. The same review standard is used at both levels. On appeal, the district court decision is afforded no particular deference. *Id.*

108. The Tenth Circuit felt that, by allowing Franklin's experts to testify, the lower court both expanded the scope of review and improperly applied the standard of review. The lower court thus overstepped its boundaries. *Id.* at 1150-51.

109. *Id.* at 1151.

110. *Id.*

111. *See* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 32-33 (1990).

112. *Id.* at 33-34. *See, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944) (holding that an agency's initial determination of a statutory term must be accepted if it is warranted in the record and has a reasonable basis in applicable law); Gray v. Powell, 314

While the general consensus is agency decisions are to be afforded considerable deference, there is still the problem of how much deference. This concerns the question of the scope of judicial review—the evidence the reviewing court will analyze in examining the agency decision. As the Tenth Circuit discussed, in order to define the proper scope of review in *Franklin* it became necessary to examine whether Congress had established or defined a scope of review to be used when reviewing appointment decisions.[113] The court found it significant that Congress passed FIRREA in response to the problems existing within the savings and loan industry and, consequently, FIRREA "dictate[d] strong and prompt supervisory oversight."[114] The Tenth Circuit analyzed the plain language of the statute that gave the director his broad regulatory and enforcement powers.[115] The court's analysis focused on the words "opinion" and "on the merits". The Tenth Circuit stressed the determination of whether the director appointed a conservator was based on the Director's opinion.[116] Congress designed the statute so the Director could immediately appoint a conservator.[117] The court also noted the "upon the merits" language of the statute providing for judicial review of the Director's decision did not authorize the lower court to construct an entirely new record.[118] The Fifth[119] and Eighth[120] Circuits have agreed judicial review under this statute is limited to the administrative record, not to a new one compiled by the district court.

Besides determining the scope of judicial review, the Tenth Circuit also deliberated upon the correct standard of review. The court found the district court articulated the correct standard,[121] but applied it incorrectly. The rest of the court's analysis focused on the trial court's mistaken application of a de novo review.[122] The district court lacked authorization to make independent, de novo, findings of fact, and should instead have determined whether any rational basis existed upon which the Director could have based his decision. Because the district court inappropriately expanded the record, the Tenth Circuit was not subject to the usual, deferential fact standard of the factual findings of a district court.

In reviewing the determination to appoint a conservator under the

U.S. 402, 412-13 (1941) (stating that a determination left to an agency will remain untouched by a reviewing court).

113. *See Franklin*, 934 F.2d at 1136.

114. *Id.*

115. For the pertinent portion of FIRREA, see *supra* note 87.

116. 934 F.2d at 1137. "Congress did not mandate a hearing or specific findings of fact be made; rather it required only the director be of the opinion statutory grounds for appointment of a conservator existed." *Id.*

117. *Id.*

118. *See id.* at 1140.

119. *See, e.g.*, Woods v. Federal Home Loan Bank Bd., 826 F.2d 1400 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

120. *See, e.g.*, Guaranty Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 794 F.2d 1339 (8th Cir. 1986).

121. The district court used the arbitrary and capricious test as specified in 5 U.S.C. § 706(2)(A) (1988).

122. 934 F.2d at 1142.

arbitrary and capricious standard, a reviewing court is limited to a consideration of the administrative record before the Director when the decision was made.[123] A reviewing court may go outside of the administrative record for limited purposes only. For example, evidence may be admitted when necessary to explain the action of the agency.[124] Where the administrative record does not disclose the factors considered by the Director, a reviewing court may require the Director to prepare additional findings, or, if necessary, require testimony from agency officials to explain the decision.[125] Judicial review should thus remain limited to the administrative record already in existence, "not some new record made initially in the reviewing court."[126]

Some of the evidence introduced at trial may have been properly admitted to explain technical terms. However, the lower court used most of the evidence to make its own determinations about the safety of Franklin's operations.[127] The inquiry of the district court went beyond any authorized scope of review, which resulted in the court substituting its own judgment for the Director's. The court thus violated the principles that "[t]he reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions"[128] and that courts are not free to substitute their views for those of the appropriate government agency.[129]

### E. *Conclusion*

Congress made it clear that it vested the Director with the responsibility to determine the soundness of a financial institution.[130] The Tenth Circuit correctly determined the Director's judgment should not be subject to the strict scrutiny re-examination the district court applied. The sole question determined during judicial review should have been the question the Tenth Circuit considered—whether the Director reasonably determined a ground existed for the appointment of a conservator. After reviewing only the agency record, the Tenth Circuit concluded the Director determined a reasonable ground existed for the conservator's appointment.

## CONCLUSION

During the past year, the Tenth Circuit continued its trend to give substantial deference to administrative agency decisions. The court carefully scrutinized agency decision-making, but overruled agency decisions only when convinced the agency definitely failed to consider all

123. *See* Camp v. Pitts, 411 U.S. 138, 142 (1973). *See also supra* note 105 and accompanying text.
124. Animal Defense Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988).
125. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).
126. 411 U.S. at 142.
127. *Franklin*, 934 F.2d at 1142-45.
128. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).
129. *Overton Park*, 401 U.S. at 416.
130. *See Franklin*, 934 F.2d at 1151.

relevant evidence. The *Franklin* decision exemplifies the Tenth Circuit's meticulous consideration of the agency record and its general tendency to defer to agency expertise when reviewing administrative actions.

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