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Administrative Law and Procedure

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ADMINISTRATIVE LAW AND PROCEDURE

During this term the Tenth Circuit considered cases involving procedural aspects of administrative law,[1] the court's scope of review of agency decisions,[2] and the interpretation and application of several state and federal statutes.[3] The most significant decision in the area of administrative law and procedure was *Nickol v. United States,*[4] in which the circuit held that when a district court reviews an agency determination for substantial evidence, and there is no conflict in the evidence, a motion for summary judgment may not be granted. This decision is discussed more extensively below because the Tenth Circuit is the first federal court to apply this rule.

Excepting the decision reached in *Nickol,* administrative law and procedure questions were resolved by the Tenth Circuit in accord with other federal courts and generally no striking additions to the law have been made. In *United States v. Smith*[5] the court followed both Tenth Circuit[6] and Supreme Court[7] precedent in upholding the use of information obtained through an administrative summons issued by the Internal Revenue Service, in good faith and prior to recommendation for criminal prosecution,[8] as

[1] Ringsby Truck Lines, Inc. v. United States, 490 F.2d 620 (10th Cir. 1974); Fisher v. Civil Serv. Comm'n, 484 F.2d 1099 (10th Cir. 1973); United States v. Smith, 484 F.2d 8 (10th Cir. 1973); Spencer v. Seamans, Civil No. 72-1509 (10th Cir., filed Dec. 7, 1973).

[2] Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974); Amoco Prod. Co. v. FPC, 491 F.2d 916 (10th Cir. 1973); Angel v. Butz, 487 F.2d 260 (10th Cir. 1973), *cert. denied,* 417 U.S. 967 (1974).

[3] Baldridge v. Hadley, 491 F.2d 859 (10th Cir.), *cert. denied,* 417 U.S. 910 (1974); United States v. Ray, 488 F.2d 15 (10th Cir. 1973); Preux v. Immigration & Naturalization Serv., 484 F.2d 396 (10th Cir. 1973), *cert. denied,* 415 U.S. 916 (1974).

[4] 501 F.2d 1389 (10th Cir. 1974).

[5] 484 F.2d 8 (10th Cir. 1973). Smith, in violation of 26 U.S.C. § 7205 (1970), filed a withholding exemption certificate with the Internal Revenue Service (IRS) claiming ten exemptions, then immediately informed the IRS that he was entitled to only two exemptions. The IRS, utilizing an administrative summons, initiated an investigation which resulted in the criminal prosecution of Smith for supplying his employer with a false or fradulent withholding certificate.

[6] United States v. Richardson, 469 F.2d 349 (10th Cir. 1972).

[7] Donaldson v. United States, 400 U.S. 517 (1971). The Supreme Court in *Donaldson* distinguished as dictum the statement in Reisman v. Caplin, 375 U.S. 440 (1964), that administrative summonses may not be issued for the purpose of obtaining evidence for criminal prosecution, on the basis that the authority for that statement—Boren v. Tucker, 239 F.2d 767 (9th Cir. 1956)—dealt with pending criminal charges or investigations solely for criminal prosecution.

[8] These are the standards for use in criminal prosecution of information obtained by administrative summons. The court nevertheless stressed that the judiciary should discourage the gathering of evidence for criminal prosecution by means of administrative summonses. *See* Abel v. United States, 362 U.S. 217 (1960).

evidence in a subsequent criminal prosecution. The Tenth Circuit also followed established precedent[9] in *Spencer v. Seamans*[10] in affirming the district court's refusal to overturn an administrative order having substantial support in the record.

The court conventionally disposed of federal procedure questions arising in the context of administrative law. In *Fisher v. Civil Service Commission*[11] the court applied the rule[12] followed by the Second[13] and the Fifth[14] Circuits that when a party attempts to invoke federal jurisdiction and his constitutional claim is returned to the state court upon the federal court's abstention, the federal court will not rehear any claims which have been fully, freely, and without reservation litigated in state court. Following an Eighth Circuit decision on similar facts,[15] the Tenth Circuit held in *Ringsby Truck Lines, Inc. v. United States*[16] that in a suit originally involving claims for injunctive and restitutionary relief, it is unnecessary on remand for a three-judge court[17] to hear the claim for money damages if the claim for injunctive relief has been mooted.[18]

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[9] Vigil v. Post Office Dep't, 406 F.2d 921, 924 (10th Cir. 1969); Bishop v. McKee, 400 F.2d 87, 88 (10th Cir. 1968). *See also* Illinois Cent. Ry. v. Norfolk & W. Ry., 385 U.S. 57 (1966); United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963); Municipal Distrib. Group v. FPC, 467 F.2d 741 (D.C. Cir. 1972).

[10] Civil No. 72-1509 (10th Cir., filed Dec. 7, 1973). Spencer pleaded guilty to a charge of aggravated assault, but denied allegations that the assault involved homosexual conduct. He was subsequently administratively removed from his civil service position with the U.S. Air Force. Both the conviction of aggravated assault and Spencer's alleged homosexual conduct were cited as reasons for his removal; however, upon review the Secretary of the Air Force sustained the removal solely on the basis of the aggravated assault. Claiming that his administrative hearing was tainted by references to his alleged homosexuality, the petitioner appealed to the district court which upheld his removal on the grounds that conviction of assault was sufficient to support the administrative finding.

[11] 484 F.2d 1099 (10th Cir. 1973).

[12] This rule was first enunciated in England v. Louisiana Medical Examiners, 375 U.S. 411 (1964) and was cited in *Fisher* as controlling.

[13] Lecci v. Cohn, 493 F.2d 286 (2d Cir. 1974).

[14] Barrett v. Atlantic Richfield Co., 444 F.2d 38 (5th Cir. 1971); Rankin v. Florida, 418 F.2d 482 (5th Cir. 1969).

[15] Middlewest Motor Freight Bureau v. United States, 433 F.2d 212 (8th Cir. 1970), *cert. denied,* 402 U.S. 999 (1971).

[16] 490 F.2d 620 (10th Cir. 1974).

[17] The applicable statutes are 28 U.S.C. § 1336 (1970), giving federal district courts power over any civil action to enjoin an ICC order; *id.* § 2325 (1970), requiring a determination by a three-judge district court (under section 2284) before the granting of an injunction to restrain the enforcement of an ICC order; and *id.* § 2284 (1970), setting forth the procedure for and composition of the three-judge court.

For further discussion of the requirement of a three-judge court, see the discussion of Doe v. Rampton, 497 F.2d 1032 (10th Cir. 1974), which appears in the Federal Practice and Procedure section *infra.*

[18] The court determined that when a motor carrier's rate increase was cancelled by

In two cases in which the scope of the court's review of agency action was considered,[19] the court applied the usual rules concerning review of adjudication and of rulemaking. In *Amoco Production Co. v. FPC*,[20] the Tenth Circuit interpreted an FPC opinion[21] which had, *inter alia*, established rate adjustments for substantial off-lease gathering of natural gas.[22] Under the authority of the Natural Gas Act,[23] the Commission had revised previous minimum and maximum rates for wellhead gas sales and for gas sales made after substantial off-lease gathering.[24] Opinion 586 specifically provided that parties bound by contract prices below the upwardly-revised minimum prices could apply for rate increases. Phillips, a substantial off-lease gatherer, had applied for and received a rate increase. Amoco, from which Phillips made wellhead purchases of gas under a previously existing contract, then filed for rate increases in its wellhead sales to Phillips. Observing that Opinion 586 had established a maximum substantial off-lease gathering charge,[25] Amoco asserted that Phillips' rate increase obligated Phillips to pay to Amoco that total price minus the gathering charge, despite the fact that the Amoco-Phillips contract specified a lower wellhead sale price. The FPC rejected

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the ICC and then superseded by other valid rate increases, the only remaining claim by shippers for allegedly excessive interim rates collected under the cancelled rate increase were claims for money damages and therefore need only be heard by one-judge rather than a three-judge court. Pursuant to the ICC's cancellation of the rate increase, the motor carriers sought to enjoin the cancellation and were granted a temporary restraining order by a three-judge district court. The district court then remanded to the ICC, which affirmed its cancellation on the grounds that the motor carriers had failed to sustain their burden of proof as to the reasonableness of the rate increases. The shippers appealed directly to the Supreme Court which dismissed the case as moot and the motor carriers then appealed to the Tenth Circuit, which did not deal with the shipper's restitutionary claim. The shippers filed another appeal to the Supreme Court and a protective appeal in the Tenth Circuit, which the circuit court undertook upon the Supreme Court's dismissal of the case for lack of jurisdiction. Holding that the judgement of the three-judge court was final and thus appealable, the Tenth Circuit remanded to a one-judge district court the claim for money damages, to be determined on the basis of the reasonableness of the superseded rate increase while it was in effect.

[19] The third case which considers scope of review is *Nickol v. United States*, discussed below, in which the court formulates and applies a new rule.

[20] 491 F.2d 916 (10th Cir. 1973).

[21] 44 FPC 761 (1970) [hereinafter cited as Opinion 586].

[22] Substantial off-lease gathering is the off-lease transportation of gas together with the compression, treatment, and liquid hydrocarbon extraction incident thereto. The substantial off-lease gatherer is, in fact, a middleman.

[23] 15 U.S.C. §§ 717-17w (1970).

[24] Rates set in this proceeding were applicable in the Hugoton-Anadarko area only. *See* Opinion 586.

[25] The charge was 2.5c per McF.

Amoco's request, holding that Opinion 586 did not require such a result because the gathering charge did not constitute a maximum price differential between the wellhead rate and the resale price after substantial off-lease gathering.[26] The Tenth Circuit sustained the FPC's action, noting the propriety of its deference to the agency's expertise.[27] The court reviewed the entire rate scheme set forth in Opinion 586 and construed the scheme as requiring computation of maximum prices after off-lease gathering by adding the gathering allowance to the maximum wellhead sale rate rather than to the actual wellhead contract price.[28] Other issues considered by the court were resolved in accordance with the agency's decision.[29]

In *Angel v. Butz,*[30] the Tenth Circuit followed a discernible trend of decisions of the U.S. Supreme Court[31] and other circuits[32] in its interpretation of section 706(2)(A) of the Administrative Procedure Act.[33] However, it became the first court to apply that

[26] 491 F.2d at 918.

[27] *Id.* at 920.

[28] *Id.* at 921.

[29] Amoco's second argument, that denial of the increase was a violation of the Natural Gas Act, which requires all rates to be "just and reasonable" (15 U.S.C. § 717c), was dismissed because Amoco had no standing to litigate the reasonableness of contract rates between Phillips and its buyer.

The court also considered the question of the proper criteria for the FPC's determination of a fair rate of return. Following the lead of the Ninth Circuit in its interpretation of Opinion 586 in *In re* Hugoton-Anadarko Area Rate Case, 466 F.2d 974 (9th Cir. 1972), the court supported generalized area rate ceilings irrespective of the efficiency of operations of individual companies. The position stressed by the court, that area ratemaking need not guarantee a fixed profit to a specific company on a particular cost basis, is in line with decisions in other circuits which have considered the issue. *See In re* Hugoton-Anadarko Area Rate Case, 466 F.2d 974 (9th Cir. 1972); Southern La. Rate Case v. FPC, 428 F.2d 407 (5th Cir.), *cert. denied*, 400 U.S. 950 (1970); Forest Oil Corp. v. FPC, 305 F.2d 763 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 916 (1963). This position stressed by the Tenth Circuit also followed the logic of Cities Serv. Gas Co. v. FPC, 424 F.2d 411 (10th Cir. 1969), which held that, concerning an individual company, the FPC did not err in basing gas price rates on the company's cost of services. The controlling case on this point is Permian Basin Area Rate Cases, 390 U.S. 747 (1968), which held that the FPC need not guarantee an individual company a fixed rate of return on its cost basis.

[30] 487 F.2d 260 (10th Cir. 1973), *cert. denied*, 417 U.S. 967 (1974).

[31] *Cf.* Palmer v. Thompson, 403 U.S. 217 (1971) (where there is substantial evidence supporting the reasonableness of a legislative action, courts will not invalidate that action on the basis of alleged improper motive for the legislation).

[32] Pacific Coast European Conference v. United States, 350 F.2d 197 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965); Flying Tiger Lines, Inc. v. Boyd, 244 F. Supp. 889 (D.D.C. 1965). Both cases held that when rulemaking is not on the record the Secretary is not limited to the formally presented evidence, but can rely on his own expertise and investigative results.

[33] 5 U.S.C. § 706(2)(A) (1970).

interpretation to administrative rulemaking.[34] Under section 706, a court reviewing an administrative action must set aside such action if it is found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."[35] The Secretary of Agriculture is empowered, under the Sugar Act of 1948, to set wages annually for sugar beet workers.[36] Claiming that the Secretary's refusal to consider the workers' demands for improved labor conditions was arbitrary, capricious, and an abuse of discretion, the workers sought a judgment declaring the wage regulations to be invalid. The district court denied the workers' claim and the Tenth Circuit affirmed.[37] The Secretary stated that he believed the Sugar Act did not authorize him to entertain such labor demands and that he thought the demands impractical and undesirable. Assuming without holding that the Secretary's statement of his own authority was improper, the Tenth Circuit held that the agency ruling must nevertheless stand if there were some basis in fact for the Secretary's finding that the demands were impractical and undesirable.[38] Holding that in the exercise of rulemaking power, an agency's action for an improper reason will not necessarily be struck down if there are also proper reasons for the action, the court determined that the Secretary's finding that the demands were impractical and undesirable constituted such proper reason for his action.[39]

I. STATUTORY INTERPRETATION

A. *Baldridge v. Hadley,* 491 F.2d 859 (10th Cir. 1974)

In *Baldridge v. Hadley,*[40] a case of first impression, the Tenth Circuit limited the government's remedies for violations of the Cropland Adjustment Program[41] and regulations promulgated

[34] The application of the section to administrative rulemaking is consistent with the reasoning of Atwood's Transport Lines, Inc. v. United States, 211 F. Supp. 168, *aff'd,* 373 U.S. 377 (1962), which held that rules and regulations promulgated by government establishments pursuant to statutory authority have the force and effect of law and are subject to the same tests as statutes.

[35] 5 U.S.C. § 706(2)(A) (1970).

[36] 7 U.S.C. § 1131(c)(1) (1970). In so doing, the Secretary is required to make an investigation and to give notice and opportunity for public hearing before making a determination whether rates are reasonable. The statute does not require rulemaking to be on the record; however, the hearing is not an adversary proceeding and is supplemented by further investigation by the Secretary.

[37] 487 F.2d 260 (10th Cir. 1973).

[38] *Id.* at 262.

[39] *Id.*

[40] 491 F.2d 859 (10th Cir.), *cert. denied,* 94 S. Ct. 2608 (1974).

[41] Food and Agricultural Act of 1965, 7 U.S.C. § 608(c) (1970).

thereunder.[42] Baldridge had engaged in a land transfer scheme which resulted in his collection of sums of money under the Program far in excess of the maximum sum permitted by the regulation.[43] The government proceeded against Baldridge under the applicable administrative regulations, which provide that if the Secretary of Agriculture determines that a producer has substantially violated the contract, all contract rights will terminate and payments will forfeit to the government with interest.[44] Baldridge appealed this decision to the district court, whereupon the Government counterclaimed for double damages under the False Claims Act.[45] The district court denied the double damages, reasoning that since the Government had elected to proceed administratively there could be no supplemental remedy under the False Claims Act. The Tenth Circuit upheld this ruling, comparing the available statutory remedies to the mutually exclusive common law remedies of recision and damages. Having elected to pursue the administrative remedy analogous to recision,[46] the Government was foreclosed from also claiming the alternative remedy of damages.[47]

B. *United States v. Ray,* 488 F.2d 15 (10th Cir. 1973)

In *United States v. Ray,*[48] the Tenth Circuit rejected defendant's constitutional claims regarding an administrative sanction. William Ray was convicted for failure to tag abandoned dead fowl as required under the Migratory Bird Treaty Act[49] and regulations promulgated thereunder.[50] On appeal, Ray claimed that the wording of the regulation[51] indicated that failure to tag was unlawful only if the bird was left in the custody of another person. The court rejected this argument, adopting the Seventh Circuit's approach to construction of administrative regulations:[52] the court, as in construing statutes, should look first to the

[42] 7 C.F.R. §§ 751.101 to .142 (Supp. 1974).

[43] 21 Fed. Reg. 6296, 8793 (1956) indicates that the total amount payable annually to any one participant shall not exceed $5000.

[44] 491 F.2d at 862, *citing* 21 Fed. Reg. 6297 (1956).

[45] 31 U.S.C. § 231 (1970) provides that any person not in the United States military making a false or fraudulent claim against the United States shall pay a fine plus double the amount of the Government's actual damages.

[46] 491 F.2d at 866.

[47] *See* note 45 *supra.*

[48] 488 F.2d 15 (10th Cir. 1973).

[49] 16 U.S.C. §§ 703-11 (1970).

[50] 50 C.F.R. § 10.36 (1970).

[51] *Id.*

[52] 488 F.2d at 18, *citing* Rucker v. Wabash R.R., 418 F.2d 146 (7th Cir. 1969).

language, and if the language is clear then no further interpretation is required. The language of the regulation, the court found, was clear and certain.[53]

Ray further claimed that the regulation violated the due process clause of the fifth amendment because it did not require that there be specific criminal intent. The court adopted a rule applied by the Eighth Circuit relating to the requirement of specific intent and applied it to administrative regulation: where the standard imposed by the statute is reasonable and is normally followed, where the penalty is minor, where conviction is not stigmatizing, and where the crime is not a common law offense, specific intent need not be proven as an element of the crime.[54]

C. *Seneca Nursing Home v. Kansas State Board of Social Welfare,* 490 F.2d 1324 (10th Cir. 1974)

In *Seneca Nursing Home v. Kansas State Board of Social Welfare,*[55] the court construed a state statute[56] as requiring promulgation of the Social Services staff manual.[57] The statute required promulgation of "every statement of general policy and every interpretation of a statute specifically adopted by an agency to govern its enforcement of administration of legislation."[58] The district court held that because the staff manual contained agency rules and regulations, promulgation was required under the statute. The Tenth Circuit affirmed[59] and in doing so became the first federal appellate court to construe a state statute of this nature. Although relief was granted on the basis of state law, the Tenth Circuit upheld the district court's exercise of jurisdiction because plaintiff's state claims were pendent to at least two federal claims.[60]

D. *Preux v. Immigration & Naturalization Service,* 484 F.2d 396 (10th Cir. 1973)

In *Preux v. Immigration & Naturalization Service,*[61] the Tenth Circuit interpreted a provision of the Aliens and National-

[53] 488 F.2d at 18.
[54] 488 F.2d at 19, *citing* Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960).
[55] 490 F.2d 1324 (10th Cir.), *cert. granted,* 95 S. Ct. 72 (1974).
[56] KAN. STAT. ANN. § 77-415(4) (1973).
[57] 490 F.2d at 1326.
[58] KAN. STAT. ANN. §§ 77-416, -421 (1973).
[59] 490 F.2d 1324.
[60] *Id.* at 1327-29.
[61] 484 F.2d 396 (10th Cir. 1973).

ity Act[62] which provides a waiver of deportation of aliens who have procured entry into the United States by fraud or misrepresentation.[63] Deportation proceedings were instituted against Monique Preux, who had entered the United States, given birth to a child, returned to her native Belgium, and then reentered the United States with a visitor's visa. Upon its expiration, she claimed the right to remain in the United States under the Aliens and Nationality Act because her child was a United States citizen.[64] Preux claimed that because she had a concealed intent not to leave the country upon the expiration of the visa, its procurement constituted fraud and misrepresentation within section 1251(f) of the Act. The court rejected this argument. Following similar interpretations of this provision by the Ninth[65] and Seventh[66] Circuits, the Tenth Circuit ruled that for section 1251(f) to apply, the fraud asserted must be relevant to the charge for which deportation is sought and is not established by mere misrepresentation in obtaining the visa.[67] Thus, waiver of deportation is available only if the charge results directly from the misrepresentation.

Lynne M. Ford

II. THE PROPRIETY OF SUMMARY JUDGMENT IN JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974)

INTRODUCTION

The federal rule of civil procedure which permits a trial court

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[62] 8 U.S.C. §§ 1101-1503 (1970).

[63] 8 U.S.C. § 1251(f) provides that

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

[64] 8 U.S.C. § 1251(f) (1970). 8 U.S.C. § 1401(a) provides that the following shall be citizens of the United States at birth:

> (1) a person born in the United States, and subject to the jurisdiction thereof . . . .

[65] 484 F.2d at 397, *citing* Cabuco-Flores v. Immigration & Naturalization Serv., 477 F.2d 108 (9th Cir. 1973).

[66] 484 F.2d at 397, *citing* Milande v. Immigration & Naturalization Serv., 484 F.2d 744 (7th Cir. 1973).

[67] 484 F.2d at 397, *citing* Immigration & Naturalization Serv. v. Errico, 385 U.S. 214 (1966).

to grant a motion for summary judgment[1] is designed to effectuate prompt disposition of actions in which there are no genuine issues as to material facts.[2] Courts have often considered whether this summary disposition of a case may be utilized by a district court reviewing an administrative decision for substantial evidence[3] and have consistently found the procedure to be a proper one.[4] However, in *Nickol v. United States*[5] the Tenth Circuit limited the granting of a motion for summary judgment in an administrative review. Where the issue before the district court is whether or not the administrative determination is supported by substantial evidence, and "there is 'substantial controversy' as to the 'material facts,' the district court is precluded from entering a Fed. R. Civ. P. 56 type of 'summary judgment.' "[6]

Because a motion for summary judgment may only be granted if there are no genuine issues as to material facts,[7] this holding may appear to be obvious and unnecessary. However, it is the opinion of several authorities[8] that whether there is sub-

[1] Fed. R. Civ. P. 56 permits either party to move for summary judgment upon all or part of a claim:

> The judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(c).

[2] Pyle, *An Appraisal of Summary Judgment Practice Under Rule 56 Federal Rules of Civil Procedure*, 31 MISS. L.J. 147, 1-3 (1960).

[3] The Administrative Procedure Act provides for judicial review of an administrative decision "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1970). The reviewing court is compelled to set aside agency actions which are found to be "unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . . ." *Id.* § 706(2)(E).

[4] Beane v. Richardson, 457 F.2d 758 (9th Cir.), *cert. denied*, 409 U.S. 859 (1972); White v. Udall, 404 F.2d 334 (9th Cir. 1968); Henrikson v. Udall, 350 F.2d 949 (9th Cir. 1965), *cert. denied*, 334 U.S. 940 (1966); Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964); Adams v. United States, 318 F.2d 861 (9th Cir. 1963); Todaro v. Pederson, 205 F. Supp. 612 (N.D. Ohio 1961), *aff'd*, 305 F.2d 377 (6th Cir.), *cert. denied*, 371 U.S. 891 (1962); Big Table, Inc. v. Schroeder, 186 F. Supp. 254 (N.D. Ill. 1960); Midwest Farmers, Inc. v. United States, 64 F. Supp. 91 (D. Minn. 1945).

[5] 501 F.2d 1389 (10th Cir. 1974).

[6] *Id.* at 1391. A week after this decision was filed, the Tenth Circuit reaffirmed its holding in Heber Valley Milk Co. v. Butz, 503 F.2d 96 (10th Cir. 1974). On review of a milk order of the Secretary of Agriculture, the district court granted the Secretary's motion for summary judgment. Because there was a substantial controversy as to the material facts, under the authority of the *Nickol* decision, the Tenth Circuit reversed and remanded the case for further proceedings. *See* text accompanying notes 20-22 *infra*.

[7] FED. R. CIV. P. 56(c). *See* note 1 *supra*.

[8] Bank of Commerce v. City Nat'l Bank, 484 F.2d 284 (5th Cir. 1973), *cert. denied*,

stantial evidence to support the administrative decision is only a question of law. Thus, there can be no issue of fact before the reviewing court, and, therefore, so long as the movant is entitled to judgment in his favor, summary judgment is proper. The theory behind the Tenth Circuit holding is that the resolution of the sufficiency of the evidence issue involves a review of the facts, and if they are in controversy, then a "finding" and identification of facts by the district court is required. Thus, the facts being in issue, summary judgment is improper.

I. *Nickol v. United States*

W. G. Nickol and his wife filed a placer mining claim for building and stone materials[9] which was denied by the administrative law judge on the ground that no valuable mineral deposit had been discovered.[10] Under the authority of the Administrative Procedure Act,[11] the Nickols appealed this adverse decision to the district court for a determination of whether the agency decision was supported by substantial evidence.[12] The court granted the government's motion for summary judgment, and the Nickols appealed. The Tenth Circuit reversed and remanded the decision to the lower court.

Recognizing that some cases do hold that review for substantial evidence is "only a question of law,"[13] the court nevertheless emphasized that the very purpose of review is "to examine the

94 S. Ct. 1609 (1974); Beane v. Richardson, 457 F.2d 758 (9th Cir.), *cert. denied*, 409 U.S. 859 (1972); Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964); Fields v. Hannegan, 162 F.2d 17 (D.C. Cir. 1947); Multiple Use, Inc. v. Morton, 353 F. Supp. 184 (D. Ariz. 1972); Todaro v. Pederson, 205 F. Supp. 612 (N.D. Ohio 1961), *aff'd*, 305 F.2d 377 (6th Cir.), *cert. denied*, 371 U.S. 891 (1962); Big Table, Inc. v. Schroeder, 186 F. Supp. 254 (N.D. Ill. 1960); Midwest Farmers, Inc. v. United States, 64 F. Supp. 91 (D. Minn. 1945); 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 56.17[3] (2d ed. 1974).

[9] The claim was filed under the authority of the organic statute of the Department of the Interior which provides: "Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims." 30 U.S.C. § 161 (1970).

[10] Brief for Appellant at 2, Nickol v. United States, No. 74-1011, 501 F.2d 1389 (10th Cir. 1974).

[11] 5 U.S.C. §§ 551-59, 701-76 (1970). *See* note 3 *supra*.

[12] The organic statute of the Department of the Interior requires that hearings and appeals be conducted according to the rules of the Department. 30 U.S.C. § 613(c) (1970). The regulations of the Board of Land Appeals, Office of Hearings and Appeals, Department of the Interior provide that hearings are to be recorded verbatim. 43 C.F.R. § 4.23 (1973). Since a hearing on the record is required, section 554 and, consequently, sections 556 and 557 of the Administrative Procedure Act are applicable. Thus, under section 706(2)(E) of the Act, the agency decision may be reviewed for substantial evidence. 5 U.S.C. §§ 554, 556, 557, 706 (1970). *See* note 3 *supra*.

[13] *See* cases cited note 8 *supra*.

facts in the record."[14] The court distinguished the cases cited to it on the grounds that there were no conflicts as to the facts or that the appellate court had reviewed the record on its own.[15] In *Nickol* the facts were divergent and controverted, and thus, in order to provide meaningful review, the Tenth Circuit held it essential that the appellate court know how the lower court had reached its determination, that is, what were the operative facts to which the law was applied.[16] A review of the record leading to a de novo determination, the court stated, is improper for an appellate court to perform but without any reasoning from the district court, the circuit court would be obliged to undertake just such a review.[17] Therefore, the district court, in reviewing the administrative record, under the statutory scheme, must evaluate the testimony, resolve the conflicts, and examine the facts as if the matter were "tried" in that court.[18]

Although the court advanced scant support for its ruling,[19] the Tenth Circuit reaffirmed the *Nickol* holding in *Heber Valley Milk Co. v. Butz.*[20] While no further foundation was provided, the court more clearly articulated its position that

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[14] 501 F.2d at 1390.

[15] *Id.* at 1391. Of the Ninth Circuit cases considered by the court, in one there were no conflicts as to the facts. Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964). In the others the Ninth Circuit made its own review of the record and found summary judgment proper. Beane v. Richardson, 457 F.2d 758 (9th Cir.), *cert. denied,* 409 U.S. 859 (1972); White v. Udall, 404 F.2d 334 (9th Cir. 1968); Henrikson v. Udall, 350 F.2d 949 (9th Cir. 1965), *cert. denied,* 384 U.S. 940 (1966).

[16] 501 F.2d at 1391.

[17] *Id.*

[18] *Id.*

[19] The court cites Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), *rev'g* 432 F.2d 1307 (6th Cir.), *aff'g* 309 F. Supp. 1189 (W.D. Tenn. 1970) for the proposition that the reviewing court must engage in a substantial inquiry as to the facts. 501 F.2d at 1391. In the *Overton Park* case the Supreme Court reversed the Sixth Circuit's affirmation of the lower court's granting of the motion for summary judgment by the Secretary of Transportation. Although this particular agency action was not subject to the substantial evidence test, the Court stated, nevertheless, that section 706 of the Administrative Procedure Act requires the court to engage in substantial inquiry. 401 U.S. at 415. It should be noted here that the Nickols also appealed the agency decision on the ground that it was "clearly erroneous as a matter of law," which is within the ambit of section 706(2)(A) of the Administrative Procedure Act. 501 F.2d at 1390. Although neither the district nor the circuit court discussed this issue, the *Overton Park* case would also require that a searching and careful inquiry be made to determine whether agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1970). *See* 401 U.S. at 416. The Tenth Circuit also quotes C. WRIGHT, LAW OF FEDERAL COURTS, § 99 at 443 (1970) to support the theory that there can be no broad rule as to when summary judgment is appropriate. 501 F.2d at 1392.

[20] 503 F.2d 96 (10th Cir. 1974). *See* note 6 *supra.*

> it is the duty of the trial court to examine the record as made before the administrative agency, and then to "find," and to identify, the "facts" which it deems to be supportive of the agency's order, if such be the trial court's resolution of the matter.[21]

A mere showing that the judge considered the record and concluded that there was evidence to support the agency decision is not enough; the trial court itself must make a finding and identification of facts.[22]

The decisions in both cases hold that summary judgment is improper in those situations where there is a conflict as to the facts. Yet, the court in *Nickol* indicated that the granting of a motion for summary judgment would be appropriate in those cases where, assuming the movant is entitled to judgment,[23] there

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[21] *Id.* at 97.

[22] *Id.* One of the Nickols' assertions on appeal was that the district court did not examine the administrative record because it had been officially sealed. Brief for Appellant at 2, Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974). The government countered that argument by noting that both parties had, in the lower court, made numerous references to the transcript and that government counsel found the record "taped in an envelope, not 'sealed.'" Brief for Appellees at 4, n.1, Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974). In the *Nickol* case the court made no finding as to whether or not the record was, in fact, examined. It noted, however, in the *Heber Valley* case that: "In the present case, unlike *Nickol*, there is nothing in the record before us to indicate that the trial judge before granting summary judgment had himself examined the record . . . ." 503 F.2d at 98. Thus, even in those situations where the court has examined the record, that court must find and identify the supporting facts.

[23] To be entitled to judgment, the movant, if he is seeking the affirmation of the agency decision, must establish that there is substantial evidence to support the decision. If the movant is seeking the reversal of the agency determination, he must show that it is unsupported by substantial evidence. Substantial evidence has been defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). *See also* NLRB v. Columbian Enameling & Stamping Co., 206 U.S. 292 (1939). The Supreme Court has held that the power of review by the district court is limited if there is substantial evidence, such evidence being adequate for a reasonable mind to accept as supporting a conclusion. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 618-21 (1965). Lower courts have followed this standard to varying degrees. *See, e.g.*, Henrikson v. Udall, 350 F.2d 949, 950 (9th Cir. 1965), *cert. denied*, 384 U.S. 940 (1966); Lewes Dairy, Inc. v. Freeman, 401 F.2d 308, 317 (3d Cir.), *cert. denied*, 394 U.S. 929 (1969); Consolidated Royal Chemical Corp. v. FTC, 191 F.2d 896, 900 (7th Cir. 1951); Standard Distribs., Inc. v. FTC, 211 F.2d 7, 12 (2d Cir. 1954). The Tenth Circuit has held that "[t]he court is not to substitute its judgment for that of the agency concerning which of various rational but opposed inferences should be drawn from this evidence." Hyatt v. United States, 276 F.2d 308, 312 (10th Cir. 1960). If the decision is supported on the record, no purpose is served by reviewing in detail the evidence before the administrative agency. More recently, the court has stated that findings of fact are not to be disturbed by the reviewing court if there is substantial evidence to support them. Travis v. Richardson, 434 F.2d 225, 227 (10th Cir. 1970). *See also* Jones v. Finch, 416 F.2d 89 (10th Cir. 1969); Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). The result is that even if evidence is

are no conflicts.[24]

II. Implication of the Decision

The *Nickol* and *Heber Valley* decisions have not increased the power and function of the district court as the appellees have contended.[25] Instead, the power of the court to grant a summary judgment motion in specific cases has been limited in an attempt to assure the appellate court that there will be a delineation of the district court's reasoning.

Whether or not the district court's review for substantial evidence is a matter of law[26] is not an issue. The very purpose of such review is to examine the facts in the record.[27] In those cases where the findings of the agency are to be accepted, the court is not relieved of its duty to examine the evidence to ascertain the existence of substantial evidence.[28] When there is a significant controversy in the evidence there is a "genuine issue as to a material fact," and, therefore, the court may not grant a motion for summary judgment.[29] Otherwise, the possibility increases that

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conflicting, there may easily be sufficient evidence to support the decision, and the district court, therefore, must affirm.

[24] "Thus if there are no conflicts, there is no problem presented . . . ." 501 F.2d at 1391.

The lack of discussion by the court on this point raises a serious question. The Supreme Court in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) states that section 706 (of the Administrative Procedure Act) requires that court to engage in a substantial inquiry:

> Even though there is no *de novo* review in this case and the Secretary's approval of the route of I-40 does not have ultimately to meet the substantial-evidence test, the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, indepth review.

401 U.S. at 415 (citations omitted).

The Tenth Circuit cites *Overton Park*, also a summary judgment case, to support its requirement for an inquiry into the facts when evidence is controverted. *See* note 19 *supra*. The strong language of the Supreme Court, however, may imply that that same type of inquiry is mandatory in all section 706 review, and therefore, under no circumstances can a district court grant a motion for summary judgment when it is conducting any section 706 review.

[25] Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc at 2, Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974).

[26] *See* note 8 *supra*.

[27] Nickol v. United States, 501 F.2d 1389, 1390 (10th Cir. 1974).

[28] Foote Bros. Gear & Mach. Corp. v. NLRB, 121 F.2d 802, 803-04 (7th Cir. 1941).

[29] Fed. R. Civ. P. 56(c). For cases which similarly interpret this rule, see Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944); Bank of Commerce v. City Nat'l Bank, 484 F.2d 284 (5th Cir. 1973); Brother-

the guaranteed right of review[30] may be denied. In the *Heber Valley* case such a situation arose; the court noted that there was no indication that the trial judge had, in fact, even examined the record.[31]

Since the Tenth Circuit nowhere states that summary judgment is inappropriate in all cases, it is necessary for the attorney appealing an administrative decision to find genuine conflicts in the facts and to bring them to the attention of the court in order to insure that the right to review is not terminated by summary judgment. Once portions of the transcript are cited by the parties, the court is under a duty to review them.[32] Thus, if divergent and controverted facts and testimony are indicated to the court, the appellant has guaranteed for himself an initial review of the record, culminating in an identification of those facts which either support or contradict the agency decision, and thereby providing the circuit court with a record for it to review. In that situation the district court is prohibited from granting a motion for summary judgment for either party.

Moreover, under the authority of *Citizens to Preserve Overton Park v. Volpe,*[33] since a summary judgment motion may not be granted when a party raises questions of arbitrariness, abuse of discretion, and errors of law on appeal,[34] if the appellant raises such questions, summary judgment cannot foreclose his right to review.

CONCLUSION

The Tenth Circuit in the *Nickol* and *Heber Valley* cases has made no new sweeping changes in the law. It has articulated a rule which has long needed enunciation. As the court indicated, "[t]he opinion does not refer to the scope of review by the dis-

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hood of R.R. Trainmen v. Louisville & N.R.R., 211 F. Supp. 308 (N.D. Ala. 1962); Poss v. Christenberry, 179 F. Supp. 411 (S.D.N.Y. 1959); Miller v. United States, 54 F.R.D. 471 (W.D. Pa. 1972). *See also* United States v. Kansas Gas & Elec. Co., 287 F.2d 601 (10th Cir. 1961) in which summary judgment was held improper where there was a good faith dispute as to the intent of the parties.

[30] OKC Corp. v. FTC, 455 F.2d 1159 (10th Cir. 1972); Harvey v. Udall, 384 F.2d 883 (10th Cir. 1967); Brennan v. Udall, 379 F.2d 803 (10th Cir.), *cert. denied,* 389 U.S. 975 (1967); Coleman v. United States, 363 F.2d 190 (9th Cir. 1966); Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958).

[31] 503 F.2d at 97. *See also* note 22 *supra.*

[32] "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . . ." 5 U.S.C. § 706 (1970).

[33] 401 U.S. 402 (1971).

[34] *See* notes 19 & 24 *supra.*

trict courts."[35] They must only ascertain what is the substantial evidence and make a record in order that the circuit court can then provide normal appellate review. As a result of this ruling the district court is forced to deny a motion for summary judgment in those cases where there is a good faith controversy as to the facts, and the parties are assured proper review in the district and circuit courts.

Judith D. Levine

[35] On Petition for Rehearing, Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974).