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Recent Developments in Environmental and Natural Resources Law

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RECENT DEVELOPMENTS IN ENVIRONMENTAL AND NATURAL RESOURCES LAW

INTRODUCTION

Increased environmental regulation by governmental agencies has greatly expanded litigation in the natural resources area, so this year's land and natural resources survey includes environmental law cases. The Tenth Circuit regularly defers to agency decisions in environmental and natural resources cases[1] and this year's decisions are no exception. In 1991, the court considered issues arising under a variety of statutes including: (1) the Clean Water Act (CWA),[2] which establishes regulatory and enforcement programs for discharges into waters of the United States; (2) the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[3] or Superfund, which establishes financial responsibility parameters for cleanup of hazardous waste sites and has resulted in extensive litigation over cleanup costs; (3) the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[4] which governs the use and registration of pesticides; and (4) the National Environmental Policy Act (NEPA),[5] which requires federal agencies to consider environmental impacts from "major federal actions that have a significant effect on the quality of the human environment."

This Article surveys select Tenth Circuit cases decided under environmental and natural resource laws. Part One discusses certain environmental law questions: Does FIFRA preempt local pesticide ordinances?[6] Do present hazardous waste site owners have a right of contribution from previous owners when cleanup is not consistent with National Contingency Plan requirements?[7] Does the Clean Water Act waive the federal government's sovereign immunity for civil penalty liability in a citizen suit action?[8] What standard of review should the court apply in determining the adequacy of an Environmental Impact Statement (EIS)?[9] Part Two considers natural resource and public land questions: What constitutes final agency action such that a court may compel by writ of mandamus the Bureau of Land Management (BLM) to issue an oil shale patent?[10] Is a lease to use tribal land valid in the absence of

1. *See, e.g.*, Quivira Mining Co. v. United States, 765 F.2d 126 (10th Cir. 1985); National Cattlemen's Assoc'n v. United States, 774 F.2d 1008 (10th Cir. 1985); Kennecott Copper Corp. v. United States, 612 F.2d 1232 (10th 1979).
2. Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251-1387 (1988).
3. 42 U.S.C. §§ 9601-9675 (1988).
4. 7 U.S.C. §§ 136-136y (1988).
5. 42 U.S.C. §§ 4321-4347 (1988).
6. *See* COPARR, Ltd. v. City of Boulder, 942 F.2d 724 (10th Cir. 1991).
7. *See* County Line Inv. Co. v. Tinney, 933 F.2d 1508 (10th Cir. 1991).
8. *See* Sierra Club v. Lujan, 931 F.2d 1421 (10th Cir. 1991).
9. *See* Sierra Club v. Lujan, 949 F.2d 362 (10th Cir. 1991).
10. *See* Marathon Oil Co. v. Lujan, 937 F.2d 498 (10th Cir. 1991). Other Tenth Cir-

compliance with NEPA?[11] May a private utility providing power to municipalities receive a preference under the law of federal reclamation and power?[12]

PART ONE — ENVIRONMENTAL LAW

I. FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT — *COPARR, LTD. V. CITY OF BOULDER*[13]

A. *Facts*

This case challenges two local ordinances that the City of Boulder, Colorado (Boulder) enacted to regulate use of pesticides within city limits. COPARR[14] alleged that Boulder Ordinance Nos. 5083 and 5129, enacted by Defendant-Appellee Boulder, violated the supremacy clause of the United States Constitution, arguing that FIFRA completely preempts regulation of pesticides by local political subdivisions.

B. *Background*

1. FIFRA

Before 1947, states could exercise full regulatory authority over pesticides. On June 25, 1947,[15] Congress enacted FIFRA "to replace and expand the protection" afforded by the Insecticide Act of 1910, which was deemed inadequate due to growth in development of new charcoal compounds and pesticide control products.[16] In 1972, Congress passed sweeping amendments to FIFRA,[17] including "a number of

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cuit mineral law cases not reviewed in this Article include Ash Creek Mining Co. v. Lujan, 934 F.2d 240 (10th Cir. 1991) (whether BLM withholding of lands from federal coal leasing program is reviewable final agency action) and Trapper Mining, Inc. v. Lujan, 923 F.2d 774 (10th Cir. 1991) (whether government can reapportion coal leases based on new laws), *cert. denied*, 112 S.Ct. 81 (1991).

11. *See* Sangre de Cristo Dev. Co. v. United States, 932 F.2d 891 (10th Cir. 1991). Another Tenth Circuit Native American case not reviewed in this Article involves a patent border dispute and the scope of the Secretary of the Interior's authority to correct land patents. Foust v. Lujan, 942 F.2d 712 (10th Cir. 1991), *cert. denied*, case no. 91-1286 (U.S. April 27, 1992).

12. *See* Salt Lake City v. Western Area Power Admin., 926 F.2d 974 (10th Cir. 1991). The Tenth Circuit also revisited the Dillon Reservoir dispute, involving over forty years of litigation regarding Denver's water rights. *See* City and County of Denver Bd. of Water Comm'rs v. United States, 935 F.2d 1143 (10th Cir. 1991) (regarding the scope of Denver water rights to fill and use Green Mountain Reservoir).

13. 942 F.2d 724 (10th Cir. 1991).

14. Plaintiff-appellants in this case are COPARR, Ltd. (Colorado Pesticide Applicators for Responsible Regulation) and Victor A. Caranci. COPARR is a Colorado nonprofit corporation comprised of trade associations, individuals and companies who are engaged in the business of commercial pesticide application in the City of Boulder and are subject to certain provisions of the Boulder ordinances. Victor A. Caranci is an individual who contracts for the commercial application of pesticides in the City of Boulder. Caranci and Coparr members face injury in the form of compliance expenses or diminished business or both, as a result of the enactment and enforcement of the Boulder ordinances.

15. *See* Federal Insecticide, Fungicide, and Rodenticide Act, Pub.L. No. 80-104, 61 Stat. 163 (1947).

16. *See* H.R. REP. No. 313, 80th Cong., 1st Sess. (1947), *reprinted in* 1947 U.S.C.C.A.N. 1200-01.

17. *See* Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86

innovations to direct and strengthen federal control over pesticides."[18] FIFRA now confers upon EPA broad regulatory and supervisory authority over pesticide and chemical substance application.[19]

EPA promulgated extensive regulations dealing specifically with pesticide application.[20] EPA pesticide regulations address the following: (1) evaluation of toxicological hazards to children and specific related warnings;[21] (2) requirements for pesticide storage and disposal;[22] (3) federal and state agency exemptions for emergency use;[23] (4) pesticide manufacturing registration;[24] and (5) standards for agricultural worker protection.[25] The Colorado statutory scheme for pesticide regulation parallels the federal statute: "A state may regulate the sale or use of any federally registered pesticide or device in the state but only if and to the extent the regulation does not permit any sale or use permitted by this subchapter."[26]

2. The Boulder Ordinances and Preemption

Boulder Ordinance No. 5083, enacted to regulate certain pesticide uses,[27] gave the city manager power to enter upon all land within the city boundary, whether public or private, to inspect and observe pesticide use. In 1988, Boulder expanded its pesticide regulatory scheme by enacting Ordinance No. 5129,[28] which created additional controls over pesticide use, such as pre-application public notice requirements.[29]

C. *The District Court Decision*

COPARR argued that Congress possessed power under the Supremacy Clause of the United States Constitution to preempt a local ordinance in two ways.[30] First, if Congress indicates "an intent to occupy a given field" and the local ordinance falls within that field, then it is preempted.[31] Second, if the ordinance "actually conflicts with a . . .

Stat. 973 (1972), designed to completely revive FIFRA. S. REP. No. 838, 92d Cong. 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 3993.

18. Organized Migrants and Community Action, Inc. v. Brennan, 520 F.2d 1161, 1165 (D.C. Cir. 1975) (FIFRA totally altered the preexisting regulatory structure).

19. *See* 7 U.S.C. §§ 136-136y (1988).

20. *See* 40 C.F.R. §§ 152-172 (1988).

21. *Id.* § 155.

22. *Id.* § 165.10.

23. *Id.* § 166.

24. *Id.* § 167.

25. *Id.* § 170.

26. 7 U.S.C. § 136v (1988); *see* COLO. REV. STAT. § 35-9-105 (1984 & Supp. 1990).

27. Ordinance No. 5083 was codified at BOULDER REV. CODE §§ 6-11-3 to 6-11-9 (Sterling Codifiers, Inc. 1989) (illegal to apply pesticides without a license as required by the Applicators Act, to fail to maintain records, to fail to report to the City Manager spills in violation of federal, state or city law, to fail to comply with various safety precautions, to fail to notify tenants and employees of any indoor applications of pesticides or to violate FIFRA, the Pesticide Act, the Pesticide Applicators Act, or any pesticide regulation).

28. Codified at BOULDER REV. CODE §§ 6-10-11, 6-11-12, and 6-10-14 (Sterling Codifiers, Inc. 1989).

29. *Id.* §§ 6-11-2, 6-10-11.

30. U.S. CONST. art. VI, cl. 2.

31. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

federal statute,"[32] it is invalid. To determine whether Congress invoked its preemptive power when statutory language is silent, courts often review the statute's legislative history to establish congressional intent.[33] COPARR viewed the comprehensive nature of FIFRA to encompass the entire field of pesticide regulation, including the pesticide use that Boulder sought to regulate. Boulder contended that the ordinance's public notification requirement was beyond the scope of FIFRA.

There being no disputed questions of fact, COPARR and Boulder presented the case via cross-motions for summary judgment. The trial court[34] held that Ordinance No. 5083 was void because it provided for local enforcement of FIFRA and the Colorado Pesticide Act.[35] The court upheld Ordinance No. 5129, ruling that it did not adopt or incorporate provisions of federal or state law and did not conflict with FIFRA.[36] The court ruled further that Boulder, as a homerule city under Article X, Section 6 of the Colorado Constitution, had legislative power to regulate use of pesticides.[37] COPARR appealed the court's declaration validating Boulder Ordinance No. 5129 in an attempt to establish that FIFRA preempts all regulation of pesticides by local governmental entities.

D. *The Tenth Circuit Decision*

The issue on appeal was whether the court erred in holding that FIFRA did not preempt local ordinance No. 5129. During the appeal, the United States Supreme Court granted certiorari in *Wisconsin Public Intervenor v. Mortier*[38] to review a FIFRA preemption question. The Tenth Circuit heard oral argument in *COPARR*, and then stayed its decision pending a ruling in *Mortier*. Following the *Mortier* decision, the court requested supplemental briefing by the parties.

In *Mortier*, the petitioners asserted FIFRA does not occupy the entire field of pesticide regulation because it expressly allows more stringent state regulation.[39] Petitioners' emphasis on the need for cooperative federalism in environmental protection apparently persuaded the Supreme Court.[40] The Court held FIFRA provides no clear congressional intent to preempt local authority over pesticide regulation, despite the 1972 amendments establishing a comprehensive regulatory scheme.[41] The majority stated:

> The specific grant of authority in Section 136v(a) . . . does not serve to hand back to the State's powers that the statute had

32. International Paper Co. v. Ouellette, 479 U.S. 481, 491 (1987) (quoting Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978)).
33. *See* R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 140 (1986).
34. *See* 735 F. Supp. 363 (D. Colo. 1989).
35. *Id.* at 367.
36. *Id.*
37. *Id.*
38. 111 S.Ct. 2476 (1991).
39. 7 U.S.C. § 136v (1988).
40. 111 S.Ct. at 2485-87.
41. *Id.* at 2486.

> impliedly usurped. Rather, it acts to ensure that the States could continue to regulate use and sales even where . . . a narrow pre-emptive overlap might occur.[42]

The Supreme Court held all local ordinances might not necessarily be valid under FIFRA, but this particular regulation did not fall "within any impliedly pre-empted field."[43] Following the *Mortier* decision, the Tenth Circuit held Boulder Ordinance No. 5129 conformed with both *Mortier* and the recently amended Colorado Pesticide Act.[44] Although the Tenth Circuit found the *Mortier* decision conclusive on the issues before it, the court noted conflicting state or local pesticide regulatory schemes could, in fact, be preempted by FIFRA.[45]

II. SUPERFUND — *COUNTY LINE INV. CO. V. TINNEY*[46]

A. *Facts*

Tinney owned property in Wagner County, Oklahoma, leased to Donald and Norma Tulk for use as a landfill from 1978 through November, 1983. The landfill allegedly received and disposed of hazardous wastes. In 1982, County Line purchased the property from Tinney. Shortly thereafter, the Oklahoma State Department of Health (OSDH) forced the landfill to cease operations. In early 1984, the Tulks abandoned the landfill. In 1985, Tinney conveyed the property to Plaintiff-Appellant Wagco, a subsidiary of County Line's parent company. In early 1986, EPA gave notice to Wagco of the possibility that hazardous substances deposited at the landfill were being released. Wagco surveyed the site and located buried hazardous waste drums with high metal concentrations. In late 1986, Wagco met with EPA and OSDH to discuss the survey results and agreed formally to close the landfill pursuant to OSDH regulations. OSDH approved Wagco's closure plan,[47] which was completed in June 1987 with costs in excess of $360,000. During negotiations with the government, Tinney refused Wagco's request for financial participation in implementation of the closure plan.

B. *The District Court Decision*

Wagco brought a cost recovery action against Tinney for costs associated with investigating and closing the landfill. Wagco based the action on three separate theories: (1) Tinney, as former owner, was jointly and severally liable under the private cost recovery provisions of CERCLA section 107;[48] (2) Tinney was liable for contribution under CER-

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42. *Id.*
43. *Id.*
44. *COPARR*, 942 F.2d at 727.
45. *See* Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 959 F.2d 158 (10th Cir. 1992) (FIFRA preempts state tort actions based on labeling and alleged failure to warn).
46. 933 F.2d 1508 (10th Cir. 1991).
47. *Id.* at 1510.
48. *Id.* (citing CERCLA § 107, 42 U.S.C. § 9607 (1988)).

CLA section 113(f)(3)(B);[49] and (3) Tinney was unjustly enriched under Oklahoma law.[50] Tinney filed a motion for summary judgment as to each claim in the United States District Court for the Northern District of Oklahoma. Judge Ellison granted summary judgment in favor of Tinney on June 30, 1989, and County Line appealed.

C. *The Tenth Circuit Decision*

The Tenth Circuit reviewed the court's decision *de novo*,[51] particularly, the issue of whether failure to comply with the National Contingency Plan (NCP) barred private cost recovery or a contribution action under CERCLA. On *de novo* review, the Tenth Circuit affirms summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[52]

1. Cost Recovery Under CERCLA Section 107

The first issue reviewed by the Tenth Circuit was whether failure to comply with the NCP barred a private cost recovery or a contribution action under CERCLA. Section 107 of CERCLA provides that persons responsible for disposal of hazardous materials are liable for all costs incurred consistent with the National Contingency Plan ("NCP").[53] The NCP establishes procedures and standards "for responding to releases of hazardous substances,"[54] and requires public comment whenever remedial action is taken.[55] Although the landfill owners viewed closure of the landfill as a remedial action under the plan,[56] the district court found the remedial action improper in four respects: (1) site investigation; (2) remedy selection; (3) cost effectiveness; and (4) public participation standards and procedures.[57]

The Tenth Circuit held that because section 107 allows individuals to recover private party costs incurred "consistent with the National

49. *Id.* at 1510-11 (citing CERCLA § 113(f)(3)(b), 42 U.S.C. § 9613(f)(3)(B) (1988)).

50. *Id.*

51. *Id.* at 1511 (citing FED. R. CIV. P. 52(c)); Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230 (10th Cir. 1990)).

52. *Id.* (citing FED. R. CIV. P. 56(c)).

53. 42 U.S.C. § 9607(a). The statute states: "Any person who at the time of disposal of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for . . . any . . . necessary cost of response incurred by any other person consistent with the national contingency plan."

54. *Id.* § 9605(a); 40 C.F.R. Part 300 (1988).

55. *County Line*, 933 F.2d at 1511.

56. A remedial action under CERCLA includes investigation and cleanup actions, whereas removal action is generally considered for emergency response purposes. 42 U.S.C. §§ 9601(24) and (23). The NCP version in effect during closure of the Landfill stated:

> (a)(1) any person may undertake a response action to reduce or eliminate the release or threat of release of hazardous substances, or pollutants or contaminated. Section 107 of CERCLA authorizes persons to recover certain response costs consistent with this Plan from responsible parties.
>
> (2) For purposes of cost recovery under § 107 . . . a response action will be consistent with the [National Contingency Plan] . . . .

See 1985 National Contingency Plan, 40 C.F.R. § 300.71 (1988).

57. *County Line*, 933 F.2d at 1512 (citing § 300.71(a)(2)(ii) of the 1985 NCP).

Contingency Plan,"[58] proof of response costs is an element of a *prima facie* private cost recovery action under CERCLA.[59] Therefore, CERCLA did not provide a remedy to Wagco because Wagco did not incur costs consistent with the NCP.[60] The Tenth Circuit stated, however, that some circumstances could permit CERCLA plaintiffs to recover from a previous owner "even though the plaintiff has not yet established that all of its claimed response costs were incurred consistent with the NCP."[61] In Wagco's case, a fully developed record existed to make a determination regarding whether Wagco incurred costs consistent with the NCP[62] and the Tenth Circuit affirmed summary judgment on this issue.

2. Contribution Under CERCLA section 113(f)

Wagco next contended that it did not need to incur costs consistent with the NCP to receive contribution under section 113(f)(3)(b) because the law creates "an independent, substantive right to contribution."[63] The Tenth Circuit viewed the provisions in section 113 "as part of the larger statutory scheme of CERCLA,"[64] rather than as an isolated, independent remedy. The court noted section 113 claims for contribution could be inconsistent with the NCP only if another basis for liability exists. Section 113 must follow the mandate of section 107, because section 107 creates the sole basis for liability in this case, which requires consistency with the NCP.[65]

3. Unjust Enrichment

Wagco also attempted to recover under a state law theory of unjust enrichment. The Tenth Circuit upheld dismissal of this claim, holding that Tinney was not enriched by the cleanup because Wagco introduced no evidence to show either that it had incurred costs or damages that were potentially recoverable from Tinney under CERCLA or that OSDH or EPA were contemplating a response action against Tinney. Therefore, the benefit conferred on Tinney was "speculative at best."[66]

Although the result of this case is harsh, it might have limited precedential value. The 1990 revisions to the NCP require "substantial" rather than "strict" compliance with its provisions, making it less difficult for a party that engages in a cleanup action to show liability under

58. *Id.*
59. *Id.* (citations omitted).
60. This case was reviewed pursuant to the 1985 NCP, which required "strict" compliance. In 1990, the NCP was revised to require "substantial" compliance. The court did not reach the question of whether the 1985 or 1990 NCP should apply as the landfill closure was deemed to be inadequate under both versions of the NCP. *Id.* at 1514-15.
61. *Id.* at 1513.
62. *Id.*
63. *Id.* at 1516.
64. *Id.*
65. *Id.* at 1516-18.
66. *Id.* at 1518.

section 107, thereby establishing a more readily attainable predicate for a section 113 contribution claim.

III. CLEAN WATER ACT AND SOVEREIGN IMMUNITY — *SIERRA CLUB V. LUJAN*[67]

A. *Facts*

The Department of the Interior (Interior), through the Bureau of Reclamation (Reclamation), owns and operates the Leadville Mine Drainage Tunnel in Lake County, Colorado. The tunnel possesses a long and checkered history. In 1944, as part of the war effort, Congress appropriated $1.4 million to the Bureau of Mines to construct, operate and maintain a drainage tunnel to drain the Leadville Mining District, a mountainous area of significant mineralization. However, the federal government abandoned the incomplete project upon conclusion of the war. With the onset of the Korean conflict, tunnel construction was again commenced, but again with limited success. In late 1959, Reclamation purchased the tunnel from the Bureau of Mines in an attempt to acquire the right to water drained from the tunnel for its Fryingpan-Arkansas project. However, the Colorado courts had determined that water from the tunnel could not inure to the benefit of Reclamation merely by virtue of ownership of the tunnel.[68]

In 1972, Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."[69] The Leadville Mine Drainage Tunnel discharged into waters of the United States, which required a CWA National Pollution Discharge Elimination System (NPDES) permit. Reclamation obtained a NPDES permit in 1975, which EPA renewed on several occasions. The NPDES permit required Reclamation to ensure that drainage from the tunnel meets specific effluent limitations.

B. *The District Court Decision*

On January 13, 1989, the Sierra Club and the Colorado Environmental Coalition filed a citizen suit in federal district court alleging that Interior and Reclamation violated the CWA and the terms of the NPDES permit. Plaintiffs asked the court to: 1) issue a mandatory injunction enjoining further permit violations; 2) order the agencies to pay civil penalties; and 3) declare the agencies in violation of the CWA. The parties entered into a consent decree on the liability question. The federal government then moved to dismiss the civil penalties claim for lack of subject matter jurisdiction, arguing that the waiver of sovereign immunity in the CWA is limited and does not authorize assessment of civil penalties against the United States. Plaintiffs filed a motion for sum-

67. 931 F.2d 1421 (10th Cir. 1991) [hereinafter *Lujan I*].

68. *See* Leadville Mine Development Co. v. Anderson, 17 P.2d 303 (Colo. 1932) (tunnel drainage subject to appropriation under Colorado Water Adjudication System).

69. 33 U.S.C. § 1251(a).

mary judgment on this issue. Concluding that the CWA waiver of sovereign immunity authorizes civil penalties against the United States, the district court denied the federal government's motion to dismiss and granted plaintiffs' motion for partial summary judgment.[70] The district court granted defendants' request to file an interlocutory appeal prior to determination of the civil penalty amount.[71]

C. *The Tenth Circuit Decision*

Largely reciting from the district court opinion, the Tenth Circuit first reviewed the applicable law.[72] It is axiomatic that the United States as sovereign receives immunity from suit in the absence of its consent, and Congress must unequivocally express any waiver of sovereign immunity.[73] Any ambiguity in a waiver of sovereign immunity is to be interpreted in favor of the sovereign. Courts must strictly construe a waiver in favor of the sovereign and may not extend it beyond the language of the statute.[74]

Defendants conceded that section 313(a) of the CWA waives sovereign immunity regarding the "requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution."[75] However, the government contended that this waiver did not authorize civil penalties against the United States because the Act did not contemplate such penalties.

The federal government argued the phrase "process and sanctions" of Section 313(a) must be read together to include only those monetary sanctions necessary to ensure compliance with judicial process. Citing *McClellan Ecological Seepage Situation v. Weinberger*[76] for support, the government asserted that the CWA evidences a waiver of sovereign immunity only for traditional sanctions imposed to enforce judicial process and injunctive relief. The *McClellan* court held that Congress did not clearly and unambiguously waive civil penalties against federal facilities in sections 313(a) and 505(a) of the CWA,[77] stating that section 313(a) "is a compilation of ambiguity."[78] Other courts considering the waiver of sovereign immunity under the CWA have disagreed with *McClellan*,[79]

70. Sierra Club v. Lujan, 728 F. Supp. 1513, 1518 (D. Colo. 1990).

71. 28 U.S.C. § 1292(b) (1988).

72. *Lujan I*, 931 F.2d at 1423 (10th Cir. 1991) (citing Library of Congress v. Shaw, 478 U.S. 310, 315 (1986)).

73. *Id.* at 1423 (citing United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. King, 395 U.S. 1, 4 (1969) and referencing Mitzelfelt v. Department of Air Force, 903 F.2d 1293, 1294-95 (10th Cir. 1990)).

74. *Id.* (citing Ruckelshaus v. Sierra Club, 463 U.S. 680, 686 (1983)).

75. *Id.* at 1425; *see also* 33 U.S.C. § 1323(a) (1988).

76. 655 F. Supp. 601 (E.D. Cal. 1986).

77. *Id.* at 605.

78. *Id.* at 604.

79. *See* Ohio v. United States Dep't of Energy, 904 F.2d 1058 (6th Cir. 1990), *rev'd*, 503 U.S. — (1992); California v. Dep't of Navy, 631 F.Supp. 585 (N.D. Cal. 1986), *aff'd*, 845 F.2d 222 (9th Cir. 1988); Metropolitan Sanitary Dist. of Greater Chicago v. Navy, 722 F. Supp. 1565 (N.D. Ill. 1989).

holding that the term "sanctions" encompasses civil penalties.[80] This is the talismanic issue examined by the Tenth Circuit.

The court first looked to Black's Law Dictionary, which defines sanction as "that part of a law which is designed to secure enforcement by imposing a penalty for its violation."[81] It also looked to the Supreme Court's *Gwaltney*[82] decision that held civil penalties authorized by the CWA may be interpreted as sanctions. The Circuit Court further noted the same section of 313(a) that "discusses 'process and sanctions' also states that the United States [is] liable for 'civil penalties.' "[83] The court concluded that "the sanctions authorized by [Section 313(a)] are also penalties, particularly when the same statute also permits 'those civil penalties arising under Federal Law.' "[84]

Second, the court looked to section 505(a) of the CWA.[85] Section 505 permits private citizens to file complaints against any person, including the government, alleged to be in violation of an effluent standard or limitation of the CWA or an order issued by the Administrator or a state with respect to such a standard or limitation. The statute also states "the district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under Section 1319(d) . . . ."[86]

The CWA's penalty provision states that any person who violates the enumerated provisions of the Act, or "any permit condition or limitation implementing any of such sections in a permit issued under . . . [the NPDES program] by the Administrator, or by a State . . . shall be subject to a civil penalty . . . ."[87] The government argued the generalized definition of "person" contained in section 502 of the CWA, which does not include the United States, should be used in interpreting the citizen suit provision, again citing *McClellan* in support of its position. The court adopted plaintiffs' interpretation, however, that the definition of "person," modified to specifically include the United States in the citizen suit provision, should be used in interpreting a citizen suit claim for civil penalties.

The court held the language of sections 313(a) and 505(a) constitutes an express waiver by the United States of its sovereign immunity for civil penalties, eliminating any need to resort to the legislative history to justify its decision. Nonetheless, the court did examine the legislative history, and found that it was not inconsistent with its conclusions concerning the plain language of the statute.[88]

80. *See Lujan I*, 931 F.2d at 1425.
81. *Id.* at 1426 (citing BLACK'S LAW DICTIONARY 1203 (5th Ed. 1979)).
82. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 53 (1987).
83. *Lujan I*, 931 F.2d at 1426.
84. *Id.*
85. 33 U.S.C. § 1365(a)(1).
86. *Id.* § 1365(a).
87. *Id.* § 1319(d).
88. *Lujan I*, 931 F.2d at 1427.

Recently in *United States Department of Energy v. Ohio*,[89] the United States Supreme Court effectively reversed the Tenth Circuit *Lujan* opinion. In an action brought by the State of Ohio for civil penalties under state CWA and the Resource Conservation and Recovery Act (RCRA)[90] programs, the Supreme Court held Congress did not waive federal sovereign immunity from liability for civil penalties imposed by a state for federal violations of the CWA or RCRA. The Court distinguished penalty provisions that result in sanctions imposed through the judicial process to achieve prospective compliance by federal agencies, which are authorized under the Acts from punitive civil penalties imposed for federal violations against the federal government not authorized by the Acts. The Court determined that Congress did not expressly waive federal sovereign immunity because the penalty provisions of the CWA and RCRA are ambiguous.

IV. NATIONAL ENVIRONMENTAL POLICY ACT — *SIERRA CLUB V. LUJAN*[91]

A. *Facts*

The Burr Trail, a county road,[92] serves as an important recreation corridor connecting the Bullfrog Basin Marina at Lake Powell with the Town of Boulder, Utah. The Trail both crosses and borders on public lands, including recreation and wilderness areas and state lands. Garfield County proposed to widen twenty-eight miles of the Trail to accommodate expanding use and create safe travel conditions, for which the Bureau of Land Management (BLM) prepared an "environmental assessment" (EA) pursuant to NEPA.[93] The Sierra Club brought suit claiming that the proposed widening exceeded the scope of the R.S. 2477 right-of-way and that BLM violated NEPA.[94] The district court in that case held that widening was consistent with the scope of the right-of-way under Utah state law and that the BLM satisfied NEPA's requirements.[95] When Sierra Club appealed, the Tenth Circuit reversed on the question of whether BLM had satisfied NEPA's procedural requirements and remanded to BLM on narrowly-defined grounds with instructions on NEPA compliance. On remand, BLM prepared a supplemental EA, accompanied by a Finding of No Significant Impact (FONSI). Sierra Club then challenged the FONSI, which eventually led to another Tenth Circuit appeal.

89. *See* United States Dep't of Energy v. Ohio, 503 U.S. (1992).

90. 42 U.S.C. § 6901-92 (1988)

91. 949 F.2d 362 (10th Cir. 1991) [hereinafter *Lujan II*].

92. R.S. 2477 right-of-way issues have given the Burr Trial a rich litigation history. Garfield County holds an R.S. 2477 right-of-way for the Burr Trail. *See* 43 U.S.C. § 932 (*repealed by* FLMPA, 706(a) Pub. L. No. 94-579, 90 Stat. 2793).

93. 42 U.S.C. §§ 4321-4347 (1988).

94. Sierra Club v. Hodel, 675 F. Supp. 594 (D. Utah), *rev'd in part*, 848 F.2d 1068, 1083 (1988).

95. *Hodel*, 675 F.Supp. at 617-19.

B. *The District Court Opinion*

The United States District Court for the District of Utah upheld the BLM FONSI. The court applied an arbitrary and capricious standard of review despite Tenth Circuit law holding that "reasonableness" is the standard to be applied in evaluating NEPA compliance. Accordingly, the Sierra Club again appealed.

C. *The Tenth Circuit Decision*

The primary focus in this chapter of the Burr Trail litigation is the scope of review used by courts to evaluate NEPA compliance and determine whether an agency must prepare an EIS. Prior Tenth Circuit cases apply a "reasonableness" standard of review to an agency's threshold NEPA determination.[96] The Tenth Circuit was faced with the task of rectifying this standard under the Supreme Court decision in *Marsh v. Oregon Natural Resources Council.*[97] In *Marsh,*[98] the Supreme Court rejected the "reasonableness" standard of review of an agency decision not to prepare a supplemental Environmental Impact Statement because it "involves primarily issues of fact," to which the APA arbitrary and capricious standard applies.[99] In dicta, the Court noted that this standard is also used on review of the agency decision not to prepare an EIS.[100]

Circuit courts vary in their interpretation of *Marsh.* The Eleventh Circuit altogether rejected the reasonableness test in its review of NEPA compliance activities.[101] The Tenth Circuit adopted the Eighth Circuit view,[102] applying the arbitrary and capricious standard to factual determinations and maintaining the reasonableness standard for review of legal questions. As such, the Tenth Circuit specifically reaffirmed its application of the reasonableness standard in *Park County Resource Council v. United States Dep't of Agriculture,*[103] as consistent with *Marsh.* Under this standard of review, the Tenth Circuit found the BLM FONSI sufficient under NEPA and upheld it on appeal.

PART TWO — NATURAL RESOURCES AND PUBLIC LANDS

I. OIL SHALE PATENTS — *MARATHON OIL CO. V. LUJAN*[104]

A. *Facts*

The *Marathon* decision belongs to a long line of oil shale cases in

96. *Lujan II,* 949 F.2d at 362.
97. 490 U.S. 360 (1990).
98. *Id.*
99. *Marsh,* 490 U.S. at 377 (citing 5 U.S.C. § 706(2)(A)).
100. *Id.*
101. North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538 (11th Cir. 1990).
102. Goos v. I.C.C., 911 F.2d 1283 (8th Cir. 1990).
103. 817 F.2d 609 (10th Cir. 1987).
104. 937 F.2d 998 (10th Cir. 1991).

Colorado.[105] Plaintiff Marathon Oil Company[106] owns six contiguous association placer mining claims in Western Rio Blanco County, Colorado. Marathon located the claims on April 5, 1918, and they comprise some 983 acres. After locating its claims, Marathon performed the requisite annual assessment work to maintain its unpatented claims.[107]

Marathon Oil began its effort to patent the claims under the Mining Law of 1872[108] in March of 1986. However, from March 1986 through May 1987, Interior imposed an administrative moratorium on processing oil shale patent applications while the agency developed new regulations governing the definition of "valid discoveries." By December 9, 1987, plaintiffs filed all required proofs for a patent pursuant to 30 U.S.C. § 29. Interior reviewed the application, confirming that plaintiffs had met all requirements of posting notice, publication, title, improvements, survey, and other necessary final proofs as documented in its draft final Mineral Report, made available in February, 1989, but took no further action. Plaintiffs brought suit in late 1989 in the United States District Court for the District of Colorado to compel final agency action.

B. *The District Court Decision*

In its opinion, the district court first resolved whether full compliance with the patent requirements had caused property rights to vest in Marathon Oil's unpatented oil shale claims. Interior argued that the patent interests had not vested, because it had not formally issued the Final Mineral Report approving patenting of the claims. The court relied on a long line of cases ruling that, upon compliance with the several requirements of 30 U.S.C. § 29 for patenting claims, Marathon Oil's property rights vest.[109] Interior did not appeal this ruling.

The lower court's second ruling was reversed on appeal. The district court viewed Interior's duty to issue patents as ministerial in nature and not discretionary because Marathon had fully complied with all requirements and was merely awaiting signature of the Final Mineral Report. The district court ruled that, although discretion exists in determining whether a patent application satisfies the requirements of 30 U.S.C. § 29, once it is determined that the applicant satisfies those requirements, the Secretary of Interior has a nondiscretionary duty to issue the patent. This case presented novel and compelling facts concerning the Secretary's nondiscretionary role because all parties agreed

105. Those cases are listed at *Marathon Oil Co. v. Lujan*, 751 F. Supp. 1455, 1457, n.3 (D. Colo. 1990).

106. Plaintiffs include Joan L. Savage, Barbara Cliff Toner, and Frank G. Cooley as personal representative of the Estate of Cameron Cliff. Marathon Oil Company represented the interests of all plaintiffs.

107. The case contains an extensive and informative discussion of the history of mining law.

108. 30 U.S.C. § 21-54 (1988).

109. These cases are listed in *Marathon Oil v. Lujan*, 751 F. Supp. 1455, 1459 (D. Colo. 1990).

that it was not the patent application itself, but the regulatory process and moratorium that delayed patent issuance. The court ruled that Interior abused its discretion in failing to perform a nondiscretionary ministerial act,[110] and granted mandamus relief to compel Interior to perform its duty.[111] The court ordered Interior to "expeditiously complete administrative action" on plaintiffs' patent application and to issue a patent within thirty days.[112] The court further enjoined defendants from failing to complete administrative action and ruled on summary judgment.[113]

C. *The Tenth Circuit Decision*

On the final day allowed by the district court to issue the patents, Interior appealed. The Tenth Circuit Court of Appeals determined the primary issues on appeal were: (1) whether the thirty day time limit mandated by the trial court was too short a period for Interior to finalize the oil shale patent application decisions, and (2) whether the district court abused its discretion in reducing Interior's decision to a ministerial act. The Tenth Circuit ruled only on the mandamus relief and not the other remedies provided by the lower court.[114]

The three-member panel included Judge Holloway, Judge Ebel, who wrote the opinion, and Judge Aldisert, sitting by designation from the Third Circuit. The court reviewed the long history of delay in issuing Marathon's patent, and affirmed the trial court's conclusion that thirty days is ample time to finalize the patent proceedings. Nevertheless, the Tenth Circuit determined that the remaining day left under the District Court order was not sufficient to fulfill the government review process, and provided fifteen additional days for completion of final agency action.[115] The court's ruling on this issue intertwines both practical and legal considerations. The legal reasoning, embedded in footnote 7 of the opinion,[116] is that Interior's decisionmaking should not halt during rulemaking proceedings, because Interior still maintains authority to act under the statute. Therefore, a regulatory moratorium is not sufficient justification for an agency to avoid timely performance of its duties. Practically speaking, however, the court noted that even under the new regulations, the oil shale claims remain patentable.

The Tenth Circuit agreed with Interior on the second issue and held that the district court abused its discretion in compelling the Secretary to issue the patents because "[t]he Department has not yet determined officially that all conditions to issuance of the patents have

110. *Id.* at 1460.
111. *Id.* at 1464.
112. *Id.* at 1473.
113. *Id.*
114. *Marathon*, 937 F.2d at 498 (other remedies merely duplicated the mandamus relief).
115. *Id.* at 502.
116. *Id.* at 502, n.7 (*citing* Knight v. United States Land Ass'n, 142 U.S. 161, 178 (1891)).

occurred."[117] The result is that until agency action is final, an agency can exercise its discretion and thereby prevent its role from being reduced to a purely ministerial function. Thus, until an agency affixes its signature to a document, it retains discretion to alter its position.

II. LAND USE ON RESERVATIONS — *SANGRE DE CRISTO DEVELOPMENT COMPANY V. UNITED STATES*[118]

A. *Facts*

The Sangre de Cristo Development Company (Company), formed by Sante Fe residents in 1968, negotiated with the Teseque Pueblo (Pueblo) to build a golf course and residential area on Pueblo land.[119] The Company entered into an agreement leasing 5,000 acres for development, which lease was approved by the Department of Interior in 1970.[120] When the Company began selling lots, several area landowners and environmental groups claimed that Interior's lease approval was invalid because it failed to satisfy the requirements of NEPA.[121] The groups filed suit to enjoin further development.[122] The Tenth Circuit held Interior's lease approval was a major federal action significantly affecting the quality of the human environment,[123] triggering NEPA procedural requirements.[124] The court also granted injunctive relief.[125] The Bureau of Indian Affairs (BIA) then began preparing an Environmental Impact Statement (EIS). During this period, the Pueblo leadership changed and formally requested invalidation of the lease. Based on environmental considerations and the Pueblo's opposition, Interior rescinded its approval of the lease. The Company then filed for bankruptcy.

B. *The District Court Decision*

The Company brought suit against the United States in the District Court for the District of New Mexico[126] alleging: (1) just compensation was due under the takings clause of the Fifth Amendment because Interior's actions deprived it of vested property rights; (2) the United States was liable under contract and trust theories; and (3) negligent lease approval prejudiced the Company's exercise of the lease.[127] Chief Judge Juan Burciaga ruled in favor of the United States on all claims.[128]

117. *Id.* at 501 (Footnote 8 contains further discussion of the legal analysis).
118. 932 F.2d 891 (10th Cir. 1991), *cert. denied* Case No. 91-1286 (U.S. April 27, 1992.
119. *Id.*
120. *Id.* at 893 (lease approval by Interior is required under 25 U.S.C. § 415(a) (1970)).
121. *Id.*
122. *Id.*
123. *Id.* (citing Davis v. Morton, 469 F.2d 597 (10th Cir. 1972)).
124. *Id.* (citing NEPA § 4332(C) requirements of an environmental impact study).
125. *Id.* (citing *Davis*, 469 F.2d at 597).
126. *Id.* at 891.
127. *Id.* at 892-3.
128. *Id.* at 891.

C. *The Tenth Circuit Decision*

The first claim on appeal was for just compensation from an alleged governmental taking under the Fifth Amendment.[129] To receive "just compensation," the Company was compelled to demonstrate it held a vested interest and Interior's action amounted to a taking.[130] The Company argued that the Tenth Circuit's remand instruction in *Davis v. Morton*[131] evidenced the lease's validity because it ordered the trial court simply to enjoin the project pending compliance with NEPA.[132] On review, however, the Tenth Circuit clarified its earlier opinion, stating it never reached the question of lease validity.[133] Relying on its decision in *Gray v. Johnson*,[134] the Tenth Circuit held that a valid approval was necessary to lease Reservation lands.[135] To create a vested interest in the lease, Interior's approval must be "within the bounds of their [sic] authority" and in the best interests of the Tribe.[136] The court invalidated the lease because Interior was "without authority to grant the lease since no environmental impact study was conducted prior to approval." The Tenth Circuit affirmed dismissal of the takings claim because an invalid lease vests no property rights.[137]

The Company next alleged that the United States, "by virtue of its pervasive involvement in the contract,"[138] became a party to the lease[139] and breached the contract. The Tenth Circuit identified the relationship between the parties, holding the Pueblo lessors, the Company lessee, and the United States with "no property interest in [the] Pueblo's land."[140] The statutory section[141] under which Interior approves leases on Reservation lands did not implicate the United States as a party to leases between Indian tribes and lessees.[142] The United States might assume liability if it contracted on the Pueblo's behalf, but in this case, it merely approved the lease.[143] However, even if the United States signed the lease as trustee, this alone would not create liability because the United States is not liable to third parties when contracting on be-

129. *Id.* at 892.

130. *Id.* at 894 (citing In re Consol. United States Atmospheric Testing Litig., 820 F.2d 982, 988 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988)).

131. 469 F.2d at 598.

132. The Tenth Circuit instructed the court to issue a Writ of Mandamus and to enjoin the United States from acting on the lease agreement "until the environmental impact of the project had been studied and evaluated" according to the "mandate of NEPA." 932 F.2d at 894 (citing *Davis*, 469 F.2d at 595).

133. 932 F.2d at 894.

134. 395 F.2d 533, 537 (10th Cir. 1968), *cert. denied*, 392 U.S. 906 (1968).

135. *See* 25 U.S.C. § 415(a) (1970) (Indian lands may be leased with the approval of the Secretary of the Interior).

136. 932 F.2d at 894 (citing *Gray*, 395 F.2d at 537).

137. *Id.* at 895.

138. *Id.*

139. The Company tried, but failed, to strengthen this allegation by asserting the United States acted as a trustee. *Id.*

140. *Id.*

141. 43 U.S.C. § 415 (1988).

142. 932 F.2d at 895.

143. *Id.* (citing GEORGE G. BOGART, THE LAW OF TRUSTS AND TRUSTEES § 712 (Rev.2d ed. 1982)).

half of Indian tribes.[144] As precedent, the court cited *United States v. Algoma Lumber Co.*,[145] in which Interior approved and entered into, on behalf of the Klamath Indians, a logging contract with a timber company.[146] In *Algoma*, although timber payments were deposited into the United States treasury and the United States signed the contract, Algoma could not recover overpayment from the United States.[147] Finally, even if the United States assumed liability under either contract or trust theories, by invalidating Interior's lease approval in its *Davis* opinion, the Tenth Circuit eliminated any potential liability of the United States.[148]

Reviewing the district court's factual findings under a clearly erroneous standard,[149] the Tenth Circuit addressed whether the United States negligently prepared the EIS. The negligence allegedly delayed finalizing the lease, which delay ultimately led to lease disapproval. The Tenth Circuit summarily dismissed this claim, holding that the district court's conclusions were amply supported by the record and were not clearly erroneous.[150]

FEDERAL POWER ALLOCATION — *SALT LAKE CITY V. WESTERN AREA POWER ADMINISTRATION*[151]

A. *Facts*

Utah Power and Light (UP&L) applied for federal power on behalf of more than 100 of its subscriber cities, towns and counties in Utah and Wyoming. UP&L interpreted the Reclamation Project Act of 1939 to authorize power allocations to municipalities as qualified preference entities in the sale of federal hydropower.[152] UP&L also applied for preferential federal power allocation on its own behalf for resale at cost to its municipal customers. Alternatively, UP&L contended it could bid for federal power from the Western Area Power Administration (WAPA).[153] WAPA concluded neither UP&L nor its subscribers qualified as "preference entities" under reclamation law because the municipalities did not operate the utility systems directly, and rejected the application on this

144. *Id.* (citing United States v. Algoma Lumber Co., 305 U.S. 415, 423 (1939)).
145. 305 U.S. 415 (1939).
146. *Id.*
147. The Tenth Circuit affirmed the validity of *Algoma* noting that a recent decision finding the United States liable to an Indian Tribe under a limited trust relationship did not overrule *Algoma* because the United States was liable to the Tribe, not to third parties. *Sangre de Cristo*, 932 F.2d at 896. *See also* United States v. Mitchell, 463 U.S. 206 (1983).
148. *Sangre de Cristo*, 932 F.2d at 896.
149. *Id.* at 897.
150. *Id.* at 897-898.
151. 926 F.2d 974 (10th Cir. 1991).
152. 43 U.S.C. § 485(h) (1988).
153. WAPA markets power generated from western federal water and power projects, including the Colorado River Storage Project (CRSP). The CRSP Act (42 U.S.C. §§ 620-92(o)) governs power marketing in the area of UP&L's application, and it incorporates federal reclamation law, including § 9(c) of the Reclamation Project Act (43 U.S.C. § 485(h)(c)). *WAPA*, 926 P.2d at 977.

basis. WAPA further determined UP&L was not eligible to purchase its power.

B. *The District Court Decision*

UP&L challenged WAPA's refusal to allocate power in the United States District Court for the District of Utah. UP&L also challenged certain WAPA practices, including WAPA's purchase of non-federal power to meet its firm power obligations.[154] Judge Thomas Green held for WAPA, finding WAPA reasonably interpreted federal law governing preference in the sale of federal hydroelectric power and its decision to purchase non-federal power to maximize sales of federal power was not *ultra vires*.[155] UP&L appealed the district court's grant of summary judgment.

C. *The Tenth Circuit Decision*

The issues on appeal were: (1) whether WAPA reasonably interpreted federal preference law in determining that a preference not be granted to UP&L as agent for the municipalities; (2) whether the Colorado River Storage Project (CRSP) Act prohibited WAPA from purchasing non-federal power; (3) if not prohibited, whether WAPA's proposed non-federal power purchases were arbitrary and capricious; and (4) whether Congress authorized WAPA, as an agency in the Department of Energy ("DOE"), to participate with private utilities in the construction and financing of transmission lines.

1. Preference Entities under Section 9(c) of the Reclamation Project Act of 1939

Section 9(c) of the Reclamation Project Act states "preference shall be given to municipalities and other public corporations or agencies . . ." in the sale of federal hydroelectric power.[156] WAPA, Reclamation and DOE consistently interpreted section 9(c) as giving preference only to municipalities actually operating utility systems, not to every city or town satisfying the dictionary definition of a "municipality." UP&L argued that WAPA interpreted section 9(c) contrary to its plain language, contending the statutory language clearly makes all municipalities preference entities, so the court should give no deference to WAPA's interpretation.[157]

The Tenth Circuit identified the United States Supreme Court decision in *Chevron, USA v. Natural Resources Defense Counsel*[158] as the prevailing analysis regarding deference to agency decisions. Because Congress

154. Firm power is power that is guaranteed to be a available at all times. *WAPA*, 926 F.2d at 980 n.4.

155. The District Court certified, under Fed. R. Civ. P. 54(b) that its ruling on the preference in ultra vires claims was final. *Id.* at 977 n.1.

156. 43 U.S.C. § 485h(c).

157. UP&L's argument was adopted by Judge Tacha in dissent.

158. 467 U.S. 837, 842-42 (1984).

did not address this precise question in either the statute or its legislative history, the majority identified the appropriate *Chevron* test as:

> when an administering agency's interpretation of a statute is challenged, and traditional tools of statutory construction yield no relevant congressional intent, the reviewing court must determine if the agency's construction is a permissible one.[159]

The court then equated the permissible standard with reasonableness.[160] To be reasonable, the agency's interpretation need not be the only possible interpretation.[161] Finding no clear expression of congressional intent, and concluding that the agencies' longstanding interpretation of section 9(c) is reasonable, the court upheld WAPA's construction of the statute.[162] The Tenth Circuit noted as reasonable WAPA's conclusion that the benefits of preferential access to federal hydroelectrical power should be enjoyed by the public, rather than the private sector.

2. WAPA's Purchase of Non-Federal Power

UP&L contended WAPA's practice of buying power produced at non-federal power plants for resale was *ultra vires*. WAPA purchased non-federal power to insure a dependable energy supply. UP&L argued WAPA possessed no statutory authority to make these purchases. The Tenth Circuit found the plain language of the statute did not prohibit WAPA from purchasing non-federal power and the statute's legislative history did not demonstrate congressional intent to prohibit non-federal power purchases.[163] The Tenth Circuit also rejected UP&L's argument that WAPA could not interact with non-federal entities absent specific congressional approval because federal courts long recognized the inherent authority to purchase power on credit from other sources when conditions prevent hydroelectric facilities from functioning at capacity.[164]

Neither the statute nor the legislative history address how WAPA may accomplish its required objective of maximizing the sale of federally produced power at firm rates. In affirming summary judgment, the court deferred to the administering agency's interpretation of the statute, and found WAPA authorized to perform those tasks reasonably necessary maximize the sale of federal power at firm rates, which included acquisition of non-federal power.[165]

UP&L also did not prevail in its claim that WAPA exceeded the scope of its authority in the volume of its non-federal power purchases. The Tenth Circuit agreed WAPA did not possess unlimited authority to

159. *WAPA*, 926 F.2d at 981.
160. *Id.*
161. *Chevron*, 467 U.S. at 843 n.11.
162. *WAPA*, 926 F.2d at 978 (quoting United States v. Shimmer, 367 U.S. 374, 382 (1961)).
163. *Id.* at 980 (citing H.R. REP. No. 1087, 84th Cong., 2d Sess., *reprinted in* 1956 U.S.C.C.A.N. 2346, 2362).
164. *Id.* at 980-81 (citing United States v. Sacramento Mun. Util. Dist., 652 F.2d 1341, 1345 (9th Cir. 1981) (citations omitted)).
165. *Id.* at 980 (citing 43 U.S.C. § 620(f)).

purchase non-federal power. However, the Tenth Circuit noted, when interpreting general reclamation statutes, federal courts allow power marketing agencies to purchase non-federal power that is reasonably incidental to the integration of federally-produced hydroelectric power.[166] In UP&L's case, Congress directed WAPA to maximize the sale of federally-produced power and, therefore, authorized it to purchase such power as necessary to meet its objectives.[167]

3. Participation in Private Utility Transmission Line Projects

Finally, UP&L contended WAPA possessed no authority to participate with private utilities in constructing and financing the Craig-Bonanza Transmission Line because this transmission line promoted WAPA's "brokerage activities."[168] UP&L asserted section 1 of the Colorado River Storage Project (CRSP) Act[169] authorized only the construction of specified initial CRSP units. The Tenth Circuit held that CRSP Act did not prohibit construction of future transmission lines in connection with the project because Congress granted broad authority to operate, build and maintain transmission lines.[170]

D. *The Dissenting Opinion*

Circuit Judge Tacha voiced concern as to whether the court must defer to the agency decision based on the plain language of section 9(c) of the Reclamation Project Act.[171] Judge Tacha found clear congressional intent regarding a preference for municipalities regardless of whether they met the agency-imposed municipality operated utility requirement. Judge Tacha referenced a series of cases following *Chevron* in which the Supreme Court acknowledged that deferential review did not replace a federal court's duty to interpret statutes using traditional rules of statutory construction.[172] The Judge stated:

> I can see no difference between the power request of a single municipality and the request of a group of municipalities represented by another entity that distributes power to them at cost. In my view, the congressional intent expressed in the plain language of section 9(c) is to provide preference to municipalities simply based on their status as political subdivisions, not in their capacity to distribute power.[173]

In the dissent's view, WAPA's requirement of direct municipality utility control to receive preference contradicted the clear congressional man-

166. *Id.* at 982 (citing *Kansas City Power and Light*, 115 F. Supp. at 417).

167. The Court applied the arbitrary and capricious standard of review to WAPA's non-federal purchasing decisions and noted that the scope of review was a narrow one. *WAPA*, 926 F.2d at 982.

168. *Id.* at 982-893.

169. 43 U.S.C. § 620 (1988).

170. *Id.* at 983 (citing Department of Energy Organization Act § 302, 42 U.S.C. § 7152(a)(1)(E)).

171. *WAPA*, 926 F.2d at 983.

172. *Id.*

173. *Id.* at 985.

date that municipalities receive federal power.[174]

CONCLUSION

The Supreme Court's *Chevron*[175] decision announced a rule of statutory interpretation, which the Tenth Circuit has interpreted as requiring deference to virtually any and all reasonable agency interpretations of law. This judicial deference makes it difficult to challenge an agency interpretation of law because the Tenth Circuit decisions tend to equate standard of "reasonableness" with "not arbitrary." In the cases surveyed in this Article, the Tenth Circuit found for the defendant, United States, in four of five cases.[176] By accepting agency interpretations of law without independent evaluation, the courts abdicate their primary role to construe the law, especially where an agency interpretation expands the scope of its jurisdiction. Courts should determine independently whether an agency's interpretation of the law is reasonable in light of congressional intent. Courts should not allow the agency's interpretation of that intent, which is often driven by non-congressional or political directives, to frustrate congressional objectives.

Robert D. Comer
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174. *Id.*

175. *Chevron*, 467 U.S. at 837.

176. Ironically, the one case in which the Tenth Circuit did not rule for the government, Sierra Club v. Lujan, 931 F.2d 1421, was effectively reversed by the Supreme Court decision in United States Dep't of Energy v. Ohio, 503 U.S. — (1992).

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