

# Denver Law Review

---

Volume 68  
Issue 4 *Tenth Circuit Surveys*

Article 10

---

February 2021

## Administrative Law

Denver University Law Review

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

---

### Recommended Citation

Denver University Law Review, Administrative Law, 68 Denv. U. L. Rev. 517 (1991).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

# CASE SUMMARIES

## ADMINISTRATIVE LAW

*American Mining Congress v. United States Nuclear Regulatory Comm'n*, 902 F.2d 781

Author: Judge McWilliams

American Mining Congress ("AMC") sought review of amendments to the Nuclear Regulatory Commission's ("NRC's") criteria relating to operation of uranium mills and disposition of tailings. Specifically, AMC challenged the measures to be taken regarding the disposal of uranium mill tailings to avoid groundwater contamination. AMC argued that NRC failed to perform an Environmental Protection Agency ("EPA") cost-benefit analysis before promulgating the amendments. AMC also argued that NRC failed to ensure that its regulations were consistent with the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6921. AMC's final contention was that the "liner" regulation was arbitrary and capricious because it did not reflect an appropriate relationship between costs and benefits, failed to provide flexibility and opportunity for proposing alternative disposal strategies, and was retroactively applied.

The Tenth Circuit first ruled that NRC may rely on the EPA cost-benefit analysis. The court stated that NRC performed its obligation when it conformed to the EPA regulations it was required to adopt. Second, the court stated that the EPA has not finalized its mining waste rules under SWDA, so a determination of whether uranium mill tailing waste is regulated would be premature. Last, the court ruled that the "liner" regulation promulgated by the NRC was not inflexible, because it allows a licensee to propose alternatives. Moreover, NRC did not engage in illegal retroactive rulemaking. The court reasoned that NRC complied with its statutory duties in requiring a "liner."

*Anderson v. Food and Drug Admin.*, 907 F.2d 936

Author: Judge Ebel

Plaintiff, Anderson, appealed the district court's order granting summary judgment in favor of defendant, Food and Drug Administration ("FDA") and defendant-intervener, Dow Corning Corporation ("Dow"). Anderson attempted, under the Freedom of Information Act ("FOIA"), to compel the FDA to disclose certain documents submitted by Dow. The district court held that the requested documents contained confidential information, exempt from disclosure requirements of the FOIA.

The Tenth Circuit affirmed the district court's finding that no evidence of material fact in dispute would preclude summary judgment. The court remanded, however, for clarification of which documents

were "confidential" and which were "trade secrets" within the meaning of exemption 4 of the FOIA. The court held that neither 18 U.S.C. § 1905, 21 U.S.C. § 306j(c), nor 21 U.S.C. § 332(j) provided any independent justification for nondisclosure under exemption 3 of the FOIA. Accordingly, the court affirmed the district court's dismissal of Anderson's Fed. R. Civ. P. 60(b)(3) motion.

*Arch Mineral Corp. v. Lujan*, 911 F.2d 408

Author: Judge McWilliams

Plaintiffs, Arch Mineral Corporation and Ark Land Company ("ARK"), engaged in several long-term coal leases with the United States. ARK brought suit to enjoin defendants, Manuel Lujan, Jr., Secretary of the Interior (the "Secretary"), and Barry A. Williamson, Director of the Minerals Management Service, from taking any further administrative or judicial action to collect "readjusted" rents and royalties allegedly due the United States on the leases. The Secretary counterclaimed, seeking approximately \$5,000,000 for underpaid rents and royalties. The district court granted summary judgment in favor of the Secretary on ARK's complaint and reserved ruling on the Secretary's counterclaim pending the resolution of administrative proceedings. ARK appealed, asserting that: (1) pursuant to Fed. R. Civ. P. 13(a), the Secretary's counterclaim was barred because it was not asserted in earlier "readjustment" cases; and (2) the Secretary lacked statutory authority to collect unpaid royalties by way of agency action.

The Tenth Circuit affirmed the district court's ruling against ARK. The court first held that Fed. R. Civ. P. 13(a) does not bar the Secretary's counterclaim. The court reasoned that the Secretary's claims in the readjustment cases did not mature until ARK filed suit in the instant case. Second, the court ruled that the Secretary has broad authority under MMLA (1970). Specifically, the Secretary has the power to collect royalties through administrative procedures.

*Bernstein v. Sullivan*, 914 F.2d 1395

Author: Judge McWilliams

Plaintiff, Bernstein, petitioned for review of a final decision of the Secretary of Health and Human Services ("Secretary"). This decision held Bernstein liable under the Civil Monetary Penalties Law ("CMPL") for submitting false claims for Medicare reimbursement. On appeal, Bernstein argued that the Secretary's action was barred by the five year statute of limitations. Moreover, Bernstein alleged that the 1987 amendment, which granted a six year statute of limitations, was not applicable because the Secretary initiated civil penalties against him in 1985.

The Tenth Circuit held that the six year statute of limitations was applicable and allowed the Secretary's action to stand. The amended version of the CMPL applied because: (1) the action was commenced after the effective date of the amendment; and (2) the amendment was

intended to apply to all proceedings initiated after the effective date. Additionally, the court reasoned that the Secretary's interpretation of the CMPL was entitled deference. The court also held that the "retroactive" application of the six year statute of limitations did not violate Bernstein's constitutional right to due process.

*Davidson v. Secretary of Health and Human Servs.*, 912 F.2d 1246  
Per Curiam

Plaintiff, Davidson, applied for worker's disability benefits and widow's disability benefits. Defendant, Secretary of Health and Human Services (the "Secretary"), denied Davidson's claim for widow's disability benefits. The Secretary reasoned that her impairments did not meet the special, stricter disability requirements for the widow's disability program. These requirements are set forth in the Listing of Impairments, an appendix to the regulation of the Department of Health and Human Services. The district court reversed and remanded to the Secretary. The district court stated that the Secretary must consider Davidson's residual functional capacity for any gainful activity. Moreover, the district court stated that the Secretary must not limit its inquiry to whether Davidson's impairments fit within the listed severe impairments, or its equivalent, as set forth in the regulations. The Secretary appealed.

The Tenth Circuit affirmed. The court ruled that the Secretary must consider not only whether the claimant has met the listed disabilities, or their equivalent, but it must also consider any medical evidence relevant to the residual functional capacity of the claimant. The court found ample evidence in the legislative history that Congress did not intend the Listing of Impairments to be exhaustive of those which allowed recovery.

*Environmental Defense Fund v. United States Nuclear Regulatory Comm'n*, 902 F.2d 785

Author: Judge McWilliams

The Environmental Defense Fund ("EDF") sought review of final regulations promulgated by the Nuclear Regulatory Commission ("NRC"). These regulations modified the requirements governing the licensing of uranium mills and the disposal of uranium mill tailings. EDF also petitioned for a writ of *mandamus* to require NRC to engage in further rulemaking on the subjects. Specifically, EDF argued that NRC did not conform its regulations to Environmental Protection Agency ("EPA") standards for the disposal of mill tailings. Moreover, in its petition for *mandamus*, EDF sought an order directing NRC to adopt the missing elements of EPA's standards governing the point of compliance.

The Tenth Circuit first ruled that NRC's general requirements for management of uranium tailings did not have to conform with EPA standards. The court reasoned that the EPA standards governing point of compliance were not promulgated under the Atomic Energy Act

("AEA") and, thus, conformance was not required. Moreover, the court noted that a high degree of deference is awarded the NRC in its regulatory capacity. Second, the court denied EDF's petition for *mandamus*. The court explained that NRC was complying with its duties pursuant to § 84(a)(3) of the AEA. Moreover, its comparability study was still in progress, and NRC was relying on a combination of conformed regulations, policies and license conditions at the tailing sites. Accordingly, the court found no reason to intervene.

*Hecla Mining Co. v. United States*, 909 F.2d 1371

Author: Judge McKay

Plaintiff, Hecla Mining Company ("Hecla"), appealed the district court's order granting summary judgment in favor of defendant, United States. This ruling upheld the decision of the Department of Energy ("DOE") which stated that under the Uranium Mill Tailings Radiation Control Act ("UMTRCA"), the town of Curita did not qualify as a "processing site" and, therefore, was not entitled to federal and state "cleanup" funds. While there was no genuine issue as to material facts, Hecla challenged the district court's process, standard of review, and conclusions of law.

The Tenth Circuit affirmed the district court's decision. Specifically, the court ruled that the district court was correct in reviewing the reasonableness of DOE's procedures and decision. The court stated that Congress has specifically authorized DOE to promulgate rules, and the Supreme Court has held that choice of procedure lies with the agency. If Congress does not address an issue directly, the court may decide if the agency's interpretation is a permissible construction of the statute. Here, the court ruled that the DOE's interpretation was permissible as supported by legislative history. The agency's action was not arbitrary, capricious, an abuse of discretion, or contrary to the law. Therefore, deference to the DOE's decision was held to be appropriate.

*Kansas Corp. Comm'n v. Interstate Commerce Comm'n*, 894 F.2d 1141

Author: Judge Bohanon, sitting by designation

The Kansas State Corporation Commission ("KCC") sought judicial review of an order by plaintiff, the Interstate Commerce Commission ("ICC"), which granted Missouri Pacific Railroad ("MP"), the right to abandon sixty-six miles of track. KCC challenged the findings of the ICC and the sufficiency of the underlying evidence.

The Tenth Circuit affirmed the decision of the ICC, allowing MP to abandon the specified section of track. The court reasoned that the ICC's decision was presumptively valid, and its review of the decision was limited to a determination of whether there was sufficient evidence to support the decision. In examining the evidence presented regarding bridge or overhead traffic, revenue impacts, alternate transportation options, impact on local communities, and perfection for abandonment, the court held there was substantial support for the ICC's decision. The

court explained that the ICC carefully considered the relevant factors and weighed the competing interests. Therefore, the court stated ICC's decision was in accord with the evidence and the law.

*Northwest Pipeline Corp. v. Federal Energy Regulatory Comm'n*, 905 F.2d 1403

Author: Judge Moore

Northwest Pipeline Corporation ("Northwest") petitioned for review of two orders of the Federal Energy Regulatory Commission ("FERC") which asserted jurisdiction over certain facilities pursuant to the Natural Gas Act (the "Act"), 15 U.S.C. § 717(b). Northwest asserted that § 1(b) of the Act circumscribed the FERC's jurisdiction to regulate the transportation of natural gas in interstate commerce. The FERC, on the other hand, claimed that no aspect of the interstate business of transporting or selling natural gas for resale is to be left unregulated by it. Specifically, the FERC used a primary function test to assert jurisdiction.

The Tenth Circuit found error in the FERC's assertion of jurisdiction and remanded for a determination of whether the facilities at issue were properly exempt from FERC's jurisdiction. The court concluded that FERC improperly applied the primary function test. In effect, the FERC placed weight on primarily one factor of the test. The FERC considered mainly status as an interstate pipeline company in determining it had jurisdiction. The court stated that FERC should have also decided whether the transportation was incidental to traditional gathering functions and, thus, exempt from its jurisdiction. The court explained that FERC has exclusive jurisdiction over the sale and transportation of natural gas for resale, while Congress expressly reserved to the states the power to regulate the production or gathering of natural gas. Furthermore, FERC's approach to the primary function test did not comport with Congress' intent in § 1(b). Essentially, FERC failed to distinguish between transportation in interstate commerce and any other transportation related to facilities for the production and gathering of natural gas.

*NLRB v. United States Postal Serv.*, 906 F.2d 482

Author: Judge Brorby

The National Labor Relations Board ("NLRB") affirmed the administrative law judge's ("ALJ") finding that the United States Postal Service ("USPS") violated § 8(a)(1) of the National Labor Relations Act. The charges resulted from the USPS's refusal to reassign an employee, Richardson, after he engaged in protected concerted activity. The activity was utilizing grievance procedures of the collective bargaining agreement. After the NLRB affirmed the ALJ decision, the USPS refused to comply with the order. This action was brought by the NLRB to enforce its decision.

The Tenth Circuit affirmed the NLRB's decision and ordered en-

forcement of the order. First, the court held that the ALJ properly concluded that the postmaster prevented Richardson's advancement due to the grievances he filed. The court found that the postmaster's justification for not reassigning Richardson was inadequate. Specifically, the postmaster did not prove that Richardson would not have been reassigned without the consideration of the grievances filed. Finally, the NLRB did not abuse its discretion in declining to defer its jurisdiction to the arbitration agreement, which was required by the collective bargaining agreement.