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UNITED STATES SUPREME COURT REVIEW OF TENTH CIRCUIT DECISIONS

This is a new section in the Annual Tenth Circuit Survey. Presented below are the case histories of the Tenth Circuit Court of Appeals decisions which were discussed in the Fourth (September 1, 1976 through August 31,1977) and Fifth (September 1, 1977 through August 31, 1978) surveys and which sought Supreme Court review.

I. SUPREME COURT REVERSALS

A. Harrah Independent School District v. Martin

In *Harrah Independent School District v. Martin*[1] the Supreme Court reversed a 1978 decision of the Tenth Circuit[2] involving the dismissal of an Oklahoma school teacher who claimed a violation of due process and equal protection.

The Oklahoma school district did not renew the tenured teacher's contract claiming she willfully neglected her duty.[3] The respondent's contract required teachers holding only a bachelor's degree to earn five semester hours of credit every three years. In 1969, when respondent was hired, the sanction for noncompliance with the continuing education requirement was the withholding of salary increases. Respondent refused to comply with the requirement and forfeited salary increases through the school year 1973-1974. In 1973 the Oklahoma Legislature enacted a law mandating salary increases for teachers regardless of compliance with the continuing education program. The school board then notified the respondent that continued noncompliance would result in the nonrenewal of her contract. Respondent appeared before the school board in January 1974 and indicated she would not comply with the requirements of her contract. In April 1974 the school board voted not to renew the teacher's contract.[4]

Respondent unsuccessfully sought administrative relief and judicial relief in the state courts before bringing her action in the United States District Court for the Western District of Oklahoma claiming she had been denied her liberty and property without due process of law and equal protection of the laws.[5] The District Court dismissed the complaint and respondent appealed to the Tenth Circuit. The Tenth Circuit reversed, finding there had been a violation of the fourteenth amendment.[6]

1. 99 S. Ct. 1062 (1979).

2. Martin v. Harrah Independent School Dist., 579 F.2d 1192 (10th Cir. 1978). For a discussion of the Tenth Circuit's opinion in this case, *see Constitutional Law, Fifth Annual Tenth Circuit Survey*, 56 DEN. L.J. 417, 422-24 (1979).

3. Oklahoma's tenure statute provided that "willful neglect of duty" was grounds for nonrenewal of a tenured teacher's contract. OKLA. STAT. ANN. tit. 70 § 6-122 (West Supp. 1973).

4. 99 S. Ct. 1063.

5. *Id.*

6. 579 F.2d 1199.

Reversing, the Supreme Court dealt briefly with the procedural due process issue holding that respondent had been afforded all necessary procedural due process by having the opportunity to appear with counsel before the school board to contest the board's determination.[7] Turning to the fourteenth amendment claims, the Court found no substantive due process violation because respondent's claim did not involve freedom of choice with respect to "basic matters."[8]

The Supreme Court stated that the Tenth Circuit mistakenly relied on the equal protection guaranty of the fourteenth amendment. Since no suspect classification or deprivation of fundamental constitutional right was alleged, the rational basis test was the standard to be applied and the agreed facts showed that the school board's action was rationally related to a state objective and the respondent was not singled out for special treatment.[9]

Mary H. Hurley

B. United Gas Pipe Line Co. v. McCombs

In *United Gas Pipe Line Co. v. McCombs*,[1] the Supreme Court reversed the Tenth Circuit's decision in *McCombs v. Federal Energy Regulatory Commission*,[2] which had held that "abandonment" within the meaning of Section 7(b) of the Natural Gas Act (Act)[3] did not require formal approval by the Federal Energy Regulatory Commission (formerly the Federal Power Commission, hereinafter FPC).

Certificates of convenience and necessity had been issued by the FPC in 1954 and 1963 to McCombs' predecessors, allowing them to sell natural gas to United Gas Pipe Line Company (United). In 1966 the producer notified United and the FPC that the gas well was depleted, and no further gas sales were made to United from the tract. McCombs subsequently obtained assignment of the gas tract lease and in 1972 discovered new gas reserves in the same tract, though at different and deeper drilling sites. He then contracted to sell this newly discovered natural gas to E. I. duPont de Nemours and Company in intrastate commerce.

United, upon learning of the new gas discovery and McCombs' intention to sell it to a third party, filed a complaint with the FPC asserting its right to the gas. The FPC upheld the administrative law judge's decision that the certificates issued to McCombs' predecessors in interest were for the entire amount of natural gas in the tract, including the newly discovered reserves.[4] The FPC declared that McCombs' attempt to sell the gas to an-

7. 99 S. Ct. 1064.
8. *Id.* (citing Kelley v. Johnson, 425 U.S. 238, 244 (1976) as to "basic matters of procreation, marriage, and family life.")
9. *Id.* at 1064-65.

1. 99 S. Ct. 2461 (1979).
2. 570 F.2d 1376 (10th Cir. 1978). For a discussion of the Tenth Circuit's opinion, *see Lands and Natural Resources, Fifth Annual Tenth Circuit Survey*, 56 DEN. L.J. 517, 531-34 (1979).
3. 15 U.S.C. § 717f(b) (1976).
4. 99 S. Ct. at 2465.

other intrastate party violated the Act and ordered McCombs to deliver all gas produced on the tract to United.

McCombs appealed to the Tenth Circuit, asking the court to set aside the order. The Tenth Circuit reversed the FPC, reasoning that the depletion of the original well, the removal by United of all its metering equipment at the site, and the lack of production or sale of natural gas to United for several years constituted "abandonment" in fact.[5] The Tenth Circuit also noted that two letters by the FPC to the lessees of the tract, suggesting that the lessees apply for abandonment approval, were tacit admissions by the FPC that abandonment had occurred and that it need only be formalized for the record.[6]

In rejecting the Tenth Circuit's reasoning, the Supreme Court pointed to the language in the original 1953 sale agreement which stated that all "merchantable natural gas . . . now or hereafter" produced from the tract would be sold to United. The Court further noted that there was no time limitation on either of the certificates granted by the FPC and that United, at the time of removal of its metering equipment from the original site in 1966, had stated it would reinstall the equipment, "if at some future date, you have further gas to deliver to us at the above delivery point, which will be subject to the terms of the above-captioned contract."[7]

The point on which the case turned was the explicit and clear language of Section 7(b) of the Act, which states that, "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, ..."[8] The Court found this language did not permit a "de facto" abandonment or a tacit approval of abandonment by the FPC. McCombs' predecessors had twice ignored letters from the FPC warning them that no abandonment application had been made. Absent the application and the statutorily required hearing, there could be no abandonment within the provisions of the Act.[9]

The Court also pointed to its own language concerning abandonment proceedings in *Sunray Mid-Continent Oil Co. v. FPC*,[10] in which it stated: "[I]f the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission under § 7(b)."[11] The Court held that, under the clear language of Section 7(b) and its own interpretation of this language in *Sunray*, there could be no abandonment of a natural gas field without a proper hearing before the Commission and specific FPC approval. The orig-

5. 570 F.2d at 1382.
6. *Id.* at 1379.
7. 99 S. Ct. at 2464.
8. 15 U.S.C. § 717f(b) (1976).
9. 99 S. Ct. at 2464, 2466.
10. 364 U.S. 137 (1960).
11. *Id.* at 158 n.25.

inal FPC decision was reinstated.[12]

Steve Brown

C. Leo Sheep Co. v. United States

In *Leo Sheep Co. v. United States*[1] the Supreme Court reversed a Tenth Circuit decision[2] that held Congress had impliedly reserved easements for access to public domain sections of land in a land grant[3] to the Union Pacific Railroad.[4]

Petitioners were successors-in-interest to Union Pacific sections in Wyoming. Because of the "checkerboard" scheme of the Union Pacific grant, it was impossible for members of the public to enter a section of recreationally-improved public domain land, which interlocked petitioners' sections, without entering petitioners' land. After negotiations for public access over petitioners' land failed, the Government cleared a road cutting across the corner of one of petitioners' sections and invited the public to use the road for access to the public land. Petitioners brought an action to quiet title against the Government as to the section corner burdened by the road, and the Wyoming District Court granted petitioners' motion for summary judgment.[5]

The Tenth Circuit reversed, reasoning that Congress must have impliedly reserved easements permitting access to public domain sections when granting lands to the Union Pacific because "[t]o hold to the contrary would be to ascribe to Congress a degree of carelessness or lack of foresight which . . . would be unwarranted."[6] The dissent argued that the Government's failure to assert easements for 110 years constituted a persuasive administrative construction of the Union Pacific grant which should be accorded great weight, and that the majority had misanalyzed the case by not recognizing the key issue — "whether the United States may *take the private land for access purposes without compensation*."[7]

Reversing the appellate court, the Supreme Court initially held that the common law easement by necessity for which the Government had argued was conceptually precluded. The doctrine of easements by necessity inherently focuses on necessity at the date that a land grant is made. Since the public land was unimproved in 1862, the doctrine did not, at that time, reserve an easement for public recreational access and could not, in 1977,

12. 99 S. Ct. at 2470.

1. 99 S. Ct. 1403 (1979).
2. Leo Sheep Co. v. United States, 570 F.2d 881 (10th Cir. 1977). For discussion of the Tenth Circuit's opinion, *see Lands and Natural Resources, Fourth Annual Tenth Circuit Survey*, 55 DEN. L.J. 535, 538-39 (1978).
3. Act of July 1, 1862, §§ 1-3, 12 Stat. 489-92, *as amended*, Act of July 2, 1864, § 4, 13 Stat. 358.
4. 570 F.2d at 885.
5. 99 S. Ct. at 1409.
6. 570 F.2d at 885.
7. *Id.* at 889-90 (Barrett, J., dissenting) (emphasis in original).

retroactively reserve an easement.[8] The Court additionally found the doctrine inapplicable because the Government's power of eminent domain precludes the existence of any "necessity" on the facts.[9]

After disposing of the argument for an easement by necessity, the Court focused on the congressional intent underlying the Union Pacific grant. The Court noted initially that the grant contained explicit reservations in favor of the United States and its grantees, and that it would be anomalous for the same Congress that had scrupulously carved specific exceptions out of the grant to have knowingly intended for access easements to be reserved by mere implication. The Court then stressed that, since the purpose of the grant was to induce the grantee to risk a great amount of capital in constructing a vital public improvement, the rule of construction favoring the Government as grantor could not be applied "in its full vigor" to the Union Pacific grant. Rather, the grant was to receive a "more liberal construction."[10] Under this liberal approach, the Court refused to devine any intent to reserve easements from the passage of the Unlawful Inclosures Act.[11] Furthermore, the Court held *Camfield v. United States*[12] inapplicable as being predicated on a "nuisance" rationale not present in *Leo Sheep*.[13]

In conclusion, the Court discussed the unprecedented nature of the Government's claim and the longstanding administrative construction of the grant which was adverse to the existence of an implied reservation.[14] Given the dearth of substance in the Government's intent argument, the Court opted for fostering security of titles rather than an "ill-defined power to construct public thoroughfares without compensation."[15]

David C. Hallford

D. United States v. Rutherford

In *United States v. Rutherford*,[1] the Supreme Court reversed a Tenth Circuit opinion[2] and upheld the Food and Drug Administration (FDA) in the agency's latest battle with supporters of the cancer drug laetrile.

The legal controversy has focused on whether laetrile is a "new drug" within the meaning of the Federal Food, Drug, and Cosmetic Act.[3] The

8. 99 S. Ct. at 1410. For an analogous rationale, see United States v. New Mexico, 98 S. Ct. 3012 (1978), holding that an "implied reservation" of water for a national forest is limited in scope by the purposes for which the forest was segregated from the public domain.
9. 99 S. Ct. at 1410.
10. *Id.* at 1411 (citing United States v. Denver & Rio Grande Ry., 150 U.S. 1, 14 (1893)).
11. Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-66.
12. 167 U.S. 518 (1897).
13. 99 S. Ct. at 1411-12.
14. *Id.* at 1413.
15. *Id.* at 1413-14.

1. 99 S. Ct. 2470 (1979).
2. Rutherford v. United States, 582 F.2d 1234 (10th Cir. 1978).
3. 21 U.S.C. § 321(p)(1) (1976). This section defines a new drug as one that experts "qualified by scientific training and experience" do not generally recognize as safe and effective.

FDA classified laetrile as "new" and maintained that it was to be excluded from interstate commerce.[4]

When the dispute initially reached the Tenth Circuit, the court upheld a district court injunction against the FDA on the grounds that the agency had classified laetrile without making any formal findings.[5] The court of appeals remanded and ordered the FDA to develop an administrative record. After hearings, the FDA again concluded that laetrile was not generally recognized as safe and effective, and was therefore a new drug.[6]

Rutherford v. United States came before the Tenth Circuit[7] a second time on appeal from a decision of the District Court for the Western District of Oklahoma which vacated the FDA ruling.[8] The district court held: 1) the FDA's findings that laetrile was not exempt under the "1962 grandfather clause"[9] was arbitrary and capricious;[10] and 2) prohibiting terminally ill cancer patients from using laetrile was an unconstitutional invasion of privacy.[11]

On appeal, the Tenth Circuit again upheld an injunction against the FDA, but did not consider the district court's grounds. Instead, the decision of the court of appeals was based on the inapplicability of the "safe and effective" standard of the Act[12] to laetrile use by terminally ill individuals. Chief Judge Seth, for the Tenth Circuit, held that "safe and effective" had no meaning for cancer patients who would die regardless of treatment.[13]

In *United States v. Rutherford*,[14] the Supreme Court disagreed. The Court found effectiveness was not limited to the capacity to cure. "[A] drug is effective if it fulfills . . . its sponsor's claims of prolonged life, improved physical condition, or reduced pain."[15] Similarly, the Court found "a drug is unsafe if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit."[16]

Justice Marshall, writing for a unanimous Court, held that the clear language of the statute and the legislative history indicated no special provisions were intended for the terminally ill.[17] His opinion noted that, rather, Congress intended that the FDA protect individuals with fatal illnesses from fraudulent cures.[18] In addition, the Court commented that an ineffective

4. 21 U.S.C. § 355(a) (1976) prohibits the introduction into interstate commerce of any new drug unless an application filed with the FDA, pursuant to 21 U.S.C. 355(b), is approved.

5. Rutherford v. United States, 542 F.2d 1137 (10th Cir. 1976). This decision is discussed in *Administrative Law, Fourth Annual Tenth Circuit Survey*, 55 DEN. L.J. 391, 392-95 (1978).

6. *See* note 3 *supra*.

7. 582 F.2d 1234 (10th Cir. 1978).

8. 438 F. Supp. 1287 (W.D. Okla. 1977).

9. The Drug Amendments of 1962 provided that drugs which were marketed before October 10, 1962 and which were generally recognized as safe were exempt from the "new drug" test of 21 U.S.C. § 321(p)(1). 21 U.S.C. § 321 (1976) (note).

10. 438 F. Supp. at 1295.

11. *Id.* at 1299-1301.

12. 21 U.S.C. § 321(p)(1) (1976).

13. 582 F.2d at 1237.

14. 99 S. Ct. 2470 (1979).

15. *Id.* at 2477.

16. *Id.*

17. *Id.* at 2475-76.

18. *Id.* at 2475.

drug could be particularly unsafe for patients with potentially fatal diseases if it caused them to reject conventional treatment.[19]

The laetrile controversy, however, has not yet reached a final resolution. The case was remanded to the Tenth Circuit for consideration of the constitutional and grandfather clause questions raised in the district court.[20]

Seymour Joseph

II. Denials of Certiorari

A. Cases from Fourth Annual Survey	Tenth Circuit Citation	Certiorari Denied
Ashland Oil, Inc. v. Phillips Petroleum Co.	554 F.2d 381 (1977)	434 U.S. 921 (1977)
Doe v. Pringle	550 F.2d 596 (1976)	431 U.S. 916 (1977)
First National Bank v. United States	552 F.2d 370 (1977)	434 U.S. 835 (1977)
Franklin v. Atkins	562 F.2d 1188 (1977)	435 U.S. 994 (1978)
Gillihan v. Rodriguez	551 F.2d 1182 (1977)	434 U.S. 845 (1977)
G.M. Leasing Corp. v. United States	560 F.2d 1011 (1977)	435 U.S. 923 (1978)
Harr v. Federal Home Loan Bank Board	557 F.2d 747 (1977)	434 U.S. 1033 (1978)
Harr v. Prudential Federal Savings & Loan Ass'n	557 F.2d 571 (1977)	434 U.S. 1033 (1978)
Los Alamos School Board v. Wugalter	557 F.2d 709 (1977)	434 U.S. 968 (1977)
Marvel v. United States	548 F.2d 295 (1977)	431 U.S. 967 (1977)
Mondragon v. Tenorio	554 F.2d 423 (1977)	434 U.S. 905 (1977)
McGrath v. Weinberger	541 F.2d 249 (1976)	430 U.S. 933 (1977)
Napier v. Gertrude	542 F.2d 825 (1976)	429 U.S. 1049 (1977)
Pacific Engineering & Production Co. v. Kerr-McGee Corp.	551 F.2d 790 (1977)	434 U.S. 879 (1977)
Staton v. Mayers	552 F.2d 908 (1977)	434 U.S. 907 (1977)
United States v. Allen	554 F.2d 398 (1977)	434 U.S. 836 (1977)
United States v. Brinklow	560 F.2d 1003 (1977)	434 U.S. 1047 (1978)
United States v. Davis	544 F.2d 1056 (1976)	436 U.S. 930 (1978)
United States v. Evans	542 F.2d 805 (1976)	429 U.S. 1101 (1977)
United States v. Fairfax	No. 77-1055 (July 28, 1977)	certiorari denied October 3, 1977
United States v. Gunter	546 F.2d 861 (1976)	431 U.S. 920 (1977)
United States v. Munz	542 F.2d 1382 (1976)	429 U.S. 1104 (1977)
United States v. Nolan	551 F.2d 266 (1977)	434 U.S. 904 (1977)
United States v. Plum	558 F.2d 568 (1977)	certiorari denied—citation not yet available
United States v. Rosenfeld	545 F.2d 98 (1976)	430 U.S. 941 (1977)
United States v. Shoemaker	542 F.2d 561 (1976)	429 U.S. 1004 (1976)
United States v. Sor-Lokken	557 F.2d 755 (1977)	434 U.S. 894 (1977)
United States v. Walton	552 F.2d 1354 (1977)	431 U.S. 959 (1977)
Utah State University of Agriculture & Applied Science v. Bear, Stearns & Co.	549 F.2d 164 (1977)	434 U.S. 890 (1977)

Further Developments:

Unified School District No. 480 v. Epperson, 551 F.2d 254 (10th Cir. 1977), *vacated*, 435 U.S. 948 (1978). The case was remanded to the Tenth Circuit for further consideration in light of Carey v. Piphus, 435 U.S. 247 (1978).

19. *Id.* at 2477.
20. *Id.* at 2479 n.18.

B. Cases from Fifth Annual Survey	10th Circuit	Certiorari Denied
Alden v. Ryan	571 F.2d 1159 (1978)	439 U.S. 860 (1978)
Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.	561 F.2d 1365 (1977)	434 U.S. 1052 (1978) (*cert. dismissed*)
Celebrity Inc. v. A & B Instrument Co.	573 F.2d 11 (1978)	439 U.S. 824 (1978)
Farmers Alliance Mutual Insurance Co. v. Jones	570 F.2d 1384 (1978)	439 U.S. 825 (1978)
Furedy v. Appleman (*In re* Vodeo Volume Development Co.)	567 F.2d 967 (1977)	439 U.S. 806 (1978)
Globe Construction Co. v. Oklahoma City Housing Authority	571 F.2d 1140 (1978)	439 U.S. 835 (1978) (*sub nom.* General Insurance Co. v. Oklahoma City Housing Authority)
McDaniel v. State	582 F.2d 1242 (1978)	439 U.S. 969 (1978)
Transok Pipeline Co. v. Darko	565 F.2d 1150 (1977)	435 U.S. 1006 (1978)
United States v. Austin	462 F.2d 724 (1972)	409 U.S. 1048 (1972)
United States v. Black	569 F.2d 1111 (1978)	435 U.S. 944 (1978)
United States v. Carleo	576 F.2d 846 (1978)	439 U.S. 850 (1978)
United States v. Fritz	580 F.2d 370 (1978)	439 U.S. 947 (1978)
United States v. Grismore	564 F.2d 929 (1977)	435 U.S. 954 (1978)
United States v. Haro	573 F.2d 661 (1978)	439 U.S. 851 (1978)
United States v. Lamb	575 F.2d 1310 (1978)	439 U.S. 854 (1978) (*sub nom.* Clary v. United States)
United States v. McCoy	573 F.2d 14 (1978)	436 U.S. 958 (1978)
United States v. Nelson	582 F.2d 1246 (1978)	439 U..S. 1079 (1979)
United States v. Oakes	564 F.2d 384 (1977)	435 U.S. 926 (1978)
United States v. Rumpf	576 F.2d 818 (1978)	439 U.S. 893 (1978)
United States v. Shovea	580 F.2d 1382 (1978)	440 U.S. 908 (1979)
United States v. Thomas	580 F.2d 1036 (1978)	439 U.S. 1130 (1979)
United States v. Thompson	579 F.2d 1184 (1978)	439 U.S. 896 (1978)

Further Developments:

Utah v. Kleppe, 586 F.2d 756 (10th Cir. 1978), *cert. granted sub nom.* Andrus v. Utah, 99 S. Ct. 2857 (1979).

NLRB v. Nat'l Jewish Hosp. & Research Center, 583 F.2d 911 (10th Cir. 1978), *vacated mem.*, 99 S. Ct. 3094 (1979). The judgment was vacated and the case remanded to the Tenth Circuit for further consideration in light of the Court's recent decision, NLRB v. Baptist Hosp., Inc., 99 S. Ct. 2598 (1979).

United States v. Blucher, 581 F.2d 244 (10th Cir. 1978), *vacated mem.*, 439 U.S. 1061 (1979). The judgment was vacated and the case remanded to the district court with instructions to dismiss the indictment, Justices White, Powell, and Rehnquist dissenting.

Tables Prepared by *Connie B. Hyde*