Denver Law Review

Volume 51 | Issue 2 Article 6

March 2021

Administrative Law - The Colorado Administrative Procedure Act - Colo. Rev. Stat. Ann. 3-16-6: Application - A Matter of Construction

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COMMENT

ADMINISTRATIVE LAW—THE COLORADO ADMINISTRATIVE PROCEDURE ACT—COLO. REV. STAT. ANN. § 3-16-6: Application—A Matter of Construction

INTRODUCTION

The coexistence of procedural requirements in the State Administrative Procedure Act (APA)[1] and in the organic statutes of many state agencies frequently presents a dilemma for the Colorado attorney representing a client in an administrative matter. He must choose the applicable procedures from overlapping and sometimes inconsistent statutory authority. To guide him in this choice the final section of the APA provides that "where there is conflict between the APA and a specific statutory provision relating to a specific agency, such specific statutory provision shall control as to such agency."[2] Prior to 1969 this provision had simply stated that specific statutory provisions pertaining to a specific agency "shall control as to such agency."[3] Implicit in the addition of the *conflict* language to section 3-16-6 is the legislature's intent to make procedures in an organic statute and the APA jointly apply where they parallel each other. The 1969 amendment's expanded definition of the APA's jurisdiction, which makes it apply "to *every* agency of the state having statewide territorial jurisdiction" and also "to every other agency to which it is made to apply by specific statutory reference"[4] further evidences the intended overlap. Taken together, these changes suggest a legislative attempt to delineate the APA's scope and to clarify its proper application.

Two recent Colorado Supreme Court cases have interpreted section 3-16-6 as amended: *North Kiowa-Bijou Management District v. Ground Water Commission*[5] and *PUC v. District Court*.[6]

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[1]COLO. REV. STAT. ANN. §§ 3-16-1 to -7 (Supp. 1969), *amending* COLO. REV. STAT. ANN. §§ 3-16-1 to -7 (1963). Section 3-16-7 provides that the entire article shall be known and cited as the "State Administrative Procedure Act."

[2]COLO. REV. STAT. ANN. § 3-16-6 (Supp. 1969).

[3]COLO. REV. STAT. ANN. § 3-16-6 (1963).

[4]COLO. REV. STAT. ANN. § 3-16-6 (Supp. 1969) (emphasis added). Prior to 1969 the APA's jurisdiction had to be inferred from the definition of "agency" in section 3-16-1. COLO. REV. STAT. ANN. § 3-16-1 (1963). The addition of the language quoted in text to section 3-16-6 obviates the necessity for such an inference by providing a clearly dispositive definition of the APA's jurisdiction.

[5]505 P.2d 377 (Colo. 1973).

[6]505 P.2d 1300 (Colo. 1973).

Although they arose under different statutes, both cases involved judicial review of administrative action. Unfortunately, neither opinion adequately examined the possible application of the APA to the procedural problems involved.

In *PUC* the court concluded, after quoting the conflict language in section 3-16-6, that the APA should not apply because "the statutory authority governing the judicial review of PUC orders and decision is *specifically detailed* in 1969 Perm. Supp., C.R.S. 1963, 115-6-14, 15 and 16."[7] In a similar perfunctory manner the court in *North Kiowa* concluded:

> As a threshold matter . . . the Code has no applicability where a specific statutory provision relating to a specific agency provides a scheme for the administrative control of that agency. Such is the situation with the Ground Water Management Act . . ., which contains a *comprehensive scheme* for administering the provisions of that article.[8]

While *PUC* does at least acknowledge the existence of the new APA language, neither opinion addresses itself to an interpretation of the conflict requirement. Specifically, neither opinion lays out any conflict it has found between provisions in the organic statutes and the APA. The court thus fails to require, much less define, the statutorily mandated conflict. As a result the attorney, when forced to choose between the parallel procedures, is left with broad, imprecise standards—whether or not the organic procedures are "specifically detailed" or constitute a "comprehensive scheme"—which may sanction arbitrary exclusion of the APA in many situations where it should now apply.

A particularized construction of the conflict language should have been an important issue in both cases. The problem is the extent to which a conflict precludes use of the APA. Does any conflict eliminate the entire APA provision or section in question, or should the organic statute control only insofar as there is actual, specific conflict, thus leaving the APA's procedures operational on all other points? The question becomes one of legislative intent and the extent to which the APA's standardized procedural scheme should supplement organic statutes where they are silent. This comment will pursue the legislative history of the 1969 amendment in order to clearly establish an intent to

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[7] *Id.* at 1301 (emphasis added).

[8] 505 P.2d at 379 (emphasis added). The Ground Water Management Act may be found at COLO. REV. STAT. ANN. §§ 148-18-1 to -38 (Supp. 1965).

expand the APA's use and will then suggest a construction of the amended language which will correctly direct the application of the coexisting procedures where they conflict.[9]

I. Legislative History and Intent

A. *Administrative Codes: The Basic Concept*

The basic idea underlying the promulgation of an administrative code is the standardization of administrative procedures in one enactment and the application of those procedures to all agencies within a jurisdiction. While the concept has won wide acceptance, in practice many situations exist in which the particular needs of individual agencies require specialized procedures. Moreover, even in some instances where the merits of such specialized needs are debatable, the special procedures remain because local concerns—the vested interest of an entrenched bureaucracy or specialized bar—so dictate.[10]

Where such compromise obtains, as it often does in Colorado,[11] there are two possible solutions to the inherent problem of conflict between provisions of the organic statutes and the uniform procedures of an administrative code. First, where specific statutory procedures exist, they could be deemed controlling and exclusive. *PUC* and *North Kiowa* incorrectly suggest this possibility, although without clearly articulating such a rule. Second, the separate provisions can coexist and jointly apply. Although this solution lacks the definiteness of the first solution, it allows potentially broader employment of the APA, a preferable result since the specialized organic procedures, even if they serve a legitimate, particular need, are often skeletal.[12] Colorado's statutory scheme, the *PUC* and *North Kiowa* opinions notwithstanding, should be interpreted so as to follow this second possibility.

B. *The Conflict Requirement: Its Origin and Intent*

In support of the proposition that the amended language of section 3-16-6 should be read to increase the APA's use is the specific origin of the language and the expressed intention of its

[9]Obviously, in a situation where the organic and code procedures parallel each other exactly there is no problem of choosing between them.

[10]More often than not, this situation arises when the organic statute of an agency predates the adoption of the State APA. *See* note 11 *infra*.

[11]*See* Henry, *The Colorado Administrative Procedure Act: Exclusions Demanding Reform*, 44 Denver L.J. 42 (1967).

[12]*See* text accompanying notes 30-32 *infra*.

author. The origin of the conflict language, and, in fact, the meaning of the entire provision, has a history unique to Colorado. The drafters of the Colorado APA worked from both the revised Model State APA and the final draft of a revised federal code which was never enacted.[13] Hubert Henry, a longtime Chairman of the Administrative Law Committee of the Colorado Bar Association and the drafter of much of the language in the Model State APA, including the 1969 amendment to section 3-16-6, points out, however, that many changes and additions were made to conform to Colorado's specific needs.[14] The language in section 3-16-6 is one of these changes, and it represents Colorado's novel "solution" to the problem of inconsistencies between the APA and organic statutes. The absence of similar language in other states negates the possibility of using constructions from other jurisdictions as a guide. This circumstance places primary importance on the amendment's legislative history. Fortunately, such legislative history is available and it offers not only insight into the origin of the amended language, but also directions as to its proper construction.

The conflict language was first proposed by Henry in a 1967 *Denver Law Journal* article as the desired judicial construction of the pre-1969 language of section 3-16-6.[15] Arguing for a judicial interpretation that would increase the APA's use, he contended:

> The number of conflicts can and should be held to a minimum by strictly and narrowly construing the crucial provision that "where a specific statutory provision applies to a specific agency, such specific statutory provision shall control as to such agency."[16]

The author then proceeded to articulate the interpretation he would give the provision in words later to be codified in the 1969 amendment:

> Only if there is an *actual conflict* between the APA and the statute applying to any specific agency, does the latter control, *and then only to the extent of the specific conflict.*[17]

To whatever degree the language of the statute fails to convey an exact, statutory command as to the application of the article, the words and intent of its author should supply the proper direction.

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[13]Henry, *supra* note 11, at 43.

[14]*Id.*

[15]*Id.* at 50.

[16]*Id.*

[17]*Id.* (emphasis added).

II. A Matter of Construction

The language of the 1969 amendment deserves detailed attention from the court, for it provides a workable, even if not precise, guide to the legislature's intention. The conflict requirement has suffered, though, from an unfortunate judicial tendency to apply the APA not according to its own instructions, but in accordance with traditional rules of common law construction.

In 1968 the Colorado Supreme Court construed the pre-amendment language of section 3-16-6 in *Shoenberg Farms, Inc. v. People*.[18] The defendants wanted the adequacy of notice issue to be resolved by reference to section 3-16-6 of the APA, but, according to the court in this case, the state APA is a general law and "[i]t is a general rule of statutory construction that a specific statute prevails over a general one."[19] There was no need, however, to resort to this general rule of statutory construction in order to preclude the application of the APA to this case. A separate provision of the organic statute in question provided that the organic procedures should control to the exclusion of any general law.[20] The resulting, unnecessarily broad preemption of the APA foreshadows the treatment section 3-16-6 received in *North Kiowa* and *PUC*.[21]

In Colorado, it is a fundamental rule of statutory interpretation that in construing amendments a change in meaning must be attributed to a change in language.[22] Furthermore, "[i]n arriving at legislative intent, the language of an amendment must be construed in light of previous decisions by courts of last resort construing the original act . . . ."[23] Therefore, it must be presumed that the legislature had in mind the judicial construction in the *Shoenberg Farms* opinion when the 1969 amendment was passed. Construed in light of the *Shoenberg Farms* opinion, the

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[18]166 Colo. 199, 444 P.2d 277 (1968).

[19]*Id.* at 215, 444 P.2d at 285.

[20]Colo. Rev. Stat. Ann. § 7-3-23 (1963).

[21]Colorado is not the only state where the judiciary has limited the applicability of an administrative code by resorting to the rule that the specific controls the general. Three Michigan cases dealing with the availability of APA procedures for judicial review where such procedures were also provided in the organic statutes in question were decided on the same basis. Superex Drug Corp. v. State Bd. of Pharmacy, 375 Mich. 314, 134 N.W.2d 678 (1965); Dossin's Food Prods. v. Michigan State Tax Comm'n, 360 Mich. 312, 103 N.W.2d 474 (1960); Imlay T. Primary School Dist. No. 5 v. State Bd. of Educ., 359 Mich. 478, 102 N.W.2d 720 (1960).

[22]General Motors Corp. v. Blevins, 144 F. Supp. 381, 393 (D. Colo. 1956).

[23]Industrial Comm'n v. Milka, 159 Colo. 114, 120, 410 P.2d 181, 184 (1966).

clause— "[B]ut, where there is a *conflict* between this article and a *specific* statutory provision relating to a specific agency, such specific statutory provision shall control as to such agency"[24]—should have persuaded the court to abandon its reliance upon a blanket application of the specific-over-general rule in favor of the more restrictive guidelines set forth by the legislature.

The supreme court should have devoted special attention to the words "conflict" and "specific." Applying the accepted rule of statutory construction that "[i]n interpreting words of a legislative enactment . . . the intention of the legislature is to be found in the ordinary meaning of the words used in the statute when considered in the light of the object to be accomplished or remedied,"[25] "conflict" implies terms directly in opposition, an inconsistency rather than the mere existence of separate statutory provisions which pertain to the same procedures. Moreover, the adjective "specific" modifies the phrase "statutory provision," and thus narrows the focus to the exact procedural requirements within a provision rather than to the provision as a whole. The amended language of section 3-16-6 anticipates, then, the situation where a particular requirement in an organic statute would actually vary the application of the uniform procedures of the APA.

The Colorado Supreme Court, in both the *North Kiowa* and *PUC* opinions, failed to give the words such a detailed analysis and instead relied on more general impressions to reach its conclusions, saying the APA is not to apply where the organic statute is "specifically detailed" or constitutes a "comprehensive scheme." The net result of the court's imprecision is the creation of a doctrine of preemption that, potentially, could be used to exclude the APA whenever an organic statute provides *any* procedures for its administration—a result in direct derogation of the legislative intent embodied in the amended version of section 3-16-6.

III. APPLICATION

The foregoing analysis of the legislative intent and statutory language shows that there are problematic deficiencies in the supreme court's handling of the applicability question in *PUC*

[24]COLO. REV. STAT. ANN. § 3-16-6 (Supp. 1969) (emphasis added).
[25]Blevins v. Truitt, 134 Colo. 88, 90, 299 P.2d 1100, 1101 (1956).

and *North Kiowa*. Fortuitously, the procedural questions were not determinative of the outcome in either case. Indeed, if the issue were restricted solely to the substantive merit of the decisions, the overbroad language would pose no problem.[26] The question is rather the value of these two opinions as precedent on the more general issue of the APA's application where its procedures are to some degree paralleled in an organic statute.

A. PUC v. District Court

The organic statute[27] involved in *PUC* specifically incorporates the APA by reference; however, it also states that "where there is a specific statutory provision in this chapter applying to the commission such specific statutory provision shall control as to the commission."[28] Furthermore, section 115-6-15(4) provides that "[n]o court of this state, except the district court *to the extent specified*, shall have jurisdiction to review . . . or to enjoin, restrain, or interfere with the commission in the performance of its official duties . . . ."[29] A closer examination shows that the procedures in sections 115-6-14 to -16 pertaining to judicial review of agency action are more detailed than those in most organic statutes. Indeed, the section in issue, 115-6-16(2), which provides for stays pending judicial review, contains procedures more detailed than those found in section 3-16-5(5) of the APA.[30] The more detailed provisions in the organic statute should obviously control in this case.

Still, the court's sweeping exclusion of the APA, however specifically detailed the PUC's organic procedures may be in some respects, fails to give the problem the particular analysis it needs. Because the specific conflicts are not recited, the standard

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[26]In *PUC* it was held that Sentry Services, Inc. lacked standing because it was not a "person" aggrieved by possible self-incrimination, the fifth amendment right being inapplicable to a corporation. The PUC's order to produce records was upheld and the district court was prohibited from staying it. Application of the APA's procedures would have had no effect on this outcome. Likewise, in *North Kiowa* the holding that the review provisions in the Ground Water Management Act applied only to rulemaking by the districts and that review of individual adjudications should be in the district courts would be unaffected by the APA.

[27]COLO. REV. STAT. ANN. §§ 115-6-1 to -21 (Supp. 1969), *amending* COLO. REV. STAT. ANN. §§ 115-6-1 to -21 (1963).

[28]COLO. REV. STAT. ANN. § 115-6-1(1) (Supp. 1969).

[29]*Id.* § 115-6-15(4) (emphasis added).

[30]COLO. REV. STAT. ANN. § 3-16-5(5) (Supp. 1969). The organic statute adds the requirement of a hearing upon 3 days' notice. COLO. REV. STAT. ANN. § 115-6-16(2) (Supp. 1969).

"specifically detailed" remains vague and without content, potentially subject to misuse in cases where the organic procedures are not as comprehensive. In short, the court should have limited its holding to the particular sections involved and itemized the detailed requirements in the organic statute which make it exclusively controlling.

B. North Kiowa-Bijou Management District v. Ground Water Commission

The *North Kiowa* case substantiates the potential for misuse inherent in the sweeping standards the supreme court has articulated. It also provides a good example of the possible uses of the APA that would be lost thereunder. In *North Kiowa* the court's analysis of the applicability problem is limited to one summary paragraph where the APA is dismissed because the Ground Water Management Act provides "a comprehensive scheme for administering the provisions of that article."[31] The specific statutory provision which would now control the disposition of the case on remand, however, is far from comprehensive and, as a solution to the problem of the applicable form of judicial review, it leaves many questions unanswered.[32] It provides in pertinent part, "Any person aggrieved by an act of the district board . . . may appeal the same to a court of competent jurisdiction within thirty days of said decision."[33] When compared to section 3-16-5 of the APA only one actual "conflict" appears and that is the provision which provides 60 as opposed to 30 days in which an appeal can be brought.[34]

There exist, then, large areas where the organic statute is silent, but where the APA details the necessary procedures. The obvious proposition in a situation such as this is that the APA should be used to fill in gaps in the procedures outlined in the organic statute; in other words, the APA should be accorded the status of a procedural supplement. For example, the APA, if applied, could take care of such potentially difficult problems as

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[31]505 P.2d at 380.

[32]In fact the original statute was silent on this point, a circumstance which brings into question the validity of the "comprehensive scheme" test the court used to exclude the APA. The court seems in reality to have been acknowledging an after-the-fact amendment to the organic statute [COLO. REV. STAT. ANN. § 148-18-30(1) (Supp. 1971)] which did provide for review in the district court. Interview with John Maley, attorney, in Denver, Colorado, June 12, 1973.

[33]COLO. REV. STAT. ANN. § 148-18-30(1) (Supp. 1971).

[34]COLO. REV. STAT. ANN. § 3-16-5(4) (Supp. 1969).

what constitutes the record on review, the scope of review, and the procedures necessary to stay action pending review, among others.[35]

Using virtually indistinguishable standards—"specifically detailed" and "comprehensive scheme"—the supreme court has excluded the APA in two vastly dissimilar statutory contexts (compare the specificity of the review procedures in *PUC* with the mere outline in *North Kiowa*). The court's opinions seem more a judicial flex of old muscle in the form of familiar rules of statutory construction than an accurate reading of the statute as it now stands. The mere existence of parallel procedures in a specific statute seems to preclude any consideration of the statutorily required "conflict." Thus, neither opinion offers a functional construction of the amended language of section 3-16-6. The court's handling of the issue is an invitation to arbitrary and, given the judicial predisposition, limited application of the code.

CONCLUSION

Employment of all possible procedural guides within the APA will, of course, not be necessary in every case. In some instances the scheme provided in an organic statute will prove entirely sufficient.[36] The important practical result of giving the APA wider application is that the more comprehensive provisions are there if needed; moreover, there is also a far-reaching policy dividend in that the APA procedures will come closer to being the standard than they now are. Thus, the APA's use and hence its value can increase if a broadening interpretation is given to the new conflict requirement. Implicit in this goal is the imperative that the judicial branch recognize, insofar as the applicability of the APA is concerned, that the *North Kiowa* and *PUC* opinions must be recast as soon as a suitable opportunity presents itself.

The thrust of the 1969 amendment to section 3-16-6 was to expand the APA's applicability and use. The statutory conferral of concurrent jurisdiction joins with the logical meaning of the language, as well as the expressed intention of its author, to argue persuasively for that result. Therefore, as a rule, coexisting procedures in the APA and organic statutes should jointly apply in all instances. Where there is conflict the organic statute should con-

[35] *Id.* § 3-16-5.

[36] The review provisions in the organic statute of the PUC come immediately to mind as one example. COLO REV. STAT. ANN. §§ 115-6-1 to -21 (Supp. 1969).

trol, but only to the extent of the conflict. Where the organic statute is silent the APA should supplement it. To this end, the conflict requirement should be interpreted narrowly to mean actual, specific conflict. If so construed, section 3-16-6 will allow specialized organic procedures to coexist usefully with the more general provisions of the APA and, when forced to choose between them, the Colorado practitioner will have a guideline rather than a dilemma.

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