Denver Law Review

Volume 60
Issue 2 *Tenth Circuit Surveys*

Article 6

January 1982

Administrative Law

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Recommended Citation
Michael G. Cooksey, Administrative Law, 60 Denv. L.J. 149 (1982).

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ADMINISTRATIVE LAW

OVERVIEW

The Tenth Circuit Court of Appeals decided a large number of cases from administrative agencies during the recent survey period. One-fifth of the cases involved disputes of agency interpretation of social security benefits, with the remainder involving a variety of issues between federal administrative bureaucracies and citizens.

Traditional deference to agency action was apparent, with many of the cases decided under the "substantial evidence" rule of the Administrative Procedure Act (APA).[1] This is not to say, however, that the Tenth Circuit automatically rubber-stamped all agency actions; several cases were reversed and remanded when the court found that agency personnel or the district courts acted arbitrarily and capriciously, abused their discretion, or misinterpreted the law.

I. SCOPE OF REVIEW

A. *Review of An Agency's Interpretation of Its Own Regulations*

In *Devon Corp. v. Federal Energy Regulatory Commission*,[2] the Tenth Circuit held that an administrative agency's interpretation of its own regulations controls the court's decision "unless it is plainly erroneous or inconsistent with the regulation."[3] In 1973 Devon, a small natural gas producer,[4] acquired reserves from Commonwealth Group. Although Commonwealth's jurisdictional sales had previously exceeded 10,000,000 Mcf, classifying it as a large producer, its 1973 sales fell below that amount.[5]

In 1976 Devon applied to the Federal Energy Regulatory Commission (FERC) for a small producer exemption,[6] claiming that because Commonwealth's sales in 1973, the year of Devon's acquisition, were below 10,000,000 Mcf, it was entitled to small producer treatment. FERC denied the exemption based on its unreported order which states that the status of a producer is determined by the amount of sales in the preceding calendar year. Because Commonwealth's 1972 sales exceeded 10,000,000 Mcf, Devon had acquired the reserves of a large producer and was not entitled to small producer treatment.[7] The court ruled that FERC's use of the "previous calendar year to determine status is reasonable, consistent with the regulations,

1. 5 U.S.C. § 706(2)(E) (1976) provides that a reviewing court shall "set aside agency action, findings, and conclusions found to be unsupported by substantial evidence . . . ."
2. 662 F.2d 698 (10th Cir. 1981).
3. *Id.* at 700 (citations omitted).
4. 18 C.F.R. § 157.40(a)(1) (1982) defines a small producer as one who sells less than 10,000,000 Mcf of natural gas during the preceding calendar year.
5. 662 F.2d at 699.
6. 18 C.F.R. § 157.40 (1982).
7. 662 F.2d at 699.

and in conformity with previous Commission practice."[8]

In a similar case, *Blue Cross Association v. Harris*,[9] the court of appeals overruled the district court and upheld the Secretary of Health and Human Services' interpretation of the Medicare Act.[10] On the local level, medicare is administered by contracts with private health insurance companies such as Blue Cross and Blue Shield. These "intermediaries"[11] and "carriers"[12] are reimbursed by the federal government on the basis of the reasonable costs incurred in operating the program.[13]

The Act further authorizes the Secretary to conduct experiments and demonstration projects to determine whether either fixed price or performance incentive contracts are more efficient than payment of reasonably incurred costs.[14] The Secretary, pursuant to the Act, sought competitive bids for administering an experimental program in Wyoming, Colorado, and Utah. Blue Cross and various hospital associations sought injunctive relief, contending that the hospitals involved had a right to nominate their intermediaries,[15] that the Act defines those who may be carriers,[16] and that the Act requires the Secretary to obtain advice and recommendations from competent specialists before issuing requests for competitive bids.[17] The district court agreed with the plaintiffs' arguments and issued an injunction against the execution of an agreement based on the competitive bids until she obtained the advice from specialists as required under section 1395b-1(b)[18] and made a good faith attempt to negotiate with the plaintiffs.[19]

On appeal, the Secretary insisted that the section of the Medicare Act that authorizes experiments and demonstration projects does not require the agency to comply with the nominated intermediary and statutory carrier provisions.[20] Even if there were reasonable differences in interpretation, the appellants contended the district court should have deferred to the Secre-

8. *Id.* at 700. *See also* Kaiser-Francis Special Account C v. FERC, 675 F.2d 249 (10th Cir. 1982), an analogous case, in which the court held that an "agency's interpretation of its own regulations is entitled to great deference on appeal." *Id.* at 250 (citation omitted). *Accord* Riverton Valley Elec. Ass'n v. Block, No. 79-2238 (10th Cir. Sept. 24, 1981), in which the Tenth Circuit reversed the United States District Court for the District of Wyoming for reviewing day-to-day administrative activities of the Rural Electrification Administration.

9. 664 F.2d 806 (10th Cir. 1981).

10. Pub. L. No. 89-97, 79 Stat. 286 (1965) (codified as amended in scattered sections of 26, 42, and 45 U.S.C.).

11. *See infra* note 15 and accompanying text.

12. *See* 42 U.S.C. § 1395u (1976 & Supp. IV 1980).

13. *Id.* § 1395g.

14. *Id.* § 1395b-1.

15. *Id.* § 1395h.

16. *Id.* § 1395u(f) (1976).

17. *See* 42 U.S.C. § 1395b-1(b) (Supp. IV 1980). This section provides:

> No experiment or demonstration project shall be engaged in or developed under subsection (a) of this section until the Secretary obtains the advice of specialists who are competent to evaluate the proposed experiment or demonstration project as to the soundness of its objectives, the possibilities of securing productive results, the adequacy of resources to conduct the proposed experiment or demonstration project, and its relationship to other similar experiments and projects already completed or in process.

18. *Id.*

19. 664 F.2d at 809.

20. *Id.*

tary's interpretation.[21] The Tenth Circuit agreed, finding that the intent and the language of the Medicare Act are clear that experimental contracts are not restricted to nominated intermediaries or statutory carriers.[22] The court added that assuming the statute authorizing experimental contracts was ambiguous, "we must afford 'great deference to the interpretation given the statute by the officers or agency charged with its administration.' "[23] The court further noted that where agency expertise is required, the Secretary's construction of a statute must be sustained if it is reasonable, even if it is not the only reasonable one, "or the one which this court would have reached de novo."[24]

In *Tsosie v. Califano*,[25] the Tenth Circuit held that a court should defer to an agency's interpretation of the statute, but not if the construction rests on the interpretation of another agency's statutes and regulations.[26] At issue in the case were dual benefits Mrs. Tsosie, a disabled widow of a veteran, received from Supplemental Security Income (SSI)[27] under the Social Security Act, and a surviving spouse pension from the Veterans Administration (VA).[28] The VA pension of $227 a month included $118 for five children in Mrs. Tsosie's custody. In addition, she received $27 a month in social security widow's benefits. Her total income was thus $254 a month, but this included the $118 VA allowance for her children.[29]

In 1977, the Social Security Administration terminated the widow's SSI on the ground that her income exceeded the statutory limit of $167.50 per month. At a hearing, the administrative law judge (ALJ) rejected Mrs. Tsosie's claim that the children's benefits should be excluded in determining her income, and held that she was no longer eligible for SSI. The district court affirmed the ALJ's decision.[30]

On appeal, Mrs. Tsosie contended that the agency's action violated the letter and spirit of the Veterans' Benefits Act[31] and defeated the purpose of the Social Security Act.[32] The Secretary argued that the language of the Veterans' Benefits Act states that the Administrator shall pay the pension "to the surviving spouse,"[33] not to the children, indicating that the money is intended to be the spouse's income.[34]

The court ruled for Mrs. Tsosie, finding the Secretary's interpretation of the applicable statute of the Veterans' Benefit Act was "unduly legalistic and technical,"[35] and gave little weight to the purpose and spirit of the Act.

21. *Id.*
22. *Id.*
23. *Id.* at 810 (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965)).
24. *Id.*
25. 651 F.2d 719 (10th Cir. 1981).
26. *Id.* at 722.
27. 42 U.S.C. §§ 1381-1383c (1976 & Supp. IV 1980).
28. *See* 38 U.S.C. § 541 (Supp. V 1981).
29. 651 F.2d at 720-21.
30. *Id.* at 721.
31. 38 U.S.C. §§ 101-5228 (1976 & Supp. V 1981).
32. 651 F.2d at 721. *See* 42 U.S.C. §§ 301-1397 (1976 & Supp. IV 1980).
33. 38 U.S.C. § 541(a) (Supp. V 1981).
34. 651 F.2d at 721.
35. *Id.* at 722.

Judge Seymour, writing for the court, likened the Secretary to "one who listens to music for individual notes rather than for the melody: he misses the theme."[36] The court held that the children's portion of a surviving spouse's pension check is intended for the children's needs, and should not be treated as the widow's income.[37]

B. *The Substantial Evidence Test*

Section 706 of the APA provides that a reviewing court may set aside agency action that is unsupported by "substantial evidence."[38] The United States Supreme Court has described substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[39] Because ALJs often weigh conflicting testimony, courts are reluctant to overrule agency action based on an interpretation of facts which is supported by substantial evidence. For example, during the recent survey period the Tenth Circuit upheld ALJs in four cases[40] denying disability insurance benefits[41] because substantial evidence indicated that although claimants were disabled, they were not totally unemployable.

Typical of these cases was *Campbell v. Harris*,[42] in which conflicting medical testimony was presented regarding the extent of the appellant's disability. Campbell had been totally disabled from 1974 to 1979. In June, 1979, medical examiners determined that he had recovered sufficiently to return to work. One physician, however, determined that, in his present condition, Campbell could not work. The United States District Court for the Western District of Oklahoma upheld the ALJ in denying further benefits on the ground that his position was supported by substantial evidence. The Tenth Circuit affirmed the lower court, noting that although there was a disagreement of medical opinion, there was substantial evidence in the record to support the ALJ's decision.[43]

In *Dun-Par Engineered Form Co. v. Marshall*,[44] a contractor failed to provide protective handrails for his employees working on the open second floor of a building under construction. The court upheld an $800 fine approved by the Occupational Safety and Health Review Commission (OSHRC).[45]

Dun-Par defended by arguing that it did not create the hazard by taking down or destroying existing handrails, and that the responsibility for

36. *Id.*

37. *Accord* Webster v. Califano, No. 78-3492 (6th Cir. July 10, 1980). *Contra* Whaley v. Harris, 650 F.2d 181 (9th Cir. 1981).

38. 5 U.S.C. § 706(2)(E) (1976).

39. Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938)).

40. McKinney v. Harris, No. 80-2050 (10th Cir. May 13, 1982); Francis v. Harris, No. 81-1492 (10th Cir. Mar. 12, 1982); Chapman v. Schweiker, No. 81-1025 (10th Cir. Feb. 26, 1982); Campbell v. Harris, No. 81-1095 (10th Cir. Feb. 8, 1982).

41. *See* 42 U.S.C. § 423 (1976 & Supp. IV 1980).

42. No. 81-1095 (10th Cir. Feb. 8, 1982).

43. *Id.* slip op. at 3.

44. 676 F.2d 1333 (10th Cir. 1982).

45. *Id.* at 1338.

erecting them rested on the general contractor.[46] The court disagreed, however, relying on *Central of Georgia Railroad v. OSHRC*[47] and *Bratton Corp. v. OSHRC*,[48] which enunciate the principle that the contractual responsibility placed upon another contractor to provide protection does not necessarily relieve the employer of the same responsibility. The court found Dun-Par had the primary responsibility for its employees' safety.[49]

Although Dun-Par had been previously cited twice for handrail violations, it objected to the characterization of its offense as "repeated."[50] Citing its decision in *Kent Nowlin Construction Co. v. OSHRC*,[51] the court noted that the congressional purpose[52] stated in the Occupational Safety and Health Act (OSHA) was to encourage employers who have been cited previously to take the necessary precautions to prevent further violations.[53] Judge McKay specifically rejected the Third Circuit's definition of repeated violations as "intentional flauntings of the Act."[54] Thus, based on Dun-Par's record of two previous violations, the court held that substantial evidence supported OSHRC's position that the contractor was subject to an enhanced penalty.[55]

In *Marshall v. M.W. Watson, Inc.*,[56] the Secretary of Labor appealed the decision of OSHRC to reduce the citations entered against a contractor by a compliance officer for OSHA. After a fatal cave-in at an excavation site, Watson, a contractor, had been charged with failure to provide adequate safety instructions for its employees[57] and failure to meet specific trenching requirements.[58] An OSHA compliance officer investigated the accident and recommended a $900 fine for the first violation and, deeming the second violation to be willful, assessed a $9000 penalty. Watson contested the citations. After a hearing, the ALJ dismissed the first citation, modified the second from willful to serious, and assessed a $50 fine. The Secretary's petition to OSHRC for a review of the ALJ's decision was not granted, making the decision final.[59]

After a review of Watson's past safety record, the court found that substantial evidence supported the ALJ's dismissal of the citation for failure to provide adequate safety instructions to its employees.[60] The court pointed out that Watson had met its burden in training its employees in hazard rec-

46. *Id.* at 1335.
47. 576 F.2d 620 (5th Cir. 1978).
48. 590 F.2d 273 (8th Cir. 1979).
49. 676 F.2d at 1336.
50. *Id.* 29 U.S.C. § 666(a) (1976) provides: "Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 665 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than $10,000 for each violation."
51. 648 F.2d 1278 (10th Cir. 1981).
52. 29 U.S.C. § 561(b) (1976).
53. 676 F.2d at 1337.
54. *Id.* (citing *Kent Nowlin Constr.*, 648 F.2d at 1282). *See* Bethlehem Steel Corp. v. OSHRC, 540 F.2d 157, 162 (3d Cir. 1976).
55. 676 F.2d at 1338.
56. 652 F.2d 977 (10th Cir. 1981).
57. *See* 29 C.F.R. § 1926.21(b)(2) (1981).
58. 652 F.2d at 978. *See* 29 C.F.R. § 1926.652(c) (1981).
59. 652 F.2d at 979.
60. *Id.* at 980.

ognition related to their work.[61] With respect to the trenching violation, the court analyzed the conditions surrounding the fatal cave-in. Substantial evidence supported the ALJ's assessment of the violation as being serious, not willful.[62]

The court of appeals overturned a decision by OSHRC in *Capital Electric Line Builders of Kansas, Inc. v. Marshall*,[63] holding that there was insufficient evidence in the record to support the finding of any violation. After an accident in which a lineman was electrocuted, an OSHA compliance officer cited Capital Electric for violations of three safety standards: 1) allowing an employee to work too closely to energized parts without insulating equipment,[64] 2) allowing an employee to remove grounds without using insulating tools,[65] and 3) allowing an employee to work in an aerial bucket without a restraining belt.[66] All violations were deemed serious. Upon discovering that a Capital Electric employee had been electrocuted one year earlier, OSHRC amended the complaints to upgrade the violations to willful.[67]

After a hearing, the ALJ found that Capital Electric had willfully violated the three regulations and fined the company $10,000.[68] In ruling against Capital Electric, the ALJ emphasized that a death had occurred and that the decedent was not using or wearing insulating equipment or body belts.[69] Capital Electric contended that the death was the result of the employee's "unforeseeable, unanticipated" failure to comply with company safety rules.[70] The ALJ ruled that the employer had the burden of proof to establish unpreventable employee misconduct.[71]

The court, relying on *Mountain States Telephone & Telegraph Co. v. OSHRC*,[72] held that the ALJ improperly allocated the burden of proof.[73] In *Mountain States*, the court ruled that the burden of disproving unpreventable employee misconduct rests with the Secretary of Labor.[74] The court in *Capital Electric* ruled that this burden can be met by showing that the violation was foreseeable because of inadequacies in the [employer's] safety precautions, training of employees, or supervision.[75] The court determined that despite the ALJ's error in allocating the burden of proof, it was unnecessary to remand the case. The evidence was insubstantial to support a finding that Capital Electric failed to provide adequate safety precautions, training,

61. *Id.* at 979.
62. *Id.* at 980.
63. 678 F.2d 128 (10th Cir. 1982).
64. *See* 29 C.F.R. § 1926.950(c)(1) (1981).
65. *See id.* § 1926.954(e)(2) (1981).
66. *See id.* § 1926.556(b)(2)(v) (1981).
67. 678 F.2d at 129.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. 623 F.2d 155 (10th Cir. 1980).
73. 673 F.2d at 129.
74. *Id.* at 158. *See* 29 C.F.R. § 2200.73(a) (1981). *See also* Brennan v. OSHRC, 511 F.2d 1139, 1143 (9th Cir. 1975). *But see* H.B. Zachry Co. v. OSHRC, 638 F.2d 812, 818 (5th Cir. 1981) (burden of proof placed on employer).
75. 678 F.2d at 130.

and supervision.[76]

C. *Arbitrary and Capricious Standard*

Closely related to the substantial evidence test is the arbitrary and capricious standard. Whereas the substantial evidence test emphasizes the facts and the question of whether the facts support a given conclusion,[77] the arbitrary and capricious test emphasizes the conclusion drawn from the facts and the resulting action taken.[78] A case which illustrates this distinction is *Curtis, Inc. v. Interstate Commerce Commission*,[79] where the administrative ruling was flawed by its failure to meet both the substantial evidence and the arbitrary and capricious tests.[80]

Story, Inc., an intervening respondent and the subject of the case, is a small independent trucking company owned and operated by Harold Story. In 1978, Story filed for interstate common carrier operating authority. Before operating authority could be issued, Story was statutorily required to prove to the Interstate Commerce Commission (ICC or Commission) that the company was fit, willing, and able to comply with applicable laws and regulations.[81] At the hearing, the ICC presented evidence that indicated

76. *Id.* Other cases decided under the substantial evidence rule during this survey period were: Romero v. Harris, 675 F.2d 1100 (10th Cir. 1982) (court of appeals reversed lower court's order requiring recipients to reimburse overpayment of SSI benefits, because evidence did not support conclusion that recipients were at fault, and because evidence did show that recovery of the overpayments would frustrate the purpose of Title XVI of the Social Security Act); Morris v. Harris, 663 F.2d 1014 (10th Cir. 1981) (Social Security Administration upheld in demanding recovery of overpayment of survivor's benefits); Wilson v. Department of Health and Human Serv., No. 81-1392 (10th Cir. Mar. 30, 1982) (Merit Systems Protection Board upheld in reversing its own hearing officer who deemed a resignation had been coerced); Longhat v. Andrus, No. 80-1171 (10th Cir. Jan. 15, 1982) (ALJ upheld in determination of heirs-at-law, despite conflicting claims and evidence); Mid-Continent Coal & Coke Co. v. Federal Mine Safety Comm'n, No. 79-2271 (10th Cir. Sept. 24, 1981) (ALJ upheld in assessing a penalty for a safety violation leading to a fatal mine accident); Gentry v. Califano, No. 78-1844 (10th Cir. Sept. 21, 1981) (ALJ upheld in determining free rent to be unearned income reducing SSI benefits); Carrizo v. Secretary of Health, Education, and Welfare, No. 80-1675 (10th Cir. Sept. 16, 1981) (ALJ upheld in determining amount of overpayment of social security retirement benefits to be recovered); Brown v. Railroad Retirement Bd., No. 78-1647 (10th Cir. Aug. 19, 1981) (Railroad Retirement Board upheld in determination of decedent's beneficiary).

77. *See* Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966).

78. *See* Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974).

79. 662 F.2d 680 (10th Cir. 1981).

80. Other cases decided during the survey period in which the arbitrary and capricious standard was applied include: Curtis, Inc. v. ICC, 669 F.2d 648 (10th Cir. 1982) (in challenge to ICC issuance of operating authorities, court deferred to ICC's interpretation of its regulations and the underlying facts); Wolf v. United States, 662 F.2d 676 (10th Cir. 1981) (Department of Agriculture upheld in suspending participation in food stamp program for six months for a store permitting its patrons to purchase non-food items); Carter v. Central States, Southeast and Southwest Areas Pension Plan, 656 F.2d 575 (10th Cir. 1981) (pension fund trustees upheld in denying benefits to a teamster who failed the 20-year continuous service requirement); Hechter v. Department of Health and Human Serv., No. 80-2086 (10th Cir. Apr. 27, 1982) (agency upheld in firing employee for failing to do assigned work); Vickers v. Hampton, No. 80-1813 (10th Cir. Apr. 7, 1982) (Civil Service Commission upheld in firing an employee for several thefts of government property, despite its being the employee's first offense); Hawkins v. Merit Sys. Protection Bd., No. 81-1267 (10th Cir. Feb. 9, 1982) (Board upheld in deeming resignation voluntary and not coerced); Curtis, Inc. v. ICC, No. 80-1486 (10th Cir. Dec. 2, 1981) (ICC upheld in challenge to its issuance of a certificate).

81. 49 U.S.C. § 10922(a) (Supp. IV 1980).

Story's past disregard of the law. Story had previously owned and operated an agricultural cooperative and had "found it difficult"[82] meeting the legal requirements of section 10526(a)(5) of the Interstate Commerce Act.[83] He admitted at the hearing that his interpretation of this section was " 'my version of it.' "[84] The ALJ noted, " 'there was not the slightest sign of contrition by Mr. Story for his past illegality . . . [and] his adherence to self-serving, twisted interpretations of the law . . . can only be described as brazen.' "[85] Despite this evidence of unfitness, the ALJ awarded a three-year conditional certificate to Story, apparently influenced by Story's background in the transportation business and his military service during the Vietnam War.[86]

The ICC rejected the ALJ's reasoning as irrelevant, but approved his conclusion.[87] The Commissioners noted that Story had never been cited for any violations of the law and that the conditional certificate would keep the company under close scrutiny.[88]

Judge Doyle, writing for the Tenth Circuit, pointed out that Story had the burden of proving fitness.[89] Therefore, it was the reviewing court's responsibility to ensure that the record contained sufficient evidence to support the Commission's conclusion that the applicant had sustained its burden.[90] The record indicated that Story had violated, and at times, flaunted statutes and regulations.[91] The court determined that this evidence raised a reasonable inference that the applicant would likely continue to violate the law.[92] Judge Doyle noted that the Commission's decision to reject that inference "might have been comprehensible had *some* evidence indicated that Mr. Story intended to comply with the law in the future."[93] In the absence of such evidence, the record did not meet the substantial evidence test.[94]

The court ruled that the Commission's decision was arbitrary and capricious because it had disregarded substantial contrary evidence and ignored relevant legal criteria.[95] Specifically, the Commission had failed to apply a five-part ICC test[96] used to judge an applicant's willingness to comply with

82. 662 F.2d at 683 (quoting ALJ).
83. 49 U.S.C. § 10526(a)(5) (Supp. IV 1980).
84. 662 F.2d at 684.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 685.
89. *Id.* at 686 (citing St. Johnsbury Trucking Co. v. United States, 326 F. Supp. 938, 940 (D. Vt. 1971)).
90. 662 F.2d at 686.
91. *Id.*
92. *Id.*
93. *Id.* (emphasis in original).
94. *Id.* at 686-87.
95. *Id.* at 687.
96. The five factors of the ICC test include:

> (1) The nature and extent of . . . [the carrier's] past violations, (2) the mitigating or extenuating circumstances surrounding the violations, (3) whether the carrier's conduct represents a flagrant and persistent disregard of [the] Commissions' rules and regulations, (4) whether it has made sincere efforts to correct its past mistakes, and (5) whether applicant is willing and able to comport in the future . . . .

Associated Transp., Inc., Extension—TVA Plant, 125 M.C.C. 69, 73 (1976).

the law when the record reveals past violations.[97]

The ICC contended that the five-part test was not appropriate in Story's case because the trucker had never actually been cited for any violations. The court rejected this argument, noting that this position is contrary to other Commission pronouncements that "the existence of a criminal conviction or other court action is not a prerequisite to our considering . . . evidence of unlawful conduct."[98]

Concluding that the five-part test should have been applied, the court reversed the Commission's decision as arbitrary and capricious.[99] The case was remanded to the Commission for reevaluation of Story's fitness. The court noted that sufficient time had passed since the issuance of the limited-time certificate to allow the Commission to determine whether "drastic improvement has taken place whereby the applicant demonstrates firm commitment to compliance with the law, not only present but in the future as well."[100]

D. *Abuse of Discretion*

The court of appeals addressed the issue of whether the Immigration and Naturalization Service (INS) abused its discretion in denying preferential status to an alien seeking a permanent visa in *Mila v. District Director of Denver*.[101] Finau Mila, a native of the Kingdom of Tonga and a naturalized United States citizen, sought preferential immigration status[102] for his sister by adoption, Anau Fainga. Fainga was adopted by her natural mother's older sister (Mila's mother) shortly after birth and raised as a member of that family.[103] Tongan law only recognizes legal adoptions for illegitimate children, and because Fainga was born legitimately, her adoption was by Tongan custom.[104] The INS refused to grant Fainga preferential status, as a sister by adoption of Mila, because it interpreted the section of the Immigration and Nationality Act[105] defining adopted children as being limited to those children *legally* adopted.[106] The Board of Immigration Appeals affirmed, holding that "if the civil law of a country does not recognize adoptions, no immigration benefits accrue under United States immigration laws

97. 662 F.2d at 688 (citing Transamerican Freight Lines, Inc., Extension—Columbus, Georgia, 131 M.C.C. 640, 643 (1979)). *See also* Berger Common Carrier Application, 119 M.C.C. 894 (1974).

98. 662 F.2d at 689.

99. *Id.* at 688-89.

100. *Id.*

101. 678 F.2d 123 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 726 (1983).

102. 8 U.S.C. § 1153(a)(5) (Supp. V 1981) (confers preferential status to brothers and sisters of United States citizens in qualifying for permanent visas).

103. Mila v. District Director of Denver, 494 F. Supp. 998, 999 (D. Utah 1980), *rev'd*, 678 F.2d 123 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 726 (1983). For a discussion of the Tongan practice of adoption, see *Mila*, 494 F. Supp. at 999-1000.

104. 678 F.2d at 124.

105. 8 U.S.C. § 1101(b)(1)(E) (Supp. V 1981) defines an adopted child as: "a child adopted while under the age of sixteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years . . . ."

106. *Mila*, 494 F. Supp. at 999.

based on adoptions alleged to have occurred in that country."[107]

Judge Winder of the United States District Court of Utah reversed the agency, reasoning that there was a true parent-child relationship between Mila's mother and Fainga. He held that the INS had "no reason to make a distinction between a society or legal system where . . . [adoption] is sanctioned by law or where it is only recognized by custom."[108]

The Tenth Circuit sided with the agency, holding that a federal court may overrule the INS only if the INS abuses its discretion by basing its decision on an improper understanding of the law.[109] The court, per Judge Logan, said that so long as the agency's interpretation is reasonable and not contrary to the intent of Congress, it "should be approved even though it is not the only reasonable interpretation or the one the reviewing court would make if deciding the issue in the first instance."[110] In this case, the INS interpretation of the statute required the adoption to be legal in the country where it occurred.[111]

The appellants contended that the INS interpretation was unduly restrictive and thwarted the congressional intent of preserving the family unit.[112] The court rationalized the narrowness of the agency's interpretation as having practical advantages: decreasing the likelihood of fraud, serving as a bright line to determine which adoptions will be recognized, and ensuring that persons who bring adopted children to this country are legally responsible for them.[113] The court also noted that the legislative history was not clear enough to rule that the INS interpretation is wrong.[114]

Judge McKay dissented, arguing that the intent of Congress in adopting the definition for foreign adoptions was to preserve family relationships.[115] He stated that the INS interpretation "places too much reliance on some formal juridical anglo-American notions of adoption and too little emphasis on whether the country recognizes these relationships as genuine family units."[116] He noted that although the majority recognized that the test of legal adoption cannot turn on inheritance rights because neither statutorily- nor customarily-adopted children can inherit, the majority never defined what constitutes a legal adoption.[117] Judge McKay found no basis for discriminating between customarily- and statutorily-adopted children and believed the trial court's decision should have been affirmed.[118]

The interpretation of a statute granting discretion to the Secretary of

107. *Id.*
108. *Id.* at 1000.
109. 678 F.2d at 125.
110. *Id.*
111. *Id.* The INS relied on a previous case also involving a Tongan customary adoption, *In re* Palelei, 16 I. & N. Dec. 716 (1979). In that case the Crown Solicitor of Tonga had stated in a letter that a customary adoption "does not give the child any legal right in the estate of the foster parent and is not recognized as legally valid under Tongan law." *Id.* at 718.
112. 678 F.2d at 126.
113. *Id.*
114. *Id.*
115. *Id.* at 126 (McKay, J., dissenting).
116. *Id.* at 127.
117. *Id.*
118. *Id.*

Health, Education and Welfare in terminating benefits occasioned the controversy in *Faidley v. Harris*.[119] Mrs. Faidley, a disabled widow, was receiving SSI benefits. In 1978 she married a man who was receiving social security retirement benefits.[120] According to 42 U.S.C. § 1382c(f)(1), the Secretary is required to include any income and resources of a spouse who is ineligible for SSI in determining the eligibility of an SSI beneficiary "except to the extent determined by the Secretary to be inequitable under the circumstances."[121] Mrs. Faidley's spouse, who was ineligible for SSI, received $295 per month in social security retirement benefits.[122] This includable income was $5.80 above the amount allowed by regulations.[123] Consequently, the Secretary terminated all of Mrs. Faidley's benefits.[124]

Mrs. Faidley claimed that the Secretary violated its statutory duty by failing to evaluate whether attributing her husband's income to her, so as to disqualify her from SSI benefits, was inequitable.[125] The district court found no violation of duty and affirmed the termination of her benefits.[126]

Relying on *Hammond v. Secretary of Health, Education and Welfare*,[127] the Tenth Circuit ruled that the Secretary was not required "to engage in case-by-case adjudications of inequitable circumstances . . . ."[128] The court held that the regulations[129] promulgated by the Secretary that provide for exclusions from the general requirement of section 1382c(f)(1)[130] accord equitable relief to beneficiaries.[131] It was within her discretion not to review every inequitable situation of a claimant.[132]

E. *Interpretation of the Law*

In *Yoder v. Harris*,[133] the Tenth Circuit upheld the Social Security Administration's (SSA) interpretation of a statute. Henry Yoder, a farmer, did not file any income tax returns from 1962 through 1974. From 1964 through 1971, he belonged to farm cooperatives that bought milk from him. The cooperatives filed tax returns (Forms 1099) with the Internal Revenue Service (IRS) reflecting the amounts paid to Yoder. At some unspecified time the IRS began auditing Yoder and required him to file delinquent tax returns. Subsequently, Yoder applied for medicare benefits.[134]

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119. 656 F.2d 582 (10th Cir. 1981).
120. *Id.* at 583.
121. 42 U.S.C. § 1382c(f) (1976).
122. 656 F.2d at 583.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. 646 F.2d 455 (10th Cir. 1981) (construing 42 U.S.C. § 1382c(f)(2) (1976) which uses identical language to that of the equities clause in 42 U.S.C. § 1382c(f)(1) (1976)). For a review of this case, see *Administrative Law, Eighth Annual Tenth Circuit Survey*, 59 DEN. L.J. 173, 186 (1982).
128. 656 F.2d at 584.
129. *See* 20 C.F.R. § 416.1100-1182 (1982).
130. 42 U.S.C. § 1382c(f)(1) (1976).
131. 656 F.2d at 584.
132. *Id.*
133. 650 F.2d 1170 (10th Cir. 1981).
134. *Id.* at 1171.

The SSA denied Yoder's request, ruling he had not established a record of self-employment income.[135] In determining the right to medicare benefits, the Secretary of Health, Education and Welfare (HEW) examines and maintains records of the self-employment income earned by individuals.[136] The Secretary may correct these records if application is made within the statutory time limit.[137] In updating these records, the Secretary has authority to conform his records to "tax returns or portions thereof (including information returns and other written statements) filed with the Commissioner of Internal Revenue . . . ."[138] If the time limit for updating records has expired, no amount of self-employment income may be credited to any account.[139] Thus, there is a conclusive presumption that a claimant did not have any self-employment income unless there is a timely correction in an account or the filing of tax returns.[140] In determining Yoder's eligibility to receive medicare benefits, the issue before the SSA was whether the Forms 1099 filed by the farm cooperatives constituted tax returns within the meaning of section 405(c)(5)(F).[141] The SSA held the Forms 1099 did not constitute tax returns because they did not show net self-employment income, but only gross amounts paid to Yoder.[142]

The district court, however, ruled that section 405(c)(5)(F) is sufficiently broad to permit the Secretary to update records from the Forms 1099.[143] The district court relied on *Grigg v. Finch*,[144] in which the Sixth Circuit Court of Appeals ruled that self-employment income for a music teacher could be deduced from the Forms 1099 filed by a music conservatory.[145] The trial court ordered the SSA to credit Yoder with earnings from 1964 to 1971 in the amounts filed by the cooperatives.[146]

The Tenth Circuit reversed, ruling that Forms 1099 did not constitute tax returns of self-employment income for Social Security Act purposes.[147] The court expressed its disagreement with *Grigg* and other supporting cases,[148] claiming the cases were not consistent with the language of the statute and its legislative history.[149]

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135. *Id.*

136. 42 U.S.C. § 405(c)(2)(A) (1976).

137. *Id.* § 405(c)(4).

138. *Id.* § 405(c)(5)(F).

139. *See id.* § 405(c)(1)(B), (c)(4). These provisions permit the Secretary to update records provided application is made within three years, three months, and fifteen days after the year in question.

140. 650 F.2d at 1172.

141. 42 U.S.C. § 405(c)(5)(F) (1976).

142. 650 F.2d at 1171.

143. *Id.*

144. 418 F.2d 661 (6th Cir. 1969). *See also* Maloney v. Celebreezze, 236 F. Supp. 222 (N.D. Ohio 1964); White v. Celebreezze, 226 F. Supp. 584 (E.D. Va. 1963) *rev'd on other grounds*, 359 F.2d 138 (4th Cir. 1966). *Contra* Shore v. Califano, 589 F.2d 1232 (3d Cir. 1978); Singer v. Weinberger, 513 F.2d 176 (9th Cir. 1975); Martlew v. Celebreezze, 320 F.2d 887 (5th Cir. 1963).

145. 418 F.2d at 664.

146. 650 F.2d at 1171.

147. *Id.* at 1174.

148. *See supra* note 144. The court said: "While we agree with the beneficent result in *Maloney*, we do not agree with the court's loose construction of section 405(c)(5)(F)." 650 F.2d at 1172 n.1.

149. *Id.* at 1172-73.

Judge Logan reviewed the legislative history of the statute, noting that self-employed persons were originally excluded from social security benefits because there was no feasible method to determine eligibility.[150] In later amending the Act, Congress adopted provisions for determining eligibility by means of examination of income tax returns, provided that the SSA's records of self-employment income become final after the time limitation to correct them has expired.[151] The court ruled that the intent of the statute is to permit *timely filed* tax returns to be used to determine self-employment income.[152] The court held that the Forms 1099 showing patronage dividends paid to Yoder did not show net self-employment income, and thus could not be used to rebut the presumption that Yoder did not have any self-employment income which arose because of his failure to file any income tax returns for twelve years.[153]

In *Martin v. Harris*,[154] the Tenth Circuit Court of Appeals grappled with the problem of the award of a widow's social security benefits when the decedent was a bigamist. In 1969, the appellant married Elmer Martin, who died in 1972. His first and "legal" wife, Jennie Lamore, from whom he had never been legally divorced drew social security benefits from his account from May 26, 1972, until October 18, 1972, when she remarried and thereby became ineligible for benefits.[155] Mrs. Martin applied for widow's benefits in May, 1973. The SSA originally denied Mrs. Martin's benefits but was subsequently overruled by an ALJ on appeal. The ALJ found that Mrs. Martin was eligible for deemed widow's benefits under a statute that deems a marriage valid for social security benefits purposes if the applicant believed in good faith at the time of the ceremony that the marriage would be valid and she was living with the insured at the time of death.[156]

Mrs. Martin drew social security benefits until September, 1977, when the SSA Appeals Council reopened her case. Based on the fact that Jennie Lamore had previously received benefits from Mr. Martin's account, the Council ruled that Mrs. Martin was ineligible.[157] This ruling was based on an exclusion clause of the deemed widow statute which states that the provisions shall not apply "[i]f another person is or has been entitled to a benefit . . . on the basis of the wages and self-employment income of such insured individual and such other person is (or is deemed to be) a wife, widow, hus-

150. *Id.* at 1173.

151. *Id.*

152. *Id.*

153. Id. at 1173-74.

154. 653 F.2d 428 (10th Cir. 1981), *cert. denied sub nom.* Martin v. Schweiker, 454 U.S. 1165 (1982).

155. 653 F.2d at 429.

156. *Id.* 42 U.S.C. § 416(h)(1)(B) (1976), states in pertinent part:

> In any case where under subparagraph (A) an applicant is not . . . the widow . . . of such individual, but it is established to the satisfaction of the Secretary that such applicant in good faith went through a marriage ceremony with such individual resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, and such applicant and the insured individual were living in the same household at the time of death . . . then, for purposes [of the Act] . . . such purported marriage shall be deemed to be a valid marriage.

157. 653 F.2d at 430.

band, or widower of such insured individual . . . ."[158]

On appeal to the district court, the judge granted a preliminary injunction, ordered the SSA to continue Mrs. Martin's benefits, and remanded the case to the agency for a determination of the meaning of the deemed widow statute.[159] An ALJ heard the case, and again ruled that Mrs. Martin was the deemed widow, but the SSA Appeals Council reversed.[160] The district court upheld the Appeals Council, and Mrs. Martin appealed.[161]

The Tenth Circuit, per Judge Doyle, upheld the district court and the Appeals Council.[162] The court concluded that the operative phrase in the exclusionary clause is "if another person is or has been entitled to benefits . . . ."[163] Because Ms. Lamore had legally claimed and been given benefits from Mr. Martin's social security account, Mrs. Martin was precluded from claiming eligibility.[164]

Mrs. Martin's main argument was that if the state in which her husband was living when he died would find that the two were validly married, she would be the widow.[165] She also argued that one of the requirements that must be met in order to receive benefits is that the widow be unmarried.[166] She reasoned that because Ms. Lamore had remarried, she lost her status as legal widow.[167] The court dismissed both arguments by stating "[t]his is not what the statute says."[168] In support of its position that the legal widow's rights are superior to the deemed widow's, the court cited cases from the Third and Seventh Circuits.[169] The court also asserted that the legislative history of the exclusionary clause verifies this interpretation.[170]

In a vigorous and tightly reasoned dissent, Judge McKay disagreed with the majority's "mechanical construction" of the deemed widow statute.[171] He insisted that the statute was obviously intended to enable "deemed widows,"[172] to collect social security benefits.[173] The exclusionary clause was added to prevent "double-dipping" whereby both a legal widow and a deemed widow could dip into a wage earner's account.[174] To avoid this situation, Congress gave priority to the legal widow over the deemed

158. 42 U.S.C. § 416(h)(1)(B) (1976).
159. 653 F.2d at 430.
160. *Id.*
161. *Id.*
162. *Id.* at 433.
163. *Id.* at 431. *See supra* note 158 and accompanying text.
164. 653 F.2d at 433.
165. *Id.* at 431.
166. *Id.*
167. *Id.*
168. *Id.*
169. Dwyer v. Califano, 636 F.2d 908 (3d Cir. 1980); Davis v. Califano, 603 F.2d 618 (7th Cir. 1979); Woodson v. Califano, 455 F. Supp. 457 (S.D. Tex. 1978). *But see* Rosenberg v. Richardson, 538 F.2d 487 (2d Cir. 1976) (the appellate court approved a plan whereby the legal widow and the deemed widow shared the benefits).
170. 653 F.2d at 433.
171. *Id.* at 436 (McKay, J., dissenting). *See* 42 U.S.C. § 416(h)(1)(B) (1976).
172. *See supra* note 156.
173. 653 F.2d at 433 (McKay, J., dissenting).
174. *Id.* at 434.

widow.[175]

Judge McKay argued that the proper interpretation of the exclusionary clause in view of this legislative intent was to allow a deemed widow to obtain benefits whenever the legal widow became ineligible for them.[176] Thus, because the insured's legal wife was ineligible, he believed Mrs. Martin should be entitled to receive the benefits as the insured's only eligible spouse.[177] Under the majority's interpretation, however, "the statute would confer a benefit upon 'deemed widows' only in the unusual case where no 'legal widow' has ever been certified to receive a benefit and where the Secretary nonetheless learns of the impediment to the 'deemed widow.' "[178] This interpretation, he said, makes the statute's conferral of a benefit "utterly illusory."[179]

II. SOVEREIGN IMMUNITY

The influence of enabling legislation on the award of attorneys' fees was aptly illustrated in two cases. In *Wesley Medical Center v. Schweiker*,[180] the plaintiffs were a group of Wichita, Kansas hospitals who had won a suit in May, 1979 against the Secretary of HEW challenging the method used to compensate emergency room personnel administering to medicare patients.[181] In January, 1981, the plaintiffs sought a new writ of mandamus, complaining that the Secretary had not yet complied with a similar writ issued eighteen months earlier.[182] The district court issued the mandamus, and awarded plaintiffs costs, interest and attorneys' fees, based on a finding that the Secretary had acted in bad faith.[183] The Secretary appealed the award of attorneys' fees and interest on the ground of sovereign immunity.[184]

The Tenth Circuit reversed the district court, noting, "[g]enerally, the doctrine of sovereign immunity precludes the award of attorneys' fees against the United States and its officers who are acting in their official capacity . . . . Sovereign immunity is not waived except by statute."[185] The court, citing *Alyeska Pipeline v. Wilderness Society*,[186] ruled that there is no bad-faith exception to the sovereign immunity rule.[187] For the same reason, the court overturned the award of interest,[188] relying on its own decision in *deWeever v. United States*.[189]

175. *Id.*
176. *Id.*
177. *Id.* at 436.
178. *Id.* at 435.
179. *Id.*
180. No. 81-1101 (10th Cir. Aug. 26, 1981) (per curiam).
181. *Id.* slip op. at 2.
182. *Id.*
183. *Id.* at 3.
184. *Id.*
185. *Id.*
186. 421 U.S. 240 (1975).
187. No. 81-1101, slip op. at 4.
188. *Id.* at 5.
189. 618 F.2d 685 (10th Cir. 1980) (interest may be assessed against the federal government only pursuant to express statutory or contractual authorization).

In *Nunez v. Bergland*,[190] the issue was not whether there was statutory authority for award of attorneys' fees, but whether the plaintiffs had prevailed in the case.[191] The case has a complex history, but the essential facts are that a group of New Mexico citizens sued the Department of Agriculture (USDA) and the State of New Mexico for equitable distribution of food under the Supplemental Food Program for Women, Infants and Children.[192] The appellants prevailed and were awarded attorneys' fees.[193] The USDA and the State of New Mexico appealed, but during the appeal, Congress amended the program.[194] The amendments, by giving the plaintiffs what they had requested, rendered the case moot.[195] The USDA and the State of New Mexico contended that because the case had been rendered moot, the plaintiffs had not prevailed. The Tenth Circuit disagreed, noting that substantial precedent supported the proposition that "where the proceedings brought by the plaintiff act as a catalyst in achieving a primary objective of the lawsuit, he can properly be considered a prevailing party although he has not obtained a judicial determination on the merits."[196]

III. JUSTICIABILITY

Justiciability, the issue of whether a case is properly before the court, was considered by the Tenth Circuit in several cases. Two cases were dismissed as being untimely.[197] In the following three cases, the court dismissed the suits because a justiciable case or controversy was not established.

A. *Case or Controversy Requirement*

In *Environmental Improvement Division v. Marshall*,[198] the court upheld the district court's ruling that insufficient injury had been alleged by the State of New Mexico to confer standing.[199] The state had sued the Secretary of Labor to compel the Occupational Safety and Health Administration (OSHA) to grant the state exclusive authority over its occupational safety and health plan.[200] The Occupational Safety and Health Act[201] authorizes states to develop their own occupational safety and health enforcement programs

190. Nos. 79-1704, 79-1705 (10th Cir. Aug. 3, 1981).

191. 42 U.S.C. § 1988 (1976 & Supp. IV 1980) provides, in part, that the party claiming attorneys' fees must have prevailed in its action in order to be awarded the fees.

192. Nos. 79-1704, 79-1705, slip op. at 3. *See* 42 U.S.C. § 1786 (1976 & Supp. IV 1980).

193. Nos. 79-1704, 79-1705, slip op. at 4.

194. Child Nutrition Amendments of 1978, Pub. L. No. 95-627, 92 Stat. 3603 (1978).

195. Nos. 79-1704, 79-1705, slip op. at 5.

196. *Id.* at 7 (citing Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980); Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); Williams v. Miller, 620 F.2d 199 (8th Cir. 1980)).

197. Mono-Therm Indus., Inc. v. Federal Trade Comm'n, 653 F.2d 1373 (10th Cir. 1981) (untimely protest to Federal Trade Commission rule); Salt Lake County v. Donovan, No. 81-2010 (10th Cir. Dec. 21, 1981) (untimely request for review of a ruling by Federal Mine Safety and Health Review Commission).

198. 661 F.2d 860 (10th Cir. 1981).

199. *Id.* at 863.

200. *Id.* at 861.

201. Pub. L. No. 91-396, 84 Stat. 1590 (codified as amendment in scattered sections of 5, 15, 18, 29, 42, and 49 U.S.C.).

under federal supervision.[202] OSHA's rules envision a four-step procedure: 1) the state submits a developmental plan;[203] 2) after approval, OSHA supervises and monitors the plan's enforcement for three years, but retains jurisdictional authority;[204] 3) during an optional period of concurrent authority, OSHA may agree to release to the state the power to enforce parts of the program;[205] 4) OSHA grants final approval.[206] Final approval, or "operational status," requires approval by the Assistant Secretary of Labor, publication in the Federal Register, and publication of the description of the plan in the Code of Federal Regulations.[207]

In May, 1978, the Acting Regional Director of OSHA entered into an agreement with New Mexico officials to confer operational status on the state's program.[208] In December, 1978, a new regional director rescinded the agreement.[209] Citing several deficiencies in the state's program, he recommended reinstatement of concurrent authority.[210] The state brought suit to compel OSHA to award the plan final approval, and to require the agency to withdraw concurrent authority.[211]

The district court granted summary judgment for the Secretary, reasoning that New Mexico had not alleged sufficient injury to confer standing.[212] The court of appeals affirmed the lower court's decision. Noting that the May, 1978 agreement was never approved by the Assistant Secretary of Labor, nor published as required, the court ruled that the agreement was at best "an informal interagency agreement which expressed a temporary delineation of enforcement authority."[213] The court stated that although the Act contemplates judicial review of final agency action,[214] OSHA's decision to reinstate concurrent authority was an interlocutory decision; therefore, it was inappropriate for judicial review.[215]

In another case the court refused to review an interlocutory order by FERC on the ground that the dispute was not ripe for adjudication. In *Colorado Interstate Gas Co. v. FERC*,[216] the court ruled that FERC's order granting belated motions to several parties to intervene in a tariff adjustment request by Colorado Interstate Gas (CIG) was merely a procedural device, and not

202. 29 U.S.C. § 667 (1976).
203. 29 C.F.R. § 1902.2(b) (1982).
204. *See* 29 U.S.C. § 667(e) (1976); 29 C.F.R. § 1954.3 (1981).
205. *Id.* §§ 1954.3, 1902.20(b)(1)(iii).
206. *Id.* § 1954.3 (1981).
207. *Id.*
208. 661 F.2d at 862.
209. *Id.*
210. *Id.* The deficiencies found by the director included the state's incomplete fulfillment of all the developmental steps, the insufficiency of the state's personnel to enforce the plan, the unacceptable performance by the state in conducting compliance inspections, and the noncompliance of the state's operational procedures with the OSHA Field Operational Manual. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 863.
214. *See* 29 U.S.C. § 667(g) (1976).
215. 661 F.2d at 864. *See also* Utah Int'l, Inc. v. EPA, 478 F.2d 126 (10th Cir. 1973); Amerada Petroleum Corp. v. Federal Power Comm'n, 231 F.2d 461 (10th Cir. 1956).
216. No. 81-1646 (10th Cir. Aug. 19, 1981) (per curiam).

justiciable.[217] Noting that the order "adjudicated no rights and resolved no claims," the court determined that judicial action would be premature.[218] The court observed that provisions of both the Federal Energy Regulatory Act[219] and the Federal Power Act[220] authorize judicial review of final FERC orders for aggrieved parties, but not for procedural or interlocutory orders.[221] The court said that orders may be reviewed only if they are definitive, deal with the merits of a proceeding, and have some "substantial effect" on the parties causing irreparable harm.[222] The court rejected CIG's claim that the expense and disruption of defending itself in hearings constituted irreparable harm.[223]

Finally, in *Sacco v. United States Parole Commission*[224] the court of appeals dismissed an action as presenting no case or controversy. Sacco had challenged the Parole Commission's reasons for denying him parole as being arbitrary and capricious. Before the appeal was completed, however, Sacco was paroled. The court reasoned that because parole was the only relief he sought, there was no case or controversy.[225] The court pointedly rejected the notion that the case was moot. The court distinguished the case from *Weinstein v. Bradford*,[226] in which the United States Supreme Court ruled the case was moot because the plaintiff's parole had already ripened into a complete release from custody. The court noted in *Sacco* that the appellant was only temporarily released from custody. Should he ever again come under the control of the Parole Commission, the court pointed out, the Commission would be required to make new findings of fact.[227] Thus, with a residual issue remaining, the court was reluctant to declare the case moot, although it presented no case or controversy at the time the appeal was considered.[228]

B. *Lack of Jurisdiction*

The Tenth Circuit Court of Appeals refused to consider several cases that should have been tried in other courts possessing primary jurisdiction. For instance, in *Alamo Navajo School Board, Inc. v. Andrus*,[229] the appellate court dismissed the case because the suit should have been tried in the Court

217. *Id.* slip op. at 3.

218. *Id.* at 4.

219. *See* 15 U.S.C. § 717r(b) (1976).

220. *See* 16 U.S.C. § 825l(b) (1976).

221. No. 81-1646, slip op. at 3.

222. *Id.* at 4 (citing Federal Power Comm'n v. Metropolitan Edison Co., 304 U.S. 375 (1938); Public Serv. Co. v. Federal Power Comm'n, 557 F.2d 227 (10th Cir. 1977)). *See also* Consolidated Gas Supply Corp. v. FERC, 611 F.2d 951 (4th Cir. 1979); Atlanta Gas Light Co. v. Federal Power Comm'n, 476 F.2d 142 (5th Cir. 1973).

223. No. 81-1646, slip op. at 4. The court cited Federal Trade Comm'n v. Standard Oil Co., 499 U.S. 232 (1980), which held that even substantial litigation expense does not constitute irreparable harm.

224. No. 81-2047 (10th Cir. Mar. 9, 1982).

225. *Id.* slip op. at 3.

226. 423 U.S. 147 (1975) (per curiam).

227. No. 81-2047, slip op. at 3.

228. *Id.* at 2.

229. 664 F.2d 229 (10th Cir. 1981), *cert. denied sub nom.* Apachito v. Watt, 102 S. Ct. 2041 (1982).

of Claims in accordance with section 1491 of the Tucker Act.[230]

The dispute arose after the Alamo Navajo School Board (School Board) contracted with the Bureau of Indian Affairs (BIA) for the operation of a new elementary school under the Indian Self-Determination Act.[231] The Act empowers the Secretary of the Interior to fund such schools uniformly,[232] but also provides for a special fund for use in emergencies and contingencies.[233] Pursuant to the Act, the Secretary established an Implementation Set-Aside Fund (ISAF)[234] to be used to adjust errors due to "underprojections, data error, misclassification of students . . . or to provide for the initial funding of new schools . . . ."[235] The contract allocated funds to the School Board to operate the school for 180 days during fiscal 1980, which ran from October 1, 1979, to September 30, 1980.[236] The School Board misunderstood the fiscal year requirement and expended all of the allocated funds during the 180 school days between October 1, 1979, and May 30, 1980.[237] Left without funds to operate the school in August and September, the School Board sued the Secretary for ISAF funds on the basis that this was an unforeseen contingency.[238]

The district court recognized that the APA[239] did not confer jurisdiction because the plaintiffs sought money damages.[240] It concluded, however, that it had both mandamus and federal question jurisdiction.[241] The appellate court disagreed, relying upon *Prairie Band of Pottawatomie Tribe of Indians v. Udall*,[242] which held that mandamus jurisdiction is inappropriate where an official is exercising discretionary powers. The court ruled that the language "emergencies or unforeseen contingencies," as contained in the statute authorizing the ISAF, was ambiguous.[243] The court concluded from its ambiguity that Congress intended to leave to the discretion of the Secretary the determination of what constituted "emergencies or unforeseen contingencies."[244] The court said further that mandamus is inappropriate where other remedies are available.[245] The court stated, " '[m]andamus does not supersede other remedies, but rather comes into play where there is a want of such remedies.' "[246]

The court additionally held that the district court erred in accepting the

230. 664 F.2d at 233; *see* 28 U.S.C. § 1491 (Supp. IV 1980).
231. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended in scattered sections of 5, 25, 42 and 50 app. U.S.C.)
232. 25 U.S.C. § 2008(a) (Supp. IV 1980).
233. *Id.* § 2008(d).
234. 25 C.F.R. § 31h.78 (1979).
235. 664 F.2d at 231 (quoting 25 C.F.R. § 31h.79 (1979)); *see* 25 U.S.C. § 2008(a), (d) (Supp. IV 1980).
236. 664 F.2d at 231.
237. *Id.*
238. *Id.*
239. *See* 5 U.S.C. § 702 (1976).
240. 664 F.2d at 232.
241. *Id.*
242. 355 F.2d 364 (10th Cir.), *cert. denied*, 385 U.S. 831 (1966).
243. 664 F.2d at 232.
244. *Id.*
245. *Id.* at 233.
246. *Id.* (quoting Carter v. Seamans, 411 F.2d 767 (5th Cir. 1969)).

case under the federal question rule,[247] which does not give district courts jurisdiction over contract disputes that must be brought exclusively in the Court of Claims.[248] The court determined that the case was indeed a contract dispute, despite the School Board's protestations.[249] The court stated, "[t]he exclusive jurisdiction of the Court of Claims cannot be avoided by framing a district court complaint to appear to seek only injunctive, mandatory, or declaratory relief."[250]

The court of appeals denied jurisdiction in another case, *Coalition for Fair Utility Rates v. Baker*,[251] because plaintiffs failed to exhaust the remedies available in state court. Plaintiffs, Oklahoma non-profit organizations whose members are electric utility consumers, brought suit against the Oklahoma Corporation Commission, which regulates the state's public utilities.[252] The purpose of the suit was to obtain a declaratory judgment authorizing the Commission to award costs and attorneys' fees to consumers who successfully intervene in ratemaking proceedings. The Coalition claimed the Public Utilities Regulatory Policies Act of 1978 (PURPA)[253] authorized awarding such costs and attorneys' fees.[254]

Initially, the plaintiffs had sought mandamus relief from the Oklahoma Supreme Court to direct the Commission to set up procedures for awarding fees and costs to intervenors.[255] The court ruled that the Commission's decision to award intervenors costs and fees was discretionary and dependent on state law.[256] Additionally, the Oklahoma court ruled that PURPA provides for a civil suit for fees against a utility in the state court.[257]

The plaintiffs then filed suit in federal district court. The district court dismissed the suit for lack of subject matter jurisdiction because the plaintiffs had not been denied the right to intervene in a ratemaking proceeding by a state court.[258] The court of appeals agreed, finding that PURPA provides for federal jurisdiction only if attorneys' fees have been denied by a state court.[259]

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247. *See* 28 U.S.C. § 1331 (1976).

248. 664 F.2d at 233 (citing Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081 (6th Cir. 1978)).

249. 664 F.2d at 233.

250. *Id.* (citing Bakersfield City School Dist. v. Boyer, 610 F.2d 621, 628 (9th Cir. 1979)).

251. 656 F.2d 593 (10th Cir. 1981) (per curiam).

252. *Id.* at 594.

253. 16 U.S.C. § 2601-2708 (1976 & Supp. V 1981).

254. 656 F.2d at 593. *See* 16 U.S.C. §§ 2632(a)(2), 2633(b)(2) (Supp. V 1981).

255. 656 F.2d at 594.

256. *Id.*

257. *Id.*

258. *Id.*

259. 656 F.2d at 594-95. *See* 16 U.S.C. § 2632(a)(2) (Supp. V 1981), which states in part, "[a] consumer . . . may collect such fees and costs from an electric utility by bringing a civil action in any state court of competent jurisdiction . . . ."

The Tenth Circuit refused jurisdiction in another case, Sadegh-Nobari v. INS, 676 F.2d 1348 (10th Cir. 1982). The court ruled that an appeal of an INS refusal to consider a change of immigration status should have been made in district court. *Id.* at 1350 (citing Cheng Fan Kwok v. INS, 392 U.S. 206 (1968)).

C. *Exhaustion of Administrative Remedies*

The court of appeals applied the exhaustion of administrative remedies doctrine to several cases during the past year, achieving disparate results. For example, the court summarily dismissed two cases, *Williams v. Carlson*[260] and *McShan v. United States*,[261] in which inmates at the Federal Correctional Institute at El Reno, Oklahoma, protested actions of prison officials. In each case, the court noted that the prisoners had failed to exhaust administrative remedies available to them.[262]

A similar result from an entirely different set of facts was reached in *Haynes v. Oklahoma Natural Gas Co.*[263] Haynes, an American Indian, filed a complaint with the Equal Employment Opportunity Commission (EEOC) protesting his discharge by Oklahoma Natural Gas Co. (ONG) and alleging that the discipline was motivated by racial discrimination—a violation of the equal employment opportunity provisions of the Civil Rights Act of 1964.[264] EEOC dismissed his charge, but issued Haynes a "right to sue" letter. In his complaint filed against ONG in district court, Haynes broadened his accusations against the company, alleging systematic discrimination, false accusations of misconduct, racial slurs, abusive language, improper processing of procedural matters, and denial of company benefits.[265] The district court dismissed the case on the basis that the "allegations on the judicial complaint far exceed the allegations in the administrative charge . . . ."[266]

The Tenth Circuit affirmed the district court's holding.[267] The appellate court ruled that an employee's discrimination suit must be limited to claims reasonably related to those made in the original complaint to the EEOC.[268] To allow the appellant to broaden the charges after bringing suit in federal court would "frustrate the . . . policies of 'encourag[ing] informal conciliation of employment discrimination suits and . . . avoid[ing] bypass of administrative remedies.' "[269]

In *New Mexico Association for Retarded Citizens v. New Mexico*,[270] however, the court specifically declined to require the plaintiffs to exhaust available administrative remedies. Furthermore, the court pointedly refused to invoke the doctrine of primary jurisdiction in the case.[271]

This case arose under section 504 of the Rehabilitation Act.[272] The

260. No. 81-1090 (10th Cir. Nov. 20, 1981).
261. No. 81-2216 (10th Cir. Apr. 12, 1982).
262. *See also Administrative Law, Seventh Annual Tenth Circuit Survey*, 58 DEN. L.J. 211-13 (1981).
263. No. 81-2051 (10th Cir. Apr. 2, 1982).
264. *Id.* slip op. at 2. *See* 42 U.S.C. §§ 2000e to 2000e-17 (Supp. IV 1980).
265. No. 81-2051, slip op. at 2-3.
266. *Id.* at 3.
267. *Id.* at 5.
268. *Id.* at 3 (citing Oubichon v. North Am. Rockwell Corp., 482 F.2d 569 (9th Cir. 1973); Donner v. Phillips Petroleum Co., 477 F.2d 159 (5th Cir. 1971)).
269. No. 81-2051, slip op. at 5 (quoting Ong v. Cleland, 642 F.2d 316, 320 (9th Cir. 1981)).
270. 678 F.2d 847 (10th Cir. 1982).
271. *Id.* at 851. The defendants argued that the Office of Civil Rights should have completed its investigation of the case before the court had jurisdiction. *Id.*
272. 29 U.S.C. § 794 (Supp. IV 1980) prohibits discrimination against any otherwise qualified handicapped individual under any federally funded or assisted program.

plaintiff association contended that New Mexico discriminated against handicapped children by its failure to provide adequate therapy and services, and by its inadequate funding of special education programs. The district court found the state in violation of section 504 and ordered it to submit a plan for compliance.[273] The trial court also permitted the plaintiffs to prepare their own plan, which was ultimately adopted when the district court rejected the state's plan as not being sufficiently responsive to section 504 requirements.[274] The state appealed, contending that the district court erred on three grounds: 1) the doctrines of exhaustion of administrative remedies and primary jurisdiction should have barred the suit; 2) the state was incorrectly found in violation of section 504; and 3) the solution fashioned by the district court was overbroad.[275]

The appellate court easily disposed of the state's contention that the district court violated the exhaustion of remedies and primary jurisdiction doctrines, but reversed and remanded for further hearings on the other grounds.[276] The court recognized the similarity between the exhaustion of remedies and primary jurisdiction doctrines, noting that both "promote proper relationships between courts and administrative bodies through a policy of suspending judicial consideration pending agency action."[277] Exhaustion requires that a claim be pursued at the administration level prior to court intervention.[278] Primary jurisdiction mandates that disputes properly pursued in either administrative bodies or in courts "are to be first decided by an agency specifically equipped with expertise to resolve the regulatory issues raised."[279]

The Tenth Circuit stated that courts must not mechanically apply the exhaustion principle in every instance.[280] It is those cases in which it is improbable that a plaintiff will obtain adequate relief from an agency action or where delays will cause irreparable harm to substantive rights that courts have dispensed with the exhaustion requirement.[281] Noting that New Mexico's administrative process could give neither adequate nor timely relief, the court ruled that it would be fruitless for the plaintiffs to exhaust administrative remedies.[282]

The court ruled further that the district court was not required to invoke the doctrine of primary jurisdiction and await the outcome of the Of-

273. New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (D.N.M. 1980), *rev'd*, 678 F.2d 847 (10th Cir. 1982).

274. 678 F.2d at 849-50.

275. *Id.* at 850.

276. *Id.* at 855.

277. *Id.* at 850 (citing United States v. Western Pac. R.R., 352 U.S. 59, 63 (1956)).

278. 678 F.2d at 850.

279. *Id.* (citing United States v. Radio Corp. of Am., 358 U.S. 334 (1959)).

280. 678 F.2d at 850 (citing Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973)).

281. 678 F.2d at 850. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979); Pushkin v. University of Colo., 658 F.2d 1372 (10th Cir. 1981); Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973).

282. 678 F.2d at 851. The remedies provided did not include a restructuring of the system to comply with the statute, part of the relief sought. Additionally, the time factors involved were further evidence of the inadequacy of the available remedies. *Id.*

fice of Civil Rights (OCR) investigation before proceeding.[283] The court reasoned that the only punitive action the OCR could take was to cut off section 504 funding for New Mexico,[284] and such "purse-string discipline" would not vindicate the plaintiffs' rights.[285]

Interpretation of the regulations[286] adopted pursuant to section 504 were crucial to the appellate court's reversal of the district court's finding that New Mexico had violated the regulations.[287] The district court relied on language in the regulations that compels public schools to develop programs that "are designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met . . . ."[288] The Tenth Circuit, however, pointed out that this language had been limited by the Supreme Court in *Southeastern Community College v. Davis*,[289] which held that the Department of HEW had improperly interpreted section 504 as giving it authority to require affirmative action programs of all recipients of federal funds.[290] The Act, the court insisted, was designed to prohibit discrimination against the handicapped, not to order affirmative relief.[291]

The court of appeals noted, however, that the Supreme Court, in *Southeastern Community College*, left the door ajar for some sort of relief for the handicapped by suggesting that the "refusal to *modify* an existing program might become discriminatory."[292] On this tenuous thread, but reinforced by *Lau v. Nichols*[293] and *Serna v. Portales Municipal Schools*,[294] the circuit court ruled that the refusal by New Mexico to modify educational programs to permit handicapped persons to achieve the same benefits as nonhandicapped persons constitutes discrimination.[295] The court observed, "[u]nfortunately the trial court failed to address the *Southeastern Community College* guidelines in its opinion and order."[296] Instead, the district court mandated an affirmative action program. The circuit court remanded the case with instructions to reevaluate the evidence and devise a solution accommodating the Supreme Court's ruling that section 504 prohibits discrimination rather than mandates affirmative action.[297]

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283. *Id.*

284. 29 U.S.C. § 794(a)(2) (Supp. IV 1980); *See* 45 C.F.R. §§ 84.64, 80.8 (1981).

285. 678 F.2d at 851.

286. 34 C.F.R. §§ 104.1-104.54 (1982).

287. 678 F.2d at 852-54.

288. 34 C.F.R. § 104.33(b)(1)(i) (1982).

289. 442 U.S. 397 (1979).

290. *Id.* at 411-412.

291. 678 F.2d at 852 (citing *Southeastern Community College*, 442 U.S. at 410).

292. 678 F.2d at 853 (quoting *Southeastern Community College*, 442 U.S. at 412-13) (emphasis in opinion)).

293. 414 U.S. 563 (1974) (holding that discrimination occurs when programs are not modified for non-English speaking students).

294. 499 F.2d 1147 (10th Cir. 1974) (holding operation of school system deprived Spanish sur-named students of statutory civil rights).

295. 678 F.2d at 855.

296. *Id.*

297. *Id.*

IV. RULEMAKING PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT

The rulemaking provisions of the APA[298] were important to three decisions handed down by the Tenth Circuit this past year. In *Nademi v. INS*,[299] the circuit court upheld the deportation of an Iranian student despite the fact that the regulation under which he was removed was not promulgated under the normal rulemaking procedure.[300]

Nademi was ordered deported by an immigration judge pursuant to section 241(a)(9) of the Immigration and Nationality Act.[301] He had violated the statute by failing to attend the college authorized by the INS on his nonimmigrant entry visa. Nademi did not protest the action, but requested a ninety-day delay to allow him to finish the semester. The immigration judge denied the request, and ordered the Iranian to depart within fifteen days, pursuant to a regulation amendment promulgated specifically for Iranians during the 1979-80 hostage crisis.[302]

Nademi contended that the amendment violated section 553 of the APA because its promulgation was not preceded by notice and comment.[303] The court held that the amendment was exempt from section 553 requirements[304] under the "foreign affairs function"[305] and the "good cause" exclusions.[306]

The court also rejected the plaintiffs' claim that the regulation denied them equal protection of the laws in violation of the fifth amendment.[307] The court relied on *Malek-Marzban v. INS*,[308] where the Fourth Circuit held that a classification of aliens must be sustained if it has a rational basis.[309] The court quoted with approval the Fourth Circuit's statement that the "United States is not bound to treat the nationals of unfriendly powers with the same courtesy and consideration it extends to nationals of friendly pow-

298. 5 U.S.C. § 553 (1976).

299. 679 F.2d 811 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 161 (1982). This was a consolidated appeal that included Sadegh-Pour v. INS, with identical grounds for appeal as *Nademi*. 679 F.2d at 812.

300. *Id.* at 814.

301. 8 U.S.C. § 1251(a)(9) (1976).

302. 679 F.2d at 813; *see* 8 C.F.R. § 244.1 (1981), which reads in part, "[i]n the case of a national of Iran, the amount of time within which he/she may be granted to depart voluntarily . . . shall not exceed 15 days from the date the special inquiry officer renders his/her decision in the case."

303. 679 F.2d at 813.

304. *Id.* at 814 (citing Malek-Marzban v. INS, 633 F.2d 113, 115-16 (4th Cir. 1981)).

305. 5 U.S.C. § 553(a)(1) (1976) which reads in part, "[t]his section applies . . . except to the extent that there is involved . . . a military or foreign affairs function of the United States . . . ."

306. 5 U.S.C. § 553(b) (1976) which reads in part, "this subsection does not apply . . . (B) when the agency for good cause finds . . . that notice and public procedure thereon are impractical, unnecessary, or contrary to the public interest." *See also* Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980).

307. 679 F.2d at 815.

308. 633 F.2d 113 (4th Cir. 1981).

309. *Id.* at 116. *See* Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980); Alvarez v. District Director, 539 F.2d 1220 (9th Cir. 1976), *cert. denied*, 430 U.S. 918 (1977); Noel v. Chapman, 508 F.2d 1023 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975); Dunn v. INS, 499 F.2d 856 (9th Cir. 1974).

ers."[310] The petitioners' contentions that the Commissioner exceeded his authority were dismissed without extensive discussion.[311]

In *Vigil v. Andrus*,[312] the court of appeals set aside a BIA action that transferred a free school lunch program for off-reservation Indians to the Department of Agriculture (USDA), because the BIA failed to comply with the notice requirement of section 553 of the APA.[313] Under the Johnson-O'Malley Act,[314] Indian children attending off-reservation schools were provided free lunches regardless of need. To simplify its operation and reduce costs, the BIA decided to transfer the public-school portion of the program to the USDA, which was already providing free lunches in public schools on a need basis.[315] The plan of transfer included a phase-in, phase-out period extending for three years. The plan anticipated that during the 1973-74 school year, Indian children in public schools would not receive free lunches unless they could establish need.[316]

Prior to transferring the program, neither the BIA nor the USDA held evidentiary hearings or rulemaking proceedings, nor did either agency give public notice of the change, as required by the APA.[317] The district court ruled that the alteration of the school lunch program fell within the contracts exception to the APA and that compliance with the formal rulemaking procedures was not necessary.[318] The Tenth Circuit reversed, noting that congressional intent,[319] precedent,[320] and the BIA's own rules[321] all supported the position that formal rulemaking procedures should be followed.[322]

The court stated that the government must "bend over backwards" to assure fair treatment to Indians when terminating benefits that have long been provided.[323] The appellate court ordered the BIA to undertake formal rulemaking if it chose to continue with the transfer plan.[324]

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310. 679 F.2d at 815 (quoting Malek-Marzban v. INS, 653 F.2d 113, 116 (4th Cir. 1981)). *See also* Matthews v. Diaz, 426 U.S. 67 (1976).

311. The court found that there was a clear line of delegation of power from Congress to the President to the Commissioner, and that the Commissioner was merely implementing foreign policy, not formulating it. 679 F.2d at 814 (citing Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980)).

312. 667 F.2d 931 (10th Cir. 1982).

313. 5 U.S.C. § 553(b) (1976).

314. 25 U.S.C. §§ 452-457 (1976).

315. National School Lunch Act, 42 U.S.C. §§ 1751-1768 (1976).

316. 667 F.2d at 933.

317. *Id. See* 5 U.S.C. § 553(b)-(d) (1976).

318. *Id.* § 553(a)(2) exempts from the rulemaking requirements matters relating to, *inter alia*, public contracts.

319. 667 F.2d at 934-35.

320. Morton v. Ruiz, 415 U.S. 199 (1974); Seminole Nation v. United States, 316 U.S. 286 (1942). *See generally* Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970).

321. Subsequent to a recommendation by the Administrative Conference of the United States, the Department of Interior (including the BIA) adopted a rule stating that it agreed to follow rulemaking procedures even if the subject matter was within the APA's exceptions for grants, benefits and contracts. 36 Fed. Reg. 8,336 (1971).

322. 667 F.2d 935-37.

323. *Id.* at 939 (citing Morton v. Ruiz, 415 U.S. 199, 236 (1974)).

324. 667 F.2d at 939.

In another case, *American Mining Congress v. Marshall*,[325] the Tenth Circuit upheld a Mine Safety and Health Administration (MSHA) rule that was challenged both substantively and procedurally by the mining industry. At issue was a regulation[326] promulgated by MSHA pursuant to the Federal Coal Mine Health and Safety Act.[327] This regulation requires mine operators to initiate area sampling programs for respirable dust in addition to the personal sampling program required for miners in high risk areas.[328] The industry attacked the area sampling program on the grounds that it was selected in an arbitrary and capricious manner,[329] and that the rulemaking procedures established by the APA were not followed.[330] The court rejected the arbitrary and capricious challenge, and ruled that the choice of sampling methods and techniques were within the Secretary's discretion.[331]

The plaintiff contended the area sampling regulation was procedurally invalid because certain documents in the rulemaking record were not date-stamped, and the index omitted some documents while including some documents dated after the close of the comment period. These deficiencies, the plaintiff maintained, deprived it of its right to comment and made "meaningful judicial review impossible."[332] The court, in rejecting this argument, pointed out that the APA makes no mention of these requirements, citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[333] In *Vermont Yankee* the Supreme Court held that "formulation of procedures [beyond those required by the APA is] basically to be left within the discretion of the agencies . . . ."[334] After reviewing the APA rulemaking requirements and the record of this case, the Tenth Circuit court determined that the procedure had been correct and substantially complete.[335]

V. THE FREEDOM OF INFORMATION AND THE PRIVACY ACTS

Three cases decided during the past year suggest that there is some agency and lower court confusion over the correct interpretation of the Freedom of Information Act (FOIA)[336] and the Privacy Act of 1974.[337] *Alirez v. NLRB*,[338] exemplifies this confusion. In *Alirez* the court of appeals reversed the district court's interpretation of the FOIA.[339] This case arose after

325. 671 F.2d 1251 (10th Cir. 1982).
326. 30 C.F.R. § 70.208 (1981).
327. 30 U.S.C. §§ 801-960 (1976).
328. The personal sampling program is required by 30 C.F.R. § 70.207 (1981).
329. 671 F.2d at 1255-57.
330. *Id.* at 1260-63.
331. The court noted that there is no perfect sampling method, and that the Secretary has discretion to adopt any method that measures respirable dust concentration with reasonable accuracy, even if the method is more burdensome to mine operators. *Id.* at 1256. The plaintiff also attacked various technical aspects of the area sampling program, but the court refused "to substitute its judgment for that of the Secretary." *Id.* at 1260.
332. *Id.* at 1260-61.
333. 435 U.S. 519 (1978).
334. 435 U.S. at 524, *quoted in American Mining Congress*, 671 F.2d at 1261.
335. 671 F.2d at 1262.
336. 5 U.S.C. § 552 (1976).
337. *Id.* § 552a.
338. 676 F.2d 423 (10th Cir. 1982).
339. *Id.* at 428.

Alirez filed unsuccessful unfair labor practices charges with the National Labor Relations Board (NLRB) against his employer. The plaintiff then requested access to the NLRB's investigatory file in the case. The Board offered Alirez access to all documents except sixteen, which it deemed exempt from disclosure.[340] Fourteen of the documents were statements by informants, many of whom indicated they feared retaliation.[341] The plaintiff brought suit to force disclosure of the withheld documents under the FOIA. The district court granted the plaintiff's motion, determining that disclosure of the documents would not be an invasion of privacy contemplated by the FOIA.[342] However, it permitted the Board to delete data identifying the informants.[343] The NLRB appealed, and the court of appeals reversed the lower court.

The appellate court noted that the FOIA is to be broadly construed in favor of disclosure,[344] that statutory exemptions are to be narrowly construed,[345] and that the burden of justifying nondisclosure is placed upon the agency.[346] Noting that the lower court had based its decision primarily on *Poss v. NLRB*,[347] the appellate court reviewed *Poss* and established that the plaintiff in that case compelled disclosure of informants' statements that were not truly sensitive in nature.[348] In *Alirez*, however, the Tenth Circuit ruled that the district court abused its discretion by not taking the fact that disclosure of the informants' statements would result in "serious invasions of privacy, potentially subjecting Board informants and others to embarrassment of reprisals from Mr. Alirez and their employer," into account.[349]

The court noted that in cases similar to *Alirez* a balancing of interests is necessary; the court must determine whether the invasion of privacy is outweighed by the public interest in disclosure. Because the plaintiff sought the documents for personal information only, the court found no public interest.[350]

Misunderstanding of the FOIA and the Privacy Act was also evident in *Wren v. Harris*,[351] a case in which the appellant was refused access to his personal file held by the SSA. Mr. Wren sought access to his records under the Privacy Act.[352] The district court prohibited disclosure under the exclusion provisions of the FOIA.[353] The court of appeals reversed, suggesting

340. *Id.* at 425. *See* 5 U.S.C. § 552(b) (1976).
341. 676 F.2d at 425.
342. 5 U.S.C. § 552(b)(7)(C) (1976).
343. 676 F.2d at 425.
344. *Id. See, e.g.*, Department of the Air Force v. Rose, 425 U.S. 352 (1976).
345. 676 F.2d at 425. *See* Department of the Air Force v. Rose, 425 U.S. 352, 361-62 (1976). *See also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978); EPA v. Mink, 410 U.S. 73 (1973).
346. 676 F.2d at 425 (citing Campbell v. United States Civil Service Comm'n, 539 F.2d 58, 61 (10th Cir. 1976)).
347. 565 F.2d 654 (10th Cir. 1977).
348. 676 F.2d at 426.
349. *Id.* at 427.
350. *Id.*
351. 675 F.2d 1144 (10th Cir. 1982).
352. 5 U.S.C. § 552a (1976); 675 F.2d at 1145. *See* 5 U.S.C. § 552(b)(5), (b)(6) (1976).
353. 675 F.2d at 1146.

that the district court's order demonstrated a "fundamental misunderstanding" of the relationship between the two acts.[354]

The Tenth Circuit compared the primary purposes of the Privacy Act and the FOIA, stating that, whereas the thrust of the FOIA is to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny,"[355] the purpose of the Privacy Act is to promote "governmental respect for the privacy of citizens by requiring all departments . . . to observe . . . rules in the . . . management, use, and disclosure of personal information about individuals."[356] Although the Privacy Act severely limits third party access to records, it permits the individual to read and copy his own records.[357] On this basis, the court concluded that the Privacy Act provides the individual greater rights with respect to his own records than to the public generally.[358]

The Tenth Circuit observed that the district court made no attempt to construe Mr. Wren's rights in light of the Privacy Act, but rather at the insistence of the appellees, applied the exemptions of the FOIA. Because of the failure to apply the Privacy Act, the court remanded the case with instructions.[359]

CONCLUSION

Administrative law reflects the inevitable friction created at the interface between governmental bureaucracies and the citizens they serve. The cases decided by the Tenth Circuit were more notable for their evenhanded application of the law than for equitable considerations. What the decisions lost in compassion and sympathy, they gained in stability and predictability in the law.

Michael G. Cooksey

354. 675 F.2d at 1145.

355. *Id.* (quoting Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976)).

356. 675 F.2d at 1145-46 (quoting S. REP. NO. 93-1183, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG & AD. NEWS 6916).

357. 5 U.S.C. § 552a(d) (1976) provides in part that each agency shall "upon request by any individual to gain access to his record . . . permit him . . . to review the record and have a copy made of all or any portion thereof . . . ."

358. 675 F.2d at 1146.

359. *Id.* at 1148. The Tenth Circuit decided another case, Hernandez v. Alexander, 671 F.2d 402 (10th Cir. 1982), similar to the dispute in *Alirez*, discussed *supra* at notes 335-346 and accompanying text. In *Hernandez*, all parties except the appellant appeared to agree on the construction of the Privacy Act and the FOIA.