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Patricia Lawrence Barrett

Cynthia D. Jones

Jeffrey S. Pagliuca

Kathleen A. Reilly

ADMINISTRATIVE LAW

OVERVIEW

Recently, the Tenth Circuit Court of Appeals issued a large number of decisions concerning appeals from various administrative agencies and interpretations of agency rules. Some of the decisions are important, not only for the legal principles enunciated, but also because they deal with topics of current public discussion. For example, the Tenth Circuit reversed the controversial convictions of eighty-six protesters of the Rocky Flats nuclear plant. This decision, however, was awaiting rehearing as of the date this article was published.

The Tenth Circuit's discussions of administrative law include dissertations on rulemaking procedures, the right to a pre-termination hearing, the proper standard for judicial scrutiny of administrative decisions, and the exhaustion of remedies doctrine. Provisions of several major acts were interpreted. Constitutional guidelines for agency action were delineated, including standards for obtaining administrative search warrants, for post-hearing modifications of penalties against corporations violating safety standards, and for inspection of corporate minutes. Finally, the Tenth Circuit examined the ever-present question of the standing requirements that parties challenging agency action must fulfill.

I. RULEMAKING PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT

Two cases considered by the Tenth Circuit Court of Appeals involved the interpretation and application of section 553 of the Administrative Procedure Act (APA).[1] Section 553 contains the notice and publication requirements which must be followed for a substantive administrative rule to be valid.[2] The rulemaking provisions of section 553 were designed to ensure that administrative rules be enacted fairly and that mature consideration be given to rules of general application.[3] As one court noted, the main purpose of the section is to permit concerned parties to comment on the rule before any official action is taken.[4]

In *Beirne v. Secretary of Agriculture*,[5] the Tenth Circuit ruled that a mere change in wording does not require an agency to comply, for a second time, with the rulemaking procedures mandated by section 553. The court noted that administrative agencies are permitted to make changes in a proposed

1. 5 U.S.C. § 553 (1976).

2. Section 553 prescribes three requirements for rule making: publication of notice in the Federal Register; an opportunity for persons to participate in the rulemaking procedure; and, after the rule is established, publication in the Federal Register not less than thirty days before its effective date. *Id.* § 553(b)-(d).

3. NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).

4. Saint Francis Memorial Hosp. v. Weinberger, 413 F. Supp. 323 (N.D. Cal. 1976).

5. 645 F.2d 862 (10th Cir. 1981).

rule after the comment period without entering into a new round of hearings,[6] when the changes are in character with the original rule and are "foreshadowed in proposals and comments advanced during the rulemaking."[7] Because the changes in *Beirne* were insubstantial and were for purposes of clarity only, the court held that the rule was lawfully promulgated.[8]

In another, well-publicized case, *United States v. Seward*,[9] the court reversed the convictions of eighty-six individuals found guilty of trespassing at the Rocky Flats nuclear generating plant (Rocky Flats). After passing signs marked "no trespassing" and being warned to leave, the defendants were arrested and subsequently found guilty of trespass.[10] On appeal, the defendants argued that their convictions were invalid because the designation of boundaries in the Federal Register failed to comply with section 553 of the APA.[11]

In 1965, the Atomic Energy Commission had designated the Rocky Flats site as subject to trespass restrictions.[12] This designation, however, included only the area enclosed by the original chain link fence and security system. Further, no public hearing was held concerning this designation.[13]

In 1975, additional property was added to the Rocky Flats plant and,

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6. 645 F.2d at 865 (citing American Iron & Steel Inst. v. EPA, 568 F.2d 284 (3d Cir. 1977)).

7. 645 F.2d at 865 (quoting South Terminal Corp. v. EPA, 504 F.2d 646, 658 (1st Cir. 1974)).

8. 645 F.2d at 865. The challenged regulation, 7 C.F.R. § 271.3(c)(1)(iii) (1974), deals with the question of which educational expenses can be deducted from the gross income of a food stamp applicant to determine the applicant's net income. The regulation reads in part:

> Deductions for the following household expenses shall be made (this list is inclusive and no other deductions from income shall be allowed):
>
> . . . .
>
> (f) Tuition and mandatory fees assessed by educational institutions (no deductions shall be made for any other education expenses such as, but not limited to, the expense of books, school supplies, meals at school, and transportation).

7 C.F.R. § 271.3(c)(1)(iii) (1974). (current version at 7 C.F.R. § 273.9(c)(3) (1981)).

This regulation was preceded by a proposed regulation which the court considered in addition to the later versions, and which read:

> Deductions for the following household expenses shall be made:
>
> . . . .
>
> (e) Educational expenses which are for tuition and mandatory school fees. This includes those tuition and mandatory school fees which are covered by scholarships, educational grants, loans, fellowships, and veterans' educational benefits.

39 Fed. Reg. 3644 (1974).

The challenged regulation was also preceded by a properly promulgated 1971 regulation which read:

> Deductions for the following household expenses shall be made:
>
> . . . .
>
> (f) Educational expenses which are for tuition and mandatory school fees, including such expenses which are covered by scholarships, educational grants, loans, fellowships, and veterans' educational benefits.

7 C.F.R. § 271.3(c)(iii)(f) (1972) (current version at 7 C.F.R. § 273.9(c)(3) (1981)).

9. No. 79-1711 (10th Cir. Jan. 5, 1981), *rehearing granted en banc*, (10th Cir. May 5, 1981).

10. *Id.*, slip op. at 3-4.

11. The defendants actually contended that the designation was in violation of 5 U.S.C. § 551-76 (1976), 42 U.S.C. § 7191-95 (1976), 10 C.F.R. § 860 (1981), and internal Department of Energy standards published in 44 Fed. Reg. 1032 (1979). The decision, however, turned on section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1976).

12. 30 Fed. Reg. 13,289 (1965), *as amended by* 32 Fed. Reg. 5382 (1967) and 40 Fed. Reg. 38,187 (1975).

13. No. 79-1711, slip op. at 8.

sixteen days before the defendants were arrested, the Department of Energy (DOE) designated the additional property as being part of the 1965 trespass area.[14] Again, no public hearing was held concerning the extension of the trespass boundaries. Thus, the defendants argued that the designation was invalid because the agency did not comply with the thirty-day notice and other rulemaking requirements contained in the APA. In response to this argument, the Government maintained that the extension of the boundaries did not change substantive rights and was therefore not subject to the notice and comment provisions of the APA. In addition, the Government contended that the defendants had actual notice of the extension and that the defendants therefore could not plead non-compliance with the APA as a defense.[15]

The court, to find that section 553 did not apply to the boundary extension, would have had to rule that the regulation was interpretative rather than legislative.[16] As one authority has noted, "[t]he law about the distinction between interpretative and legislative rules is quite troublesome, . . ."[17] However, a few generalizations can be made. A substantive or legislative rule has statutory force upon enactment while interpretative rules only guide an administrative agency in the performance of its duties.[18] An interpretative rule, like a general policy statement, does not create any rights or obligations,[19] and it has no independent binding effect.[20] Further, an interpretative rule is a declaration issued without lawmaking authority[21] or without any intent to exercise that authority, and it is not determinative of the rights or issues it addresses.[22]

The DOE was granted the authority "to issue regulations relating to entry upon . . . any facility, installation, or real property"[23] subject to that agency's jurisdiction. There was no law against trespass on the property acquired in 1975 until the DOE promulgated a rule to that effect. This was not an agency interpretation of law or a general policy statement, but rather the creation of a new law. Thus, the boundary designation constituted substantive rulemaking. As such, it was subject to the requirements of the APA, and a failure to comply with the requirements rendered the rule invalid.[24]

The court also dismissed the Government's second argument, that the defendants' actual knowledge of the entry restrictions barred the defendants

14. 44 Fed. Reg. 22,145 (1979).

15. No. 79-1711, slip op. at 9.

16. 5 U.S.C. § 553(d)(2)(a) (1976) excepts interpretive rules and general statements of policy from the publication requirement.

17. K. DAVIS, ADMINISTRATIVE LAW TEXT § 5.03 at 126 (3d ed. 1972).

18. Comptroller of Treasury v. M.E. Rockhill, Inc., 205 Md. 226, 234, 107 A.2d 93, 98 (1954).

19. *See* Texaco v. FPC, 412 F.2d 740, 744 (3d Cir. 1969).

20. Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974).

21. *See* Joseph v. Civil Serv. Comm'n, 554 F.2d 1140, 1153-54 (D.C. Cir. 1977).

22. *See* Pacific Gas v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974).

23. 42 U.S.C. § 2278(a) (1976). See also, S. REP. NO. 2530, 84th Cong. 2d Sess., *reprinted in* [1956] U.S. CODE CONG. & AD. NEWS 4426, 4430.

24. No. 79-1711, slip op. at 16. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 763-65 (1969).

from pleading the notice requirements as a defense.[25] Section 553(b) requires notice before rulemaking, not after,[26] because the main purpose of the section is to permit concerned parties to comment on the rule before any official action is taken. The court noted that "notice of a final rule, by publication or actual notice, does not cure improper notice and comment procedures."[27] Thus, the rule was invalid even though the defendants had actual notice that the area was restricted.

Chief Judge Seth dissented and would have affirmed the convictions of the Rocky Flats protestors. The Chief Judge felt that the actual regulation restricting access to the plant had been properly promulgated in 1963—it was only the effective date of the regulation that was postponed.[28] The Chief Judge argued that the regulation as to all facilities, then existing and future, was adopted in 1963. Thus, "the regulation was *the* rulemaking under *Skidmore v. Swift and Co.*"[29] As such, this was the initial rule which allowed the DOE to make rules of general application that did not have to be promulgated pursuant to section 553 of the APA.[30]

A review of section 553 of the APA and decisions promulgated thereunder indicates that the majority's analysis is the better of the two. The regulation enacted on April 13, 1979, must be considered substantive lawmaking because it imposed rights and obligations where none had existed before. As a substantive rule, the enactment was subject to the notice and comment procedures of the APA.[31]

II. RIGHT TO A HEARING BEFORE TERMINATION OF MEDICAID FUNDING

In two similar cases the Tenth Circuit Court of Appeals denied a pre-termination hearing concerning the non-renewal of Medicaid provider agreements to nursing homes which participated in the Medicaid program and to the patients in the homes. In *Geriatrics, Inc. v. Harris*,[32] the court held that because the purpose of limiting the term of a provider agreement to one year was to assure that only facilities which comply with Medicaid regulations were involved in the program, a nursing home had at most a "unilateral hope" that the one year agreement would be renewed.[33] Citing *Board of Regents v. Roth*,[34] the court held that the home had no right to a hearing because a "unilateral hope cannot constitute a protected 'property' interest [which would] require a pre-termination hearing."[35]

25. No. 79-1711, slip op. at 17.
26. Wagner Elec. Corp. v. Volpe, 466 F.2d 1013, 1019 (3d Cir. 1972).
27. No. 79-1711, slip op. at 18.
28. No. 79-1711, Seth, C.J., dissenting op. at 6.
29. *Id.* at 7; Skidmore v. Swift & Co, 323 U.S. 134 (1944).
30. No. 79-1711, Seth, C.J., dissenting op. at 7 (citing Batterson v. Francis, 432 U.S. 416 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976)).
31. At the time of this article's publication a rehearing of the *Seward* case was pending in the Tenth Circuit Court. No. 79-1711 (10th Cir. May 5, 1981).
32. 640 F.2d 262 (10th Cir. 1981).
33. *Id.* at 265.
34. 408 U.S. 564 (1971).
35. 640 F.2d at 265. *See also* Paramount Convalescent Center Inc. v. Department of

The court also noted that although the home would encounter operating difficulties because of the termination, it still was not entitled to a pre-termination hearing. Eventide of Lakewood Nursing Home, the plaintiff, was not the intended beneficiary of the Medicaid program. Thus, the difficulties which would be encountered by the home were "not of constitutional significance."[36]

In disposing of the patients' claims, the court relied on *O'Bannon v. Town Court Nursing Center*,[37] which specifically held that the residents of a nursing home were not entitled to a hearing before the government could suspend the home from participation in the program.[38] Although a pre-termination hearing would be required if the benefits received by the patients were withdrawn, the decertification of a nursing home does not deprive the residents of their direct benefits. Thus, no constitutional rights are involved.[39]

In *Lomond View Nursing Homes, Inc. v. Califano*,[40] the issue addressed was slightly different from that in *Geriatrics* but the conclusion was the same. *Geriatrics* involved the question of whether an operating home could have its Medicaid provider agreement terminated before a hearing on the matter. In *Lomond View*, however, the termination came *after* an extension period which was granted so that the nursing home corporation could build new facilities in compliance with the Life and Safety Code.[41] After the extension time had run, however, the homes were still not in compliance with the Code. Based on the reasoning in *Geriatrics*, the court held that there was no right to a pre-termination hearing regardless of whether an extension had been given.[42]

III. Scope of Review

Between 1980 and 1981, the Tenth Circuit addressed the question of judicial review of administrative decisions. The proper scope of review was considered under section 706 of the APA;[43] with regard to an Agency's interpretation of its own rules; under the Mine Safety and Health Act;[44] and where a postmaster was terminated for insubordination.

A. *Informal Administrative Decisions*

In *CF&I Steel Corp. v. Economic Development Administration*,[45] the court considered the standard of judicial review of an informal administrative decision under section 706 of the APA. Citing *Citizens to Preserve Overton Park,*

Health Care Servs., 15 Cal. 3d 489, 542 P.2d 1, 125 Cal. Rptr. 265 (1975), *cert. denied*, 425 U.S. 992 (1976).

36. 640 F.2d at 265.
37. 447 U.S. 773 (1980).
38. *Id.* at 785.
39. 640 F.2d at 264.
40. 639 F.2d 674 (10th Cir. 1981).
41. 42 C.F.R. §§ 442.321-.323 (1980).
42. 639 F.2d at 676.
43. 5 U.S.C. § 706 (1976).
44. 30 U.S.C. §§ 801-960 (1976).
45. 624 F.2d 136 (10th Cir. 1980).

Inc. v. Volpe,[46] the court noted that when dealing with informal agency action, the function of judicial review is threefold. First, the court must determine the authority of the agency. Second, the court must be certain that the agency complied with prescribed procedures. Finally, the reviewing court must determine whether the challenged action was arbitrary, capricious, or an abuse of discretion.[47]

While this review might seem broad, "the ultimate standard of review is a narrow one,"[48] and neither the substantial evidence test nor de novo review apply. Under *Seatrain International v. Federal Maritime Commission*,[49] the court, before substituting its judgment for the agency's, must decide if the action has a rational basis on the facts.[50] If the facts supporting the agency's action are adequately adduced and rationally applied, then the court may not substitute its judgment for that of the agency.[51]

CF&I Steel Corporation challenged the dismissal of a declaratory judgment action which claimed violations of the Public Works and Economic Development Act of 1965,[52] of regulations implementing the Act,[53] and of the Steel Industry Lending Guidelines.[54] CF&I claimed that the Economic Development Administration (EDA) unlawfully guaranteed a $63.5 million loan to the Wheeling Pittsburgh Steel Corporation. Extensive studies were entered into by the EDA before approval of the loan guarantee, and the agency felt that the guarantee was proper.[55]

CF&I, however, attacked the decision of EDA, arguing that the studies made were incorrect and not thorough enough. CF&I's objections went to the weight of the evidence, however, and the court could not change the judgment because the EDA study and decision were "adequately adduced and rationally applied."[56] Further, CF&I could not show any fraud, bad faith, or bias on the part of the EDA.[57] Thus, given the limited scope of review with regard to informal agency action and CF&I's failure to show bad faith, the court was correct in affirming the EDA decision.

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

In *Morrison & Morrison, Inc. v. Secretary of Labor*,[58] the court considered the standard for reviewing an administrative agency's interpretation of its own regulations. Morrison & Morrison, Inc., a real estate brokerage firm, sought to employ an alien in its business and offered to pay the alien $600 per

46. 401 U.S. 402 (1971).
47. 624 F.2d at 139 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. at 415-17).
48. 624 F.2d at 139 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. at 416).
49. 598 F.2d 289, 292-93 (D.C. Cir. 1979).
50. *Id.*
51. *Id.*
52. 42 U.S.C. §§ 3121-3246 (1976).
53. 13 C.F.R. § 301 (1981).
54. 43 Fed. Reg. 16,360 (1978).
55. 624 F.2d at 138-40.
56. *Id.* at 140.
57. *Id.* at 141.
58. 626 F.2d 771 (10th Cir. 1980).

month plus commissions. Based on this offer, Morrison & Morrison, Inc., petitioned the Secretary of Labor to employ Tom Kite, a resident of England, pursuant to section 1182(a)(14) of the Immigration and Nationality Act.[59]

For a domestic employer to comply with the Act, the employer must show, among other things, that he has attempted to fill the position, recruiting at the prevailing wage within the United States.[60] Further, an employer must advertise the position in a professional publication calculated to reach interested nationals.[61] The Secretary of Labor interpreted section 656.21(b)(4) as requiring the guaranteed wage for commission-compensated employment to be the prevailing wage or, in this case, $1200. In addition, the Secretary construed section 656.21(b)(9)(i) as requiring a more extensive publication than was provided by Morrison & Morrison, Inc.[62]

Citing *United States v. Larionoff*,[63] the court noted that "[t]he standard for reviewing an administrative agency's interpretation of its own regulations is 'plainly erroneous or inconsistent.' "[64] Because the Secretary's construction of the regulation was not plainly erroneous or inconsistent with prior interpretations, the court had little choice but to affirm the lower court's decision.

C. *Judicial Review Under the Mine Safety and Health Act*

In *American Coal Co. v. United States Department of Labor*,[65] the Tenth Circuit Court of Appeals interpreted a provision of the Mine Safety and Health Act[66] as implicitly providing for the review of actions taken by a coal mine inspector. According to the court, this review would initially be within the administrative agency, subject to final consideration by the court of appeals.[67]

A Mine Safety and Health Administration (MSHA) inspector inspected a coal mine owned by the Utah Power and Light Company after a portion of the mine collapsed. The inspector concluded that the roof control plan was inadequate, and issued an order temporarily closing a large section of the mine.[68] American Coal responded to the order by filing suit in the United States District Court for the District of Utah alleging that the inspector was not authorized to issue such an order.[69] The suit in the federal district court was, however, dismissed for lack of subject matter jurisdiction.[70]

American Coal appealed this dismissal, contending that the Act did not provide for administrative review. Therefore, according to American Coal, any order made pursuant to the statute was properly reviewable in a federal

59. 8 U.S.C. § 1182(a)(14) (1976).
60. 20 C.F.R. § 656.21(b) (1981).
61. 20 C.F.R. § 656.21(b)(9)(i) (1981).
62. 626 F.2d at 773.
63. 431 U.S. 864 (1977).
64. 626 F.2d at 773 (citing United States v. Larionoff, 431 U.S. at 872).
65. 639 F.2d 659 (10th Cir. 1981).
66. 30 U.S.C. § 813(k) (Supp. III 1979).
67. 639 F.2d at 661.
68. *Id.* at 660.
69. *Id.*
70. *Id.*

district court and not, as the lower court ruled, first reviewable by the MSHA review board and then by the court of appeals.[71]

The Tenth Circuit noted that while section 813(k) of the Act does not explicitly provide for administrative review, review can be implied from a reading of the entire Act along with its legislative history.[72] Thus, initial jurisdiction to review the action taken by the inspector was properly vested in the MSHA review board, with final review in the court of appeals. As support for this proposition, the court cited *Whitney Bank v. New Orleans Bank*[73] in which the Supreme Court stated "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. . . . To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design."[74]

D. *The Substantial Evidence Test*

Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[75] Substantial evidence is "something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[76] This test was applied by the Tenth Circuit Court of Appeals in *Henkle v. Campbell*.[77] Henkle had been fired from his job as postmaster after a finding of insubordination by the Civil Service Commission. Although removal for insubordination is permissible under federal law,[78] the court was concerned whether the appellant's responses to an order from his supervisor constituted insubordination.

In applying the substantial evidence test to the facts, the court noted that the appellant's refusal to refrain from calling the local police chief a "chicken shit son of a bitch" after a direct order from his superior to cease using such language and the appellant's failure to report to a fitness for duty examination clearly constituted a rational basis for the Commission's action.[79] Thus, the holding was supported by substantial evidence and the decision of the Commission to dismiss Henkle was affirmed.

IV. EXHAUSTION OF REMEDIES

In two similar cases, the Tenth Circuit Court of Appeals considered the exhaustion of remedies doctrine in the context of state parole board deci-

71. *Id.*
72. *Id.* at 661-62.
73. 379 U.S. 411 (1965).
74. 639 F.2d at 662 (quoting Whitney Bank v. New Orleans Bank, 379 U.S. at 420).
75. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).
76. Consolo v. FMC, 383 U.S. 607, 620 (1966).
77. 626 F.2d 811 (10th Cir. 1980).
78. 5 C.F.R. § 752.104(a) (1977) (current version at 5 C.F.R. § 752.301 (1981)) (incorporating 5 U.S.C. § 7513 (Supp. III 1979)).
79. 626 F.2d at 813.

sions. Under federal law,[80] a state inmate's petition to a federal court for a writ of habeas corpus will be dismissed unless the prisoner has exhausted all available state remedies.[81] If there are no adequate state remedies available, however, the statute provides that a prisoner need not attempt to exhaust state remedies before petitioning for relief in federal court.[82]

In *Schuemann v. Colorado State Board of Adult Parole*,[83] the Tenth Circuit, in following a previous decision,[84] noted that the standard of review for parole board decisions is whether the action was "arbitrary, capricious or an abuse of discretion."[85]

Because there were no state remedies available to Schuemann, who was confined in the Colorado State Penetentiary, the petition was properly before the court. Schuemann contended, for various reasons, that the parole board's decision to deny him parole was a denial of due process.[86] The court, however, found that the parole board's decision was neither arbitrary nor capricious, nor was there any abuse of discretion.[87] Thus, Schuemann's petition was denied.

In a similar case, *Shea v. Heggie*,[88] the court of appeals reversed the lower court's invocation of the exhaustion doctrine. The district court held that inmates in the Colorado State Penetentiary had remedies which could have been pursued.[89] However, the Colorado Supreme Court, in answering a certified question from the federal court of appeals,[90] held that the decision to deny parole is discretionary and not subject to judicial review in the state courts. Thus, the invocation of the exhaustion doctrine was improper and the court remanded the case for reconsideration based on its decision in *Schuemann v. Colorado State Board of Adult Parole*.[91]

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80. 28 U.S.C. § 2254(b) (1976) reads as follows:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

81. Slayton v. Smith, 404 U.S. 53 (1971); Shea v. Heggie, 624 F.2d 175 (10th Cir. 1980); Watson v. Patterson, 358 F.2d 297 (10th Cir. 1966), *cert. denied*, 385 U.S. 876 (1966). *See In re*: Question Concerning State Judicial Review of Parole Denial, 610 P.2d 1340 (Colo. 1980).

In two unpublished decisions, the Tenth Circuit dismissed petitions for writs of habeas corpus because state remedies had not been exhausted. Raine v. Warden, No. 80-1265 (10th Cir. Feb. 27, 1981) (not for routine publication); Ford v. Griffin, No. 79-2084 (10th Cir. June 30, 1980) (not for routine publication).

82. 28 U.S.C. § 2254(b) (1976).

83. 624 F.2d 172 (10th Cir. 1980).

84. Dye v. United States Parole Comm'n, 558 F.2d 1376 (10th Cir. 1977).

85. 624 F.2d at 173.

86. *Id.* For an excellent discussion of the due process clause and parole board decisions see Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 8-16 (1979).

87. 624 F.2d at 175.

88. 624 F.2d 175 (10th Cir. 1980).

89. Gomez v. Colorado State Parole Bd, 470 F. Supp. 778 (D. Colo. 1979), *rev'd*, 624 F.2d 175 (10th Cir. 1980).

90. *In re*: Question Concerning State Judicial Review of Parole Denial, 610 P.2d 1340 (Colo. 1980).

91. 624 F.2d 172 (10th Cir. 1980).

V. RATE CHANGES UNDER THE FEDERAL AVIATION ACT OF 1958

In *Frontier Airlines, Inc. v. CAB*,[92] the Tenth Circuit Court of Appeals interpreted the Federal Aviation Act of 1958[93] as allowing for individual adjustment of subsidy awards under certain conditions. Frontier Airlines sought review of its subsidy allotment from December 2, 1969 to June 30, 1971, awarded under the Act[94] which empowers the Civil Aeronautics Board (CAB) to "fix . . . fair and reasonable rates of compensation for the transportation of mail by aircraft,"[95] taking into consideration the needs of each carrier. Frontier sought an increase in its subsidy because it was operating at a significant loss in an attempt to maintain service on small, unprofitable runs under the class rate system set up by the CAB.[96]

The CAB, however, denied an individual subsidy increase to Frontier Airlines and emphasized its policy of favoring the class rate system in setting subsidy awards.[97] The CAB noted that the class rate system was favorable because it was simple and it increased incentives toward carrier efficiency.[98] It also noted that carriers who remain in the class system are more motivated to "pare costs in order to maximize profits in good times, and to minimize losses in bad times."[99] Further, the CAB held that for a carrier to show need and therefore be entitled to an individualized rate, "its ultimate survival [must be] in jeopardy."[100] Thus, because Frontier Airlines was not in danger of bankruptcy, the individualized rate was denied.

On appeal, the decision turned on the court's interpretation of "need" under section 1356 of the Act. The court noted that under the statute, a "carrier must be permitted to leave the Class System and seek an individualized rate, when it can show that the . . . class rate does not adequately take into consideration its "need," and that it is operating under 'honest, economical, and efficient management.' "[101] Need, however, does not mean an air carrier must be faced with bankruptcy. Rather, the carrier must show that it is being denied a fair profit under the class rate system.[102] Thus, the CAB was incorrect in its interpretation of the statute.

The court also held that the CAB erroneously considered profits made by Frontier outside of the challenged time period.[103] The court noted that in determining need, the CAB should have reviewed only profits and losses

92. 629 F.2d 643 (10th Cir. 1980).
93. 49 U.S.C. § 1301 (1976).
94. *Id.* § 1376.
95. *Id.* § 1376(a).
96. This system was created as a means "of just compensation for services rendered to the Government by requiring that fair and reasonable rates be fixed from time to time for carrying of the mail." Capital Airlines v. CAB, 171 F.2d 339, 340 (D.C. Cir.), *cert. denied*, 336 U.S. 961 (1948). Airlines receive subsidies from the government as an incentive to maintain what would otherwise be unprofitable routes to small communities. Delta Air Lines, Inc. v. CAB, 280 F.2d 636 (D.C. Cir.), *cert. denied*, 364 U.S. 870 (1960).
97. Pursuant to 49 U.S.C. § 1376(b).
98. 629 F.2d at 646.
99. *Id.*
100. *Id.*
101. *Id.* at 648.
102. *Id.*
103. *Id.* at 649.

incurred during the period in question and should not have reached into the closed rate period as set forth in the Act,[104] because profits earned during closed rate periods are not to be diminished by refusing to adjust losses during an open rate period.[105]

VI. THE SOCIAL SECURITY ACT

A. *Due Process*

In *Garcia v. Califano*,[106] the Tenth Circuit affirmed the decision of the New Mexico District Court and the Secretary of Health, Education and Welfare (HEW), which denied Garcia's claim for social security disability benefits. Garcia's application for disability listed sciatica arthritis as his ailment and, in addition, he submitted two medical histories and disability reports which buttressed his allegation of disability due to arthritis.[107]

The HEW Secretary denied his claim and, subsequently, Garcia obtained a hearing before the Social Security Administration examiner. Garcia received a notice of hearing which advised him of his right to representation;[108] however, he appeared at the hearing *pro se*. The hearing examiner did not re-advise him of the right to counsel; rather, the examiner questioned him about his back, his previous drinking problem, and his work history.

On appeal, Garcia contended that he was denied due process because first, he was not advised at the hearing of his right to be represented by counsel. Secondly, the hearing examiner did not inquire about his condition of depression as a cause of his alleged disability. The Tenth Circuit rejected both arguments, holding that the applicable statute[109] and regulation[110] did not require the hearing examiner to advise the plaintiff of his right to representation by an attorney. The court distinguished *Brooks v. Califano*,[111] which had held that a hearing examiner should make certain a claimant for disability benefits is cognizant of the possible availability of free legal serv-

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104. 49 U.S.C. § 1376(b) (1976).

105. 629 F.2d at 649 (citing Transatlantic Final Mail Rate Case, Reopened, 23 C.A.B. 307, 323 (1956)).

106. 625 F.2d 354 (10th Cir. 1980).

107. *Id.* at 355.

108. *Id.*

109. 42 U.S.C. § 405(b) (1976), provides that:

> The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual . . . who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant . . . reasonable notice and opportunity for a hearing with respect to such decision. . . .

Cf. Muenich v. United States, 410 F. Supp. 944 (N.D. Ind. 1976); Lonzollo v. Weinberger, 387 F. Supp. 892 (N.D. Ill. 1974), *rev'd on other grounds*, 534 F.2d 712 (7th Cir. 1976).

110. 20 C.F.R. § 404.923 (1980) (current version at 20 C.F.R. §§ 404.936-.938):

> The presiding officer shall fix a time . . . for the hearing, written notice of which, . . . shall be mailed to the parties . . . not less than 10 days prior to such time . . . . The notice of hearing shall include the time and place of the hearing, and a statement of the specific issues to be determined, and matters on which findings will be made and decision reached. The parties shall be informed of their right to representation. . . .

111. 440 F. Supp. 1341 (Del. 1977), *aff'd mem.*, 586 F.2d 834 (3d Cir. 1978).

ices. The court found, however, that the *Brooks* holding was applicable only if "the claimant's record at the hearing was not fully developed or . . . there were serious gaps therein which could have been filled if counsel had been present. . . ."[112]

Garcia's second contention was held to be without merit because the subject of depression was never raised prior to the hearing or during the hearing. As a result, the examiner, in denying the claim, made no findings with respect to depression. The court held that Garcia was responsible for raising the issue of his depression if he intended to base his disability claim on depression.[113] The court denied his request that the cause be remanded to the Secretary for further proceedings.[114]

B. *Judicial Review under the Social Security Act*

Two cases necessitated the Tenth Circuit's consideration of standards for judicial review. In *Clements v. Califano*,[115] the court, utilizing the substantial evidence standard, affirmed the district court's decision denying disability benefits. In *Kroenke v. Secretary of Health, Education and Welfare*,[116] the court upheld the district court's finding that additional evidence submitted by the plaintiff, in an effort to overturn an earlier denial of benefits, merely duplicated the previous evidence and contained no new information.[117]

In the *Clements* case, the plaintiff-appellant applied for disability benefits alleging that he had contracted emphysema and rheumatoid arthritis.[118] He was granted a hearing before an administrative law judge (ALJ). During the hearing the plaintiff, his ex-wife, and his daughter testified with respect to his alleged disability.[119] Additional evidence included medical reports from five doctors who had examined the plaintiff. Two of the doctors concluded that the plaintiff could not engage in gainful work, while two doctors determined that he could return to work.[120] The ALJ found that the claimant's alleged maladies were of limited severity; consequently, the claimant was able to engage in gainful employment.[121]

Pursuant to the applicable law,[122] the claimant filed suit in the district

112. 625 F.2d at 356.

113. *Id.*

114. *Id.* at 356-57.

115. No. 79-1566 (10th Cir. April 16, 1981) (not for routine publication).

116. No. 79-1565 (10th Cir. Jan. 8, 1981) (not for routine publication).

117. No. 79-1565, slip op. at 7.

118. No. 79-1566, slip op. at 2.

119. *Id.*, slip op. at 2-3. The plaintiff attested to the fact that he had a tenth grade education and had been trained as a beautician. He worked in that capacity until the onset of his alleged disability. *Id.*, slip op. at 3.

120. *Id.*, slip op. at 4. One doctor was noncommittal and made no determination with respect to the plaintiff's ability to work. *Id.*

121. *Id.*, slip op. at 5.

122. 42 U.S.C. § 405(g) (1976) (amended 1980) provides that:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides . . . .

court alleging, among other matters, that the facts did not support the denial of benefits. The district court affirmed the ALJ's decision, holding that if the Secretary's decision was supported by substantial evidence, then that decision must be affirmed.[123]

The Tenth Circuit agreed and affirmed the lower court's decision denying the claimant's application for disability benefits. The appellate court rejected the claimant's contention that he was psychiatrically disabled and that, therefore, the ALJ's finding was in error. Relying on *Kelbach v. Harris*,[124] the court held that the burden of proof was on the claimant to establish disability.[125] In addition, when the court is reviewing the record, the court is restricted by the Secretary's determination.[126] However, the court can determine whether the Secretary's decision was arbitrary, capricious, or an abuse of discretion.[127] Moreover, the court upheld the district court's determination that the Secretary's decision was supported by substantial evidence. The court relied on *Richardson v. Perales*,[128] and held that regardless of

123. No. 79-1566, slip op. at 6. *See* Brown v. Harris, No. 80-1201 (10th Cir. Feb. 27, 1981) (not for routine publication); Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966).

124. 634 F.2d 1304 (10th Cir. 1980).

125. No. 79-1566, slip op. at 8. Disability is defined as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 416(i)(1), 423(d)(1)(A) (1976). *See* Osteen v. Califano, No. 80-2233 (10th Cir. April 30, 1981) (not for routine publication).

In Biffle v. Harris, No. 79-2074 (10th Cir. Jan. 19, 1981) (not for routine publication), the Tenth Circuit elucidated a tripartite test to determine whether a claimant qualified for disability benefits. Tommie J. Biffle, a forty-six year old woman with a ninth grade education, applied for disability insurance alleging that she suffered from "neuritis, reflex dystrophy in her shoulders, ulcers, and other stomach problems." *Id.*, slip op. at 4. Prior to submission of this application, Biffle had worked as a waitress, cotton picker, and beautician.

Setting forth the applicable standard by which the *Biffle* case would be adjudicated, the court held:

> First, the burden is upon the claimant to establish that she is suffering from physical or mental impairment of such severity that she is unable to perform her former work, considering her age, education, and work experience. If this is established, the burden shifts to the Secretary to establish by competent evidence that the claimant, considering her impairment, age, education, and work experience, is nevertheless able to engage in other types of substantial gainful employment that exist in significant numbers in the national economy. Under the third prong, the burden shifts back to the claimant to demonstrate by a preponderance of the evidence that she could not engage in those types of employment the Secretary has shown to be available for persons suffering from impairments similar to claimant's.

Id., slip op. at 4-5. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

Applying this test to the facts, the court affirmed the Secretary's ruling that, taking into account the claimant's background, Biffle could work as a "sales person, cashier, sewing machine operator, and alteration seamstress or similar occupation." No. 79-2074, slip op. at 6. Biffle failed to demonstrate her inability to engage in employment. *See* Van Natter v. Secretary of HEW, No. 79-1439 (10th Cir. Jan. 8, 1981); Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972); Keating v. Secretary of HEW, 468 F.2d 788 (10th Cir. 1972).

126. No. 79-1566, slip op. at 9. *See also* Mandrell v. Weinberger, 511 F.2d 1102 (10th Cir. 1975); Johnson v. Finch, 437 F.2d 1321 (10th Cir. 1971).

127. No. 79-1566; slip op. at 9-10; Edwards v. Califano, 619 F.2d 865, 868 (10th Cir. 1980) (quoting Sabin v. Butz, 515 F.2d 1061, 1066-67 (10th Cir. 1975)).

128. 402 U.S. 389 (1971). The Supreme Court held that reports of physicians who had examined the plaintiff constituted substantial evidence. Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 401 (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

the fact that two doctors determined the claimant was disabled and two doctors arrived at the opposite conclusion, nevertheless, substantial evidence existed. As a result, the Secretary's determination could not be considered arbitrary and capricious.[129]

In *Cagle v. Califano*,[130] the plaintiff Cagle sought relief from the decision of the HEW Secretary denying his application for disability benefits. Cagle had applied for disability benefits alleging that he suffered from back pains which affected his ability to work as a welder. The ALJ denied Cagle's application and the district court affirmed, holding that the ALJ's decision was supported by substantial evidence.[131] On appeal, the plaintiff requested that the case be remanded to the Secretary for the consideration of new and material medical evidence[132] pursuant to section 405(g) of the Social Security Act.[133] The plaintiff alleged that the new evidence, which consisted of reports stating that the plaintiff was unemployable, was not available prior to the initial administrative determination.[134]

The court had to consider whether this information fell under the rubric of cumulative or new information. The court was persuaded by a Fourth Circuit decision[135] which defined new evidence as evidence that might reasonably have changed the Secretary's decision "had that (new) evidence been before him when his decision was rendered."[136] The Tenth Circuit Court of Appeals affirmed the ALJ's decision that the applicant was not disabled. The court, however, remanded the case to the district court for consideration of the new medical evidence.[137]

C. *Interpretation of Social Security Act Provisions*

In *Hammond v. Secretary of Health, Education and Welfare*,[138] a mother of two disabled[139] children challenged the Secretary's decision to terminate the benefits of her minor sons, William H. Ross and Richard R. Ross. The Secretary's determination was based on the ground that the children's stepfather's income was attributable to them. Consequently, the children were no longer eligible to receive Supplemental Security Income (SSI). The Secretary reached this determination after reviewing the applicable statute[140] and

129. No. 79-1566, slip op. at 11.

130. 638 F.2d 219 (10th Cir. 1981).

131. 638 F.2d at 220. *See* text accompanying note 127, *supra*.

132. 638 F.2d at 221.

133. 42 U.S.C. § 405(g) (1976) *as amended by* Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 307, 94 Stat. 458.

134. 638 F.2d at 221.

135. King v. Califano, 599 F.2d 597 (4th Cir. 1979).

136. 638 F.2d at 221 (quoting King v. Califano, 599 F.2d at 599); *see* Kroenke v. Secretary of HEW, No. 79-1565 (10th Cir. Jan. 8, 1981).

137. 638 F.2d at 221.

138. 646 F.2d 455 (10th Cir. 1981).

139. For a definition of disability, see note 125 *supra* and accompanying text.

140. 42 U.S.C. § 1382c(f)(2) (1976) states in pertinent part:

> For purposes of determining eligibility for and the amount of benefits for any individual who is a child under age 21, such individual's income and resources shall be deemed to include any income and resources of a parent of such individual (or the spouse of such a parent) who is living in the same household as such individual,

the agency regulation enforcing the statute.[141]

Counsel for the plaintiff focused his argument on the last sentence of the applicable statute[142] and interpreted this sentence as requiring the Secretary to make an *ad hoc* determination of whether the income of a parent, or stepparent, is actually available to the disabled child.[143] The district court agreed with this interpretation and remanded the case to the Secretary, ordering the Secretary to decide whether the stepfather's income was actually available in this case.

The Tenth Circuit emphatically rejected this stance holding that:

> To interpret the statutory language "except to the extent determined by the Secretary to be inequitable under the circumstances" as meaning that income of a stepparent is chargeable to the disabled child *only* if such income is actually available to the stepchild would render meaningless the prior statutory language that such income is deemed income of the child "whether or not available to such individual." The "except" language in the statute . . . cannot be read to excise from the statute the prior clause providing that income of the parent, or stepparent, is chargeable to the child "whether or not available." To interpret the statute in the manner suggested by counsel would require this Court to give a meaning to statutory language that is at least somewhat nebulous in nature which would totally negate other statutory language which is crystal clear in its meaning. This we decline to do.[144]

In addition, the court relied heavily on *Kollett v. Harris*,[145] a First Circuit decision, which also rejected the argument that the Secretary must determine the actual availability of a parent's income to a disabled child.[146] In *Kollett*, disabled children who were eligible for SSI benefits brought an action against the HEW Secretary, challenging the constitutionality of section 1382c(f)(2) of the Social Security Act.[147] The First Circuit held that the statute was constitutional; however, the court affirmed in part, reversed in part, and remanded the case to the district court because the 1974 regulations were procedurally defective.[148]

Although the Tenth Circuit relied on *Kollett*, the court noted that the

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whether or not available to such individual, except to the extent determined by the Secretary to be inequitable under the circumstances.

141. 20 C.F.R. § 416.1185(b) (1980) provides that:

> In the case of an individual who is a child (as defined in § 416.1050) and under age 21, such child's income shall, subject to the succeeding sentences of this paragraph and to paragraph (c) of this section, be deemed to include (except as otherwise provided in this section), any income (as defined in § 416.1102(a)) of a parent of such individual (or the spouse of such a parent) who is not eligible for benefits under this part and is living in the same household as the child whether or not such income is available to the child.

142. 42 U.S.C. § 1382c(f)(2) (1976).

143. 646 F.2d at 457.

144. *Id.*

145. 619 F.2d 134 (1st Cir. 1980).

146. *Id.* at 139 n.4.

147. 42 U.S.C. § 1382c(f)(2) (1976) (amended 1980).

148. 619 F.2d at 145-46.

constitutional issue slightly differentiated *Kollett* and other cases[149] from the *Hammond* case. The court reversed and remanded the case ordering the trial court to affirm the Secretary's decision.[150]

The Tenth Circuit's decision in *Kimmes v. Harris*[151] concerned the sensitive subject of senior citizens subsisting on a fixed income. The appellee in *Kimmes* was a sixty-year-old widow suffering from a heart condition who received monthly welfare payments of $187.80.[152] In addition, Kimmes resided, rent free, in a small one bedroom trailer owned by her daughter. Kimmes paid the cost of maintaining the trailer. The ALJ determined that since the rental value of the trailer was $150 per month, Kimmes received in-kind income of eighty dollars per month.[153]

Faced with these facts, the district court was required to determine whether this rental arrangement between Kimmes and her daughter constituted in-kind income. The district court reversed the Secretary's determination, holding that Kimmes had not received in-kind income. After reviewing the apposite statute[154] and regulation,[155] the lower court reasoned that since no income was "actually available"[156] to Kimmes, the extent to which the rental value of the mobile home exceeded the maintenance payments could not be counted against Kimmes' disability benefits.[157]

Chief Judge Seth, speaking for the appellate court, reversed the district court and held that Kimmes' living arrangement did provide her with in-kind income. The Tenth Circuit, relying heavily on cases from other districts that encompassed similar circumstances,[158] concluded that the ration-

149. Termini v. Califano, 464 F. Supp. 797 (W.D.N.Y.), *rev'd*, 611 F.2d 367 (2d Cir. 1979). *See also* Weinberger v. Salfi, 422 U.S. 749 (1975); Flemming v. Nestor, 363 U.S. 603 (1960).

150. 646 F.2d at 459.

151. 647 F.2d 1028 (10th Cir. 1981).

152. *Id.* at 1030.

153. *Id.* The ALJ arrived at this figure by subtracting the maintenance costs of $70 from the rental value of $150. *Id.*

154. 42 U.S.C. § 1382a(a) (1976) provides in relevant part:

> Income; definition of earned and unearned income; exclusions from income; and . . .
>
> (1) earned income means only
>
> (A) wages . . .
>
> (B) net earning from self employment . . . and
>
> (2) unearned income means all other income, including . . .
>
> (A) support and maintenance furnished in cash or in kind; except that (i) in the case of any individual . . . living in another person's household and receiving support and maintenance in kind from such person, the dollar amounts otherwise applicable to such individual . . . shall be reduced by 33⅓ percent in lieu of including such support and maintenance in the unearned income of such individual. . . .

155. 20 C.F.R. § 416.1102 (1980) provides:

> (a) *Meaning of income*. The term "income" . . . means the receipt by an individual of any property or services which he can apply, either directly or by sale or conversion, to meeting his basic needs for food, clothing and shelter.
>
> . . .
>
> (c) *Unearned income*. The term "unearned income" means all income that is not included in the definition.

See 20 C.F.R. §§ 416.1102, .1110, .1120 (1981).

156. Kimmes v. Califano, 472 F. Supp. 474, 476 (D. Colo. 1979), *rev'd*, 647 F.2d 1028 (10th Cir. 1981). In addition, the lower court relied on decisions dealing with welfare programs, *id.* at 476, which the appellate court found inapposite. Kimmes v. Harris, 647 F.2d at 1033 n.4.

157. 472 F. Supp. at 476.

158. 647 F.2d at 1033. *See* Antonioli v. Harris, 624 F.2d 78 (9th Cir. 1980). *Antonioli* in-

ale utilized in the other cases was relevant to the *Kimmes* case. The Tenth Circuit held that Kimmes' living arrangement constituted in-kind income which was actually available to her. "The fact that such benefit is not in cold hard cash is of no moment. We are dealing here with unearned income in-kind."[159]

VII. WORKERS' COMPENSATION

A. *Independent Contractors and Parent Corporations*

In a significant line of cases, the Tenth Circuit examined the exclusive remedy provisions of state and federal Workers' Compensation Acts as applied to employees who attempt to sue a principal employer or parent corporation for injuries sustained in the course of employment. The court also addressed various ancillary issues dealing with the accrual of a cause of action against the United States as well as with the scope of the Federal Tort Claims Act.[160]

The issue in *Arrington v. Wisconsin-Michigan Pipeline Co.*[161] was whether the employees of an independent contractor could recover amounts in excess of those received under workers' compensation, when suing the independent contractor's employer as the third party tortfeasor under the Oklahoma Workers' Compensation Act (Compensation Act).[162] The plaintiffs, employees of an independent contractor, brought common law tort actions against Wisconsin-Michigan Pipeline Company, the principal employer, after several workers were killed or injured in an explosion while performing construction work on Wisconsin-Michigan's pipeline. The explosion occurred when, after the independent contractor's workers built a fire to keep warm, an employee of Wisconsin-Michigan negligently turned on a valve releasing natural gas. The natural gas combusted when it reached the flames.[163]

The plaintiffs sought actual and punitive damages against Wisconsin-

volved an SSI recipient who lived in a house owned by his father. Although the recipient paid no rent, he did pay the property taxes and maintenance expenses. The Ninth Circuit Court of Appeals held that this living arrangement constituted in-kind support from the recipient's father. Styles v. Harris, 503 F. Supp. 125 (D. Md. 1980), concerned a supplemental security income recipient who rented an apartment from her son for $80 per month. The market value of the apartment was $100 per month. As a result, the district court held that the recipient had in-kind income of $20. In Wynn v. Harris, 494 F. Supp. 878 (W.D. Tenn. 1980), the recipients resided rent-free in a home owned by their children. Once again, the district court held that the living arrangement constituted in-kind income. In Buschmann v. Harris, No. 78-622 (D. Or. March 11, 1980), the recipient lived in a dwelling owned by his son. The recipient paid $80 per month for a dwelling that had a current market value of $145 dollars. The district court held that the difference between the rent actually paid and the market value constituted in-kind income. As *Kimmes* pointed out, "an SSI recipient who obtains shelter at less than the fair rental value does have money available which otherwise would be spent on shelter, and . . . accordingly, such savings represents money 'actually available' to the recipient." Kimmes v. Califano, 647 F.2d at 1032.

159. 647 F.2d at 1033-34.

160. Ch. 753, Title IV, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

161. 632 F.2d 867 (10th Cir. 1980). This decision was later cited in an unpublished decision, Nezhadian v. Firestone Tire & Rubber Co., No. 78-2059 (10th Cir. Dec. 3, 1980), as controlling in the disposition of that case.

162. OKLA. STAT. ANN. tit. 85, § 44 (West Supp. 1979).

163. 632 F.2d at 868.

Michigan for gross, wanton, and willful negligence in the instruction and supervision of its employees. The action was dismissed on the ground that the sole remedy available to plaintiffs was afforded under the Compensation Act.[164] The workers appealed, claiming that the language of the Compensation Act preserved their right to sue third parties.[165]

In rejecting the appellants' arguments, the court cited a consistent line of authority holding that a worker's exclusive remedy as the employee of an independent contractor arises under the Compensation Act.[166] In Oklahoma, there is no recourse under ordinary tort theory against the principal employer where the independent contractor's employees were injured while performing labor that was "an integral part of the principal employer's business."[167]

The appellants also failed to persuade the court that allegations of gross negligence would bring the claims outside the purview of the Compensation Act, on the rationale that the Compensation Act applies only to "accidental" personal injuries, not willful or intentional acts committed by the employer. The court cited cases holding that willful acts may be characterized as "accidents"[168] if they incorporate an element of chance, that is, if they are unusual or unexpected events.[169] The explosion resulting in the lawsuits against Michigan-Wisconsin was deemed to be accidential. Further, the court refused to characterize the Michigan-Wisconsin employee's act of turning the wrong valve on as "willful," because it was not a deliberate act.[170]

In concluding, the Tenth Circuit interpreted the Oklahoma Workers' Compensation Act as "barring all common law actions against the principal employer based upon the negligence of its employee."[171] The court also rejected the plaintiffs' argument that Michigan-Wisconsin should remain in the litigation because an inherently dangerous activity was involved, in which case the principal contractor should be held liable for an independent contractor's torts. Since no such situation had been alleged in the plaintiffs' complaint, the court affirmed the trial court's dismissal of the action.[172]

The court expanded upon these conclusions in *Love v. Flour Mills of America*.[173] Some employees of Flour Mills were seriously injured in a series of dust explosions at Flour Mills' grain elevator. The workers alleged gross, wanton, and willful negligence on the part of the defendants—Flour Mills, its parent corporation Chickasha Cotton Oil Company, and an insurance company Houston General Insurance Company—in the maintenance and inspection of the plant. The court was called upon to resolve three issues: 1) whether the Compensation Act's exclusive jurisdiction can be sidestepped by allegations of gross, willful, and wanton negligence on the employer's

164. OKLA. STAT. ANN. tit. 85, § 44 (West Supp. 1979).
165. 632 F.2d at 869.
166. *Id.*
167. *Id.*
168. *Id.* at 870.
169. *Id.* (citing Stasmas v. State Indus. Comm'n, 80 Okla. 221, 222, 195 P. 762, 763 (1921)).
170. 632 F.2d at 871.
171. *Id.*
172. *Id.*
173. 647 F.2d 1058 (10th Cir. 1981).

part; 2) whether an employer's insurance carrier, joined in the action as defendant for alleged failure to inspect adequately and to warn, may claim as a defense the employer's immunity from common law tort actions; and 3) whether the employee of a subsidiary may sue the parent corporation for injuries resulting from the parent corporation's negligence.[174]

The court reiterated the doctrine of the *Arrington* case, that claims of negligence against an employer, no matter the degree of aggravation, are barred by the Oklahoma Workers' Compensation Act.[175] The insurance carrier, here viewed as an alter ego of the employer for the purpose of tort immunity, could also claim the "exclusive remedy" defense against common-law tort liability.[176] The Tenth Circuit concluded that Oklahoma does not recognize any cause of action against an employer's insurer for negligent inspection.[177]

The court then discussed at length the immunity available to parent corporations in each jurisdiction. Louisiana considers the parent corporation to be a statutory employer in workers' compensation cases,[178] and thus immune from common-law tort liability, if the subsidiary is merely an operating division of the parent corporation. However, most jurisdictions attribute a separate and independent identity to parent corporations.[179] Thus, in the majority of jurisdictions, a parent corporation will not be immune from tort liability to its subsidiary's employees. There is one exception: torts committed by the parent in a representative or managerial capacity are the liability of the subsidiary alone.[180] Chickasha, the parent corporation, would have been liable at common law if its negligence were unrelated to the management of its subsidiary, Flour Mills. However, Chickasha's negligence involved acts connected with the operation of Flour Mills. The plaintiff had alleged Chickasha failed to perform the employer's duty of providing a safe workplace, or to enforce this duty on the employer. The Tenth Circuit was unwilling to extend liability for an employer's nondelegable duty of maintaining the work premises to a shareholder, even a controlling shareholder such as a parent corporation.[181] Chickasha was held to be immune from tort liability under the Compensation Act, and the action's dismissal was affirmed.

The Workmen's Compensation Act of Kansas[182] was examined in *Fowler v. Interstate Brands Corp.*,[183] to determine when an independent contractor's employee may bring a common law tort claim against a principal

174. *Id.* at 1059.

175. *Id.* at 1060 (quoting Arrington v. Michigan-Wisconsin Pipeline Co., 632 F.2d 867, 871 (10th Cir. 1980)).

176. 647 F.2d at 1061.

177. *Id.*

178. Coco v. Winston Indus., Inc., 330 So. 2d 649 (La. App. 1975), *rev'd on other grounds*, 341 So. 2d 332 (La. 1976).

179. *See, e.g.*, Boggs v. Blue Diamond Coal Co., 590 F.2d 655 (6th Cir.), *cert. denied*, 444 U.S. 836 (1979); Latham v. Technar, Inc., 390 F. Supp. 1031 (E.D. Tenn. 1974); Foley v. New York City Omnibus Corp., 112 N.Y.S.2d 217 (1952).

180. 647 F.2d at 1062.

181. *Id.*

182. KAN. STAT. ANN. § 44-501 (Supp. 1980).

183. No. 79-1538 (10th Cir. Dec. 22, 1980) (not for routine publication).

employer. The issue was similar to that raised in *Arrington*[184]—whether recovery against a principal is limited to the remedies in the Compensation Act—but the *Fowler* court's analysis, using a two-prong test under Kansas law, is more exacting.[185]

When a member of the principal employer's maintenance crew short-circuited the plant's electrical system, the plaintiff, employee of an independent contractor, was called in to assist the principal employer in making repairs. Before the plaintiff could complete his work, the main electrical distribution plant exploded, injuring him.[186]

The trial court granted summary judgment in the principal employer's favor. The plaintiff appealed on the ground that a principal employer is protected from suit under the Compensation Act only if the work performed by the independent contractor was part of the principal employer's trade or business.[187] The plaintiff maintained that repairing the plant's electrical system was not an integral part of the principal employer's business or trade.[188]

The court concluded that under the facts of this case, plant repair was part of the principal employer's regular activity. Therefore, the independent contractor's employee and the principal employer stood in a statutory employee/employer relationship, and the employee's sole remedy arose under the Kansas Workmen's Compensation Act.[189] The court's conclusions were buttressed by the fact that the plant's operation required complex machinery and that consequently, the principal employer's staff included a full-time, twenty-five member maintenance and engineering crew, for routine upkeep and repair services necessary to production.[190] These factors satisfied the two-pronged test that the court set forth to determine whether the principal employer stood as a third party or as the statutory employer of the

184. *See* text accompanying notes 160-67 *supra*.

185. The Kansas Supreme Court had announced a two-pronged test for determining whether a worker will be considered a statutory employee. If either part of the test is met, the worker's sole recourse is the Compensation Act. Under the test of Hanna v. CRA, Inc., 196 Kan. 156, 409 P.2d 786 (1966):

> 1. The work being performed by the independent contractor and the injured employee must have been necessarily inherent in and an integral part of the principal's trade or business, or
>
> 2. that work must have been such as would ordinarily have been done by an employee of the principal.

No. 79-1538, slip op. at 6 (citing Hanna v. CRA, Inc., 196 Kan. at 159-60, 409 P.2d at 789).

186. No. 79-1538, slip op. at 4.

187. *Id.*, slip op. at 2. The applicable provision was KAN. STAT. ANN. § 44-503(a) (Supp. 1980), which provides:

> (a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under the workmen's compensation act which he would have been liable to pay if that workman had been immediately employed by him . . . .

See also Hanna v. CRA, Inc., 196 Kan. 156, 409 P.2d 786 (1966).

188. No. 79-1538, slip op. at 7.

189. *Id.*, slip op. at 8.

190. *Id.*, slip op. at 4.

worker.[191] The court affirmed the district court's ruling that both tests were met, and that the principal employer was immune from common-law tort liability.[192]

B. *Workers' Compensation and the Federal Tort Claims Act*

Employees of independent contractors hired by the federal government, as well as individuals entering into the service of the federal government, may come within the ambit of the exclusive remedy provisions of Compensation Acts.

The availability of the exclusive remedy provision of the Kansas Workmen's Compensation Act[193] as a defense to a negligence claim against the United States was determined in *Griffin v. United States*.[194] An employee of a contractor for a federal agency brought suit pursuant to the Federal Tort Claims Act (FTCA)[195] for injuries sustained in the course of employment.

The Tenth Circuit affirmed the district court's grant of summary judgment. Under the FTCA, the United States stands in the same position as a private citizen in the suit, and may pursue the same defenses as any private party under state law.[196] The court recognized that in theory, the protections afforded a worker is substantially undercut because a state may not require the federal government to obtain workmen's compensation insurance.[197] However, the agency contract in this instance required the contractor to obtain the insurance; thus, the court was satisfied as to the worker's ability to obtain compensation for his injuries.[198] Since the United States indirectly paid for the insurance, the court felt that the policies of the FTCA and the Kansas Workmen's Compensation Act were fulfilled by allowing the United States to assert the "exclusive remedy" defense. The Tenth Circuit declined to extend this holding to the situation in which insurance had not been purchased.[199]

The court then examined the factual issue previously discussed in *Fowler v. Interstate Brands Corp.*,[200] whether the contractor's work was integral to the

191. *See* note 185 *supra*. The court commented that isolated events not constituting the business of the principal employer, such as the erection of a building, would not give the principal employer status as a statutory employer of the independent contractor's employees. No. 79-1538, slip op. at 9-11.

192. No. 79-1538, slip op. at 12. The plaintiff also argued that his technical expertise precluded his labor from being an integral part of the principal employer's business, as his work normally would not have been performed by the plant's own employees. *Id.*, slip op. at 8. The court dismissed this argument on the facts, namely, that the plaintiff was not called in for his expertise, but to relieve the plant's employees. *Id.*, slip op. at 9. The court also rejected the argument that the business conducted must be the employer's main or primary business in order to be immune from tort liability. *Id.*, slip op. at 11-12.

193. KAN. STAT. ANN. § 44-501 (Supp. 1980).

194. 644 F.2d 846 (10th Cir. 1981).

195. Ch. 753, Title IV, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

196. 28 U.S.C. §§ 1346(b), 2674 (1976). *See* Scoggin v. United States, 444 F.2d 74, 75 (10th Cir. 1971); Gov't Employees Ins. Co. v. United States, 349 F.2d 83, 85 (10th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966).

197. 644 F.2d at 847-48.

198. *Id.* at 848.

199. *Id.*

200. No. 79-1538 (10th Cir. Dec. 22, 1980) (not for routine publication).

business of the principal employer, in this case "a hypothetical private party in the position of the GSA."[201] The United States was found to have stood in the same position of liability as an independent contractor, on the basis of affidavits and a deposition presented as evidence, and was thus entitled to raise the "exclusive remedy" defense.[202]

In *Hudiburgh v. United States*,[203] the Tenth Circuit ordered the trial court to abate further consideration of an action under the FTCA,[204] pending determination of the issue of whether a Reserve Officers Training Corps (ROTC) trainee must seek relief under the Federal Employees Compensation Act (FECA)[205] first. The plaintiff, enrolled in the ROTC, was seriously injured during a drill session.[206]

The court ordered the action to be abated because it agreed with the district court that the complaint presented the possibility of FECA's applicability.[207] The plaintiff was directed to adopt the procedure prescribed by the Fifth Circuit[208] pending final resolution of his remedies under FECA.

VIII. PROCEDURAL ASPECTS OF THE FEDERAL TORT CLAIMS ACT, AS APPLIED TO UNITED STATES AGENCIES

In *Reynolds v. United States*,[209] the Tenth Circuit addressed itself to the sufficiency of a complaint stating a claim against the federal government. The plaintiffs' neighbors had received financial assistance through the Farmers Home Administration (FmHA) to construct a residence.[210] In accordance with federal regulations,[211] the FmHA county inspector visited the residence several times during construction to inspect and approve the structure. After completion, the plaintiffs' son was watching the house while the owners were away, and was poisoned by carbon monoxide gas, suffering severe brain damage. The plaintiffs sought to recover damages from the government for negligent inspection of the house's furnace system.[212]

The district court dismissed the action, finding the FmHA owed no duty of ordinary care to FmHA borrowers' invitees.[213] The Tenth Circuit

201. 644 F.2d at 848. Like the *Fowler* court, the court in *Griffin* reiterated the *Hanna* test. *See* note 185 *supra* and accompanying text.

202. 644 F.2d at 848.

203. 626 F.2d 813 (10th Cir. 1980).

204. 28 U.S.C. § 2671 (1976).

205. 5 U.S.C. § 8101 (1976). *See* Reep v. United States, 557 F.2d 204 (9th Cir. 1977), which holds that if a plaintiff's injuries may be compensable by the FECA, the plaintiff cannot sue under the FTCA.

206. 626 F.2d at 814.

207. *Id.* The court also agreed with the trial court's dismissal of the plaintiff's petition for a writ of mandamus, since "mandamus is not intended to be used for unliquidated money damages." *Id.*

208. Concordia v. United States Postal Service, 585 F.2d 731 (5th Cir. 1978).

209. 643 F.2d 707 (10th Cir.), *cert. denied*, No. 80-2064 (Oct. 5, 1981).

210. Id. at 708. The court pointed out that the statutory objective of FmHa assistance is "the realization . . . of the goal of a decent home and a suitable living environment for every American family . . . ." 643 F.2d at 710 (quoting 42 U.S.C. § 1441 (1970)).

211. 7 C.F.R. §§ 1804.3(d)(1), 1804.4(g)(3) (1980) (current version at 7 C.F.R. §§ 1804.64, 1804.73 (1981)).

212. 643 F.2d at 708.

213. 643 F.2d at 708-09.

affirmed the decision on other grounds. In avoiding the issue of whether any duty was owed to the plaintiffs, the court focused on a specific statutory exception to the FTCA: misrepresentation.[214] The Supreme Court, in *United States v. Neustadt*,[215] had held that an inaccurate FmHA inspection and appraisal is the basis for a claim for misrepresentation, and thus is not actionable under the FTCA.[216] This position has been followed in several circuits.[217] Finally, the court noted that sovereign immunity waivers must be construed in favor of the government.[218] The misrepresentation exception is deemed to include "false representations of any type."[219] Consequently, the plaintiffs had no claim against the government, since the court considered their claim to be one of misrepresentation by the FmHA, and not of negligence.[220]

Strict construction under the FTCA also extends to the two-year statute of limitations.[221] In *Robbins v. United States*,[222] the court determined when a cause of action would accrue under the FTCA. The test, announced by the Supreme Court in *United States v. Kubrick*,[223] establishes that the plaintiff's cause of action accrues once he knows "both the existence and the cause of his injury."[224] This test expressly overrules prior decisions holding that a cause of action accrues once a claimant knows that medical malpractice may have occurred.[225]

Robbins had developed a skin condition and, as the dependent of an Air Force officer, contacted a base physician. The drug prescribed for him caused an additional skin disorder. After consultation with another physician, he was advised to discontinue use of the drug. Four years later, he was told the condition could become permanent. He then filed an administrative claim under the FTCA.[226]

The court determined that the claimant's cause of action accrued shortly after his awareness that the drug caused his injury.[227] The running of the two-year statute of limitations was not tolled by the minority of the claimant.[228] "[A] legally cognizable injury will begin the running of the statutory period . . . even though the ultimate damage is unknown or unpredictable;"[229] hence, Robbins' ignorance of the permanency of his injury

214. 28 U.S.C. § 2680(h) (1976).

215. 366 U.S. 696 (1961).

216. *Id.* at 708.

217. *See, e.g.*, Moon v. Takisaki, 501 F.2d 389 (9th Cir. 1974); United States v. Longo, 464 F.2d 913 (8th Cir. 1972); Edelman v. FHA, 382 F.2d 594 (2d Cir. 1967).

218. 643 F.2d at 713 (citing Hurley v. United States, 624 F.2d 93 (10th Cir. 1980)).

219. 643 F.2d at 712. *See* Hall v. United States, 274 F.2d 69 (10th Cir. 1959).

220. 643 F.2d at 712. *See* Irzyk v. United States, 412 F.2d 749 (10th Cir. 1969).

221. 28 U.S.C. § 2401(b) (1976). This provision imposes a two-year statute of limitations on actions against the government.

222. 624 F.2d 971 (10th Cir. 1980).

223. 444 U.S. 111 (1979).

224. *Id.* at 113.

225. 624 F.2d at 972.

226. *Id.*

227. *Id.* at 973.

228. *Id.* at 972.

229. *Id.* at 973.

did not delay the running of the limitations period.[230]

IX. OCCUPATIONAL SAFETY AND HEALTH AGENCY

In reviewing four actions brought by employers against the Occupational Safety and Health Agency (OSHA), the Tenth Circuit twice affirmed and twice reversed the agency's decisions. None of the decisions evinces the level of deference normally accorded agency action.

The Tenth Circuit reversed the Occupational Safety and Health Review Commission (Commission) in *Mountain States Telephone and Telegraph Co. v. Occupational Safety & Health Review Commission*,[231] determining that the agency acted arbitrarily[232] in finding Mountain Bell liable for a serious violation of a safety regulation.[233] The reversal on review was based upon the agency's erroneous allocation of the burden of proof with regard to safety violations.[234]

Mountain Bell sent two employees, a supervisor and an apprentice, to install telephone lines on a utility pole. During the installation the supervisor, who had not worn the protective rubber gloves required when exposed to high voltage lines, was fatally electrocuted. Because of this accident, Mountain Bell was cited for a serious violation of OSHA safety standards. The ALJ vacated the citation, finding that Mountain Bell did not know of the violation. The Commission reversed on the ground that the knowledge of a supervisory employee is imputed to the employer.[235] In effect, the Commission shifted the burden of proof so that Mountain Bell had to demonstrate that the accident was unpreventable.

The court found the shift of the burden of proof to be untenable in light of the Commission's rule concerning the allocation of the burden of proof.[236] It is reasonable to impute to an employer a supervisory employee's knowledge of subordinate employees' safety violations, if the supervisory employee has been entrusted with the task of ensuring compliance with safety standards.[237] However, imputing a supervisory employee's knowledge of his *own* wrongdoing to his principal, for the purposes of demonstrating a violation of a safety standard, would allow OSHA to establish a prima facie case against the principal merely by showing that a violation occurred.[238] The Tenth Circuit aligned itself with the Fourth Circuit in rejecting such an allocation of the burden of proof.[239]

In *R.A. Pohl Construction Co. v. Marshall*,[240] the Tenth Circuit partly re-

230. *Id.*
231. 623 F.2d 155 (10th Cir. 1980).
232. Arbitrary action is defined under the APA, 5 U.S.C. § 706(2)(A) (1976).
233. 29 C.F.R. § 1910.132(a) (1980).
234. 623 F.2d at 157-58.
235. *Id.* at 157.
236. *Id.* (citing Commission Rule 73(a), 29 C.F.R. § 2200.73(a) (1980)). This rule requires the Secretary to prove all elements of a violation. *See* Brennan v. Occupational Safety & Health Review Comm'n, 511 F.2d 1139 (9th Cir. 1975).
237. 623 F.2d at 158.
238. *Id.*
239. *Id. See, e.g.*, Ocean Elec. Corp. v. Secretary of Labor, 594 F.2d 396 (4th Cir. 1979).
240. 640 F.2d 266 (10th Cir. 1981).

versed an order of the Commission and took issue with an unsupported determination by an ALJ of the soil conditions at an accident scene. The determination became part of the record on the day the decision was rendered, not prior to or during the hearing, and concerned a fact which neither the agency nor the petitioner had addressed. On the basis of the determination, one of the charges against the employer was amended after the decision was handed down.[241] The issue on review was whether the amendment of the agency citation from violation of one standard to violation of another, after the hearing had concluded, was valid if not expressly or impliedly consented to by the employer.[242]

The Tenth Circuit found that without the express or implied consent of an employer, no additional standard of violation could be used to sustain any sanctions against that employer. Such consent is present where the employer had the opportunity to adequately address the allegations of the amended citation.[243]

The court determined that the ALJ had gone beyond the scope of the litigation in changing the charge against the employer to one not raised in the Commission citation.[244] An agency's citation must be considered in the same light as a citation for a criminal offense: it must clearly convey the charges against the employer so that an adequate defense may be prepared. A case cannot be "tried on one regulation or standard and decided on another."[245] The only amendment permissible is that to which the employer has consented by reason of having had an adequate opportunity to address it during the proceedings.[246]

In contrast to the *Pohl* case, the court in *P.A.F. Equipment Co. v. Occupational Safety & Health Review Commission*[247] affirmed the amendment of a citation upgrading the charge from a willful to a serious violation. The ALJ had determined the amendment was improper. The Commission reversed the ALJ's decision on review. In upholding the increase in penalty, the court emphasized its previous decisions in *Clarkson Construction Co. v. Occupational Safety & Health Review Commission*[248] and *Savina Home Industries v. Secretary of Labor*.[249]

241. The employer was deemed to have violated 29 C.F.R. § 1926.652(b) (1980), rather than 29 C.F.R. § 1926.652(c) (1980), as previously alleged. Both pertain to violations of trenching standards in certain types of soil. 640 F.2d at 267.

242. 640 F.2d at 267. Rule 15(b) of the Federal Rules of Civil Procedure permits amendments to the pleadings to include issues not raised therein if the issues were addressed by the parties during trial. The amendments are considered to have received the implied or express consent of the parties. Ellis v. Arkansas Louisiana Gas Co., 609 F.2d 436 (10th Cir. 1979). This rule is adopted under the Occupational Safety and Health Act, 29 U.S.C. § 661(f) (1976).

243. 640 F.2d at 267.

244. *Id.* at 268.

245. *Id.*

246. *Id.* at 267.

247. 634 F.2d 741 (10th Cir. 1981).

248. 531 F.2d 451 (10th Cir. 1976). The *Clarkson* court held that the commission may increase penalties so long as there is no vindictiveness and the right to judicial review remains intact. *Id.* at 456.

249. 594 F.2d 1358, 1366 (10th Cir. 1979) (the Commission's penalty-modifying power does not constitute a violation of due process).

In *Marshall v. Horn Seed Co.*,[250] the Tenth Circuit considered the grounds for the issuance of an administrative warrant to inspect.[251] An OSHA compliance officer petitioned the district court for a search warrant based upon unverified complaints from anonymous sources. The district court granted the application. The respondent company refused to honor the warrant, and the agency obtained an order to show cause why the company should not be held in contempt. After a hearing, the district court quashed the warrant, finding no probable cause sufficient to sustain it.[252] The Tenth Circuit agreed, and proceeded to discuss the level of probable cause necessary to sustain an administrative search warrant.[253]

Neither of the sections in the Occupational Safety and Health Act authorizing inspection of the workplace for occupational hazards requires a search warrant.[254] The Supreme Court imposed the search warrant requirement on nonconsensual OSHA inspections in *Marshall v. Barlow's, Inc.*[255] The *Barlow's, Inc.* decision affirmed previous Supreme Court holdings[256] that administrative probable cause requires a standard less stringent than that applied to criminal cases. The Tenth Circuit followed these holdings, and ruled that OSHA inspections require a showing of administrative probable cause.[257] Under the *Barlow's, Inc.* standard, the Secretary of Labor can demonstrate probable cause by presenting specific evidence of an existing violation.[258]

In determining the level of scrutiny required for an administrative search warrant based on evidence of a safety violation, the Tenth Circuit imposed an intermediate standard:

> [T]he magistrate need not have a reasonable belief that a violation *will* be found. Nor need he even find it *more probable than not* that a violation will be uncovered. . . . [T]here must be some plausible basis for believing that a violation is *likely* to be found.[259]

In essence, the court requested that the magistrate assure that the complaint and the resulting search warrant do not rely entirely upon an un-

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250. 647 F.2d 96 (10th Cir. 1981).

251. The Occupational Health and Safety Act of 1970, 29 U.S.C. § 657(f) (1976) authorizes an inspection when an employee believes "that a violation of a safety or health standard exists that threatens physical harm. . . ." *Id.*

252. 647 F.2d at 98.

253. *Id.* at 98-104.

254. 29 U.S.C. § 657(a), (f)(1) (1976).

255. 436 U.S. 307 (1978). In *Barlow's, Inc.*, the Supreme Court distinguished the level of probable cause necessary in criminal proceedings from that in administrative proceedings. The Court found:

> For purposes of an administrative search . . . probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting . . . an inspection are satisfied with respect to a particular [establishment].'

Id. at 320 (quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967) (footnote omitted)). This requirement is different from the showing of probable cause necessary in a criminal context. *See* Marshall v. W.W. Steel Co., 604 F.2d 1322, 1326 (10th Cir. 1979).

256. Camara v. Municipal Court, 387 U.S. 523, 538-39 (1967); See v. City of Seattle, 387 U.S. 541, 545 (1967).

257. 647 F.2d at 102.

258. *Id.* at 103 (citing *Barlow's, Inc.*, 436 U.S. at 320).

259. 647 F.2d at 102 (emphasis in the original).

named source whose credibility cannot be challenged.[260] The *Horn Seed* search warrant was deemed insufficient because the affiant simply stated that a complaint was received and detailed the alleged unsafe conditions. She did not identify the source of the complaint[261] or describe the underlying facts and circumstances surrounding the complaint.[262]

In dicta, the court explained that a warrant may also be sought to conduct inspections pursuant to a general administrative plan, where no specific violation is alleged. Such a warrant need not be questioned as to the reliability of its source or the probability of a violation. It needs merely to be reasonable and to conform to guidelines designed to protect individuals from arbitrary agency action.[263]

X. THE INTERSTATE COMMERCE COMMISSION

The Tenth Circuit published two unrelated decisions affirming the Interstate Commerce Commission (ICC) in its exercise of authority. In general, the decisions upheld the reasonable actions of the agency in any good faith undertaking to fulfill its congressional mandate.[264]

In *Graves Truck Line, Inc. v. ICC*,[265] the Tenth Circuit rendered a narrow opinion on the jurisdiction, under the revised Interstate Commerce Act (ICA),[266] of federal and state licensing authorities over intrastate carriers. The Act provides that an intrastate carrier, upon receipt of a state certificate of public convenience and necessity, may apply to the ICC for registration to enable it to handle goods moving in interstate commerce.[267] A Kansas carrier, Winters Truck Line, Inc., became certified and registered under this provision, then sought additional certification through the Kansas Corpora-

260. *Id.* at 103.

261. *Id.* The source need not be identified specifically, but information should be given as to whether the source is an employee, competitor, customer, visitor, etc. *Id.*

262. 647 F.2d at 103.

263. *Id.* at 100-01.

264. The Tenth Circuit also decided two ICC cases dealing with standards of reviewing ICC interpretations and grants of certificates of public convenience and necessity to carriers. Missouri, Kansas, and Oklahoma Coach Lines, Inc. v. ICC, No. 80-1535 (10th Cir. November 10, 1980) (not for routine publication); Pack Transport, Inc. v. United States, No. 77-1967 (10th Cir. Sept. 12, 1980) (not for routine publication).

265. 637 F.2d 757 (10th Cir. 1980).

266. 49 U.S.C. § 10101 (Supp. III 1979).

267. *Id.* § 10931 provides:

> (a) A motor common carrier may provide transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title without a certificate issued by the Commission under section 10922 of this title, when—
>
> (1) the carrier provides transportation entirely in one State;
>
> (2) the carrier is not controlled by, controlling, or under common control with a carrier providing transportation outside the State;
>
> (3) the carrier has applied for, and has been issued, a certificate of public convenience and necessity by the State authority having jurisdiction to issue such a certificate, permitting the carrier to provide intrastate transportation by motor vehicle; and
>
> (4) the intrastate certificate was issued after, and the certificate states that—
>
> (A) notice was given to interested parties through publication in the Federal Register of the filing of the application by the carrier and the desire of the carrier to provide transportation otherwise under the jurisdiction of

tion Commission (KCC) several years later, in order to extend its intrastate authority and to have the extension applied to the transportation of interstate shipments. The petitioners, Graves Truck Lines, Inc. and Santa Fe Trail Transportation Co., challenged the application on the basis that Winters did not operate entirely intrastate, as required by the ICA provision[268] under which Winters registered with the ICC, and that "public convenience and necessity" was not served by allowing Winters to transport interstate shipments.[269] The KCC rejected the petitioners' contentions and granted Winters' application. Based on the KCC's grant, the ICC gave Winters a certificate of registration, again over the petitioners' objections.[270]

The petitioners appealed on the basis that Winters' original ICC registration included "commercial zones"[271] extending outside the state, which precluded Winters from valid KCC registration as an intrastate carrier. The ICC, however, maintained that any possible defect in the original ICC certificate was cured by a restrictive order issued shortly before Winters applied to the KCC for extension of its authority. This restrictive order eliminated

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the Commission within the limits of the certificate issued by the State authority;

(B) reasonable opportunity to be heard was given; and

(C) the State authority considered and found that the public convenience and necessity require that the carrier be permitted to provide transportation under the jurisdiction of the Commission within limits that do not exceed the scope of the certificate issued by the State authority.

(b) An interested party that opposed issuing the certificate to a motor common carrier in a proceeding before a State authority may petition the Commission for reconsideration of a decision of the State authority. On reconsideration, the Commission, based on the record before the State authority, may affirm, reverse, or change that decision, but only with respect to the transportation subject to Commission jurisdiction.

(c) The Commission may require, before a motor common carrier provides transportation authorized under this section, that—

(1) a certified copy of the carrier's intrastate certificate and other appropriate information be filed with the Commission; and

(2) the carrier comply with applicable requirements established by the Commission.

(d)(1) The Commission shall issue a certificate of registration to a motor common carrier authorizing the carrier to provide transportation under this section. The authority granted under the certificate is subject to all other applicable provisions of this subtitle. Except as otherwise provided in this subsection and subchapter III of chapter 113 of this title, the certificate of registration may be transferred if it is transferred with the intrastate certificate. Transfer of the intrastate certificate without the certificate of registration revokes the certificate of registration.

(2) The certificate of registration issued by the Commission is valid as long as the motor common carrier provides transportation entirely in the State from which it received its intrastate certificate and is not controlled by, controlling, or under common control with, a carrier providing transportation outside the State.

(e)(1) On the 180th day after the termination, restriction in scope, or suspension of the intrastate certificate, the authority granted under this section to provide transportation is revoked or likewise restricted unless the intrastate certificate is renewed or reissued or the restriction is removed by that 180th day.

(2) Transportation authorized under this section may be suspended or revoked by the Commission under section 10925 of this title.

268. *Id.*

269. 637 F.2d at 759.

270. *Id.*

271. A "commercial zone" is defined as a zone "adjacent to, and commercially a part of" a municipality. 49 U.S.C. § 10526(b)(1) (Supp. III 1979). ICC regulations determine the extent of the zone according to the population of the municipality. 49 C.F.R. § 1048.101 (1980).

from Winters' ICC registration any territories outside Kansas.[272] Additionally, Winters argued that its single-state status was intact as it in fact never engaged in transport outside Kansas.[273]

The court concluded that the ICC's intervening restrictive order resolved all doubt as to Winters' qualification for intrastate registration under the ICA.[274] Thus, the KCC and the ICC had properly exercised jurisdiction in granting Winters' applications for registration.[275]

In *Midwestern Transportation, Inc. v. ICC*,[276] the court considered the ICC's application of regular route versus alternative route criteria in the grant of a certificate of public convenience and necessity.[277] The applicant, Graves Truck Line, Inc., had been issued a certificate of authority for use of a circuitous route between two cities, and sought certification for an additional direct route. The certificate was granted in view of the substantial cost savings which would accrue to Graves in terms of driver time and fuel expenditures. The petitioners, two of the other twelve carriers authorized on the direct route, brought an action claiming the application, filed as a regular route application, was improperly prosecuted and treated as an alternate route application and could not be sustained under the decisional criteria adopted by the ICC for proving the need for a direct route.[278] Further, the petitioners asserted that the ICC's decision was arbitrary and capricious and could not be sustained even if the correct criteria had been applied.[279] The

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272. 637 F.2d at 759.

273. *Id.*

274. *Id.* at 760.

275. *Id.*

276. 635 F.2d 771 (10th Cir. 1980).

277. Such a grant is pursuant to 49 U.S.C. § 10922 (Supp. III 1979), which provides:

> (a) Except as provided in this section and 10930(a) of this title, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor common carrier or water common carrier, respectively, if the Commission finds that
>
> (1) the person is fit, willing, and able
>
> (A) to provide the transportation to be authorized by the certificate; and
>
> (B) to comply with this subtitle and regulations of the Commission; and
>
> (2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.

Regular route and alternative route criteria were distinguished in Cooper's Express, Inc., 51 M.C.C. 411 (1950):

> We have consistently recognized a distinction between the measure of proof required to sustain the granting of an application seeking authority to improve an existing and competitively effective service and one seeking authority to institute a new service. In determining these so-called alternate route applications, the essential issue presented is whether applicant actually engaged in the transportation of traffic, in substantial volumes, between the termini of the proposed alternate or direct route and is at present in a position effectively to compete with other carriers for such traffic, or whether the new route will enable applicant either to institute a new service not theretofore conducted, or to institute a service so different from that theretofore provided as materially to alter the competitive situation to the injury of existing carriers. In the case of the former, we are justified in granting the authority sought solely upon proof that the proposed operation would result in operating economies, which, although primarily a benefit to the applicant, result in an indirect benefit to the public through the medium of more efficient service.

Id. at 414.

278. 635 F.2d at 773-74.

279. *Id.* at 775.

ICC contended that it applied the correct criteria in granting Graves' application, and that its decision benefitted the public.[280]

The court agreed that the application, although filed as a regular route service application, was prosecuted as an alternative route certification. However, the court decided that Graves fulfilled the criteria required for a regular route certificate.[281] In affirming the Commission, the Tenth Circuit relied upon the criteria for regular and alternative route certification,[282] as well as the impact of the National Transportation Policy[283] on the regulatory powers of the ICC. The court also looked to an ICC policy statement[284] that eliminated as a criterion the adequacy of existing services such as those provided by the petitioners, Graves' competitors. Final rejection of the petitioners' position[285] was based on the Supreme Court's pronouncement in *Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc.*,[286] where the Supreme Court found that the purpose of the ICC, in granting certificates of public convenience and necessity, is to promote the needs of the public while balancing the competing interests.[287]

XI. THE DEFINITION OF "CONSUMER PRODUCT"

In *Bell Enterprises, Inc. v. Consumer Product Safety Commission*,[288] the Tenth Circuit considered whether an amusement park ride is a "consumer product" within the meaning of the Consumer Product Safety Act.[289] The court held that an amusement park "Skyride" is not a "consumer product" as defined in the Act.

The case resulted from an accident involving an amusement park ride

280. *Id.*
281. *Id.* at 777.
282. *See* note 277 *supra*.
283. 49 U.S.C. § 10101(a)(Supp. III 1979) provides:

> (a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes
>
> (1) to recognize and preserve the inherent advantage of each mode of transportation;
>
> (2) to promote safe, adequate, economical and efficient transportation;
>
> (3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
>
> (4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;
>
> (5) to cooperate with each State and the officials of each State on transportation matters; and
>
> (6) to encourage fair wages and working conditions in the transportation industry.
>
> (b) this subtitle shall be administered and enforced to carry out the policy of this section.

284. 44 Fed. Reg. 60,296 (1979).
285. 635 F.2d at 777.
286. 419 U.S. 281 (1974).
287. 635 F.2d at 777 (quoting Bowman Transp., Inc. v. Arkansas Best Freight Sys., Inc., 419 U.S. at 283).
288. 645 F.2d 26 (10th Cir. 1981).
289. 15 U.S.C. § 2051 (1976).

in Texas, which sparked an investigation of such rides. The "Skyride" involved in the case was an aerial cable tram of a type in general use in amusement parks. The Consumer Product Safety Commission (CPSC) sent a letter to Bell Enterprises in Tulsa, Oklahoma, requesting information about a "Skyride" Bell Enterprises was operating in its amusement park. The letter warned that a failure to provide information could subject Bell Enterprises to penalties up to $500,000, and also could subject individuals to criminal penalties.[290] Bell Enterprises then sought a declaratory judgment that the Consumer Product Safety Act was unconstitutional in regard to the investigatory authority it bestowed on the CPSC, and inapplicable to amusement parks and to their rides since, according to Bell Enterprises, the rides were not "consumer products" over which the CPSC had jurisdiction.[291] The lower court held that the Skyride *was* a consumer product over which the CPSC had jurisdiction, and that Bell Enterprises' constitutional rights had not been violated. Bell Enterprises appealed.[292]

The court of appeals listed several cases where courts had reached different results on the issue of whether Skyrides or similar rides were "consumer products" within the meaning of the Act,[293] and then looked to the Act itself for the definition of "consumer product."

> The term 'consumer product' means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—
>
> (A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer . . . .[294]

The legislative history of the Act indicated that clause (i) was the original clause, defining articles produced or distributed for sale to consumers, and that clause (ii) was added later to include articles dispensed to consumers by gift, promotional samples, or other non-sale distributions.[295] The court, pointing out that clause (ii) was added solely to cover all manner of distribution and not to expand the class of articles defined in clause (i), maintained that the language of clause (i), not the term "enjoyment" in

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290. 645 F.2d at 27.

291. *Id.*

292. *Id. See* Bell Enterprises, Inc. v. Consumer Prod. Safety Comm'n, 484 F. Supp. 1221 (N.D. Okla. 1980), *rev'd*, 645 F.2d 26 (10th Cir. 1981).

293. 645 F.2d at 27; *See* State Fair of Texas v. Consumer Prod. Safety Comm'n, 481 F. Supp. 1070 (N.D. Tex. 1979), *modified*, 650 F.2d 1324 (5th Cir.), *vacated mem.*, 102 S. Ct. 560 (1981); Consumer Prod. Safety Comm'n v. Chance Mfg. Co., 441 F. Supp. 228 (D.D.C. 1977); Walt Disney Prods. v. Consumer Prod. Safety Comm'n, No. 79-0170-LEW (Px) (C.D. Cal. April 18, 1979), *vacated mem.*, 649 F.2d 870 (9th Cir. 1981).

294. 15 U.S.C. § 2052(a)(1) (1976).

295. The court added that no significance was to be attached to the term "personal" in clause (ii), and that "personal" use in clause (ii) is equivalent to "to a consumer for use" in clause (i). 645 F.2d at 28.

clause (ii), determined the definition of a "consumer product."[296] The court disagreed with the CPSC's interpretation, which would have defined a "consumer product" so broadly as to include "any article which the consumer enjoys."[297] In support of its position that clause (ii) does not broaden the clause (i) definition of a consumer product, the court cited a District of Columbia Circuit case, *ASG Industries v. Consumer Product Safety Commission*,[298] for the proposition that both clauses, read together, were designed to ensure that the definition of a "consumer product" does not depend on the mode of distribution by which an article reaches a consumer.[299]

The *Bell Enterprises* court then pointed out that another aspect of this definition lay in the places and purposes stated in the Act. Thus, a consumer product is one purchased or distributed for use, generally, in the places and for the purposes stated in clauses (i) and (ii), *i.e.*, for use in households, residences, or schools, for purposes of recreation "or otherwise."[300]

The definition is clarified further by the exclusion in subdivision (A) of articles "not customarily produced or distributed for sale to, or use or consumption by . . . a consumer."[301] Therefore, a product customarily sold "to an industrial or commercial enterprise which had the *exclusive* control and possession of the article in its use" is not a consumer product under the Act.[302] The District of Columbia Circuit had considered this exception clause in *Consumer Product Safety Commission v. Anaconda Co.*[303] Like the *Anaconda* court, the Tenth Circuit in *Bell Enterprises* deemed the "separately-sold-to-consumers" aspect to be a factor in determining whether a Skyride was a consumer product.[304]

Another factor considered was whether the article, when used, is under the control and direction of the user. The court inferred this requirement from the inclusion of articles for use in household, residences, or schools, in

296. *Id.*

297. *Id.*

298. 593 F.2d 1323 (D.C. Cir.), *cert. denied sub nom.* Flat Glass Ass'n of Japan v. Consumer Prod. Safety Comm'n, 444 U.S. 864 (1979).

299. *Id.* at 1328.

300. 645 F.2d at 28-29. The court observed that much thought went into the definition of "consumer product" in the Act:

> It should be noticed that in (i), as well as in (ii), the description changes *within each phrase* from one directed to *place* of use to *how* the article is used. Since this division or contrast is evident and was repeated, it is of importance. The "where" element—any article produced or distributed for use "in or around a . . . household, or residence," and the "how" element—for use "in recreation, or otherwise," are separately stated. Thus the articles are those produced or distributed for use (ordinarily) at the places stated although they may be used elsewhere from time to time. They are articles produced (ordinarily) for the purposes or uses stated.

Id. at 28-29.

301. 15 U.S.C. § 2052(a)(1)(A) (1976).

302. 645 F.2d at 29 (emphasis in original).

303. 593 F.2d 1314, 1322 (D.C. Cir. 1979). The *Anaconda* court had held that "consumer products" are those "customarily sold or otherwise distributed to consumers." They require more than an occasional sale: "there must be a significant marketing of the product as a distinct article of commerce for sale to consumers or for the use of consumers before the product may be considered as 'customarily' produced or distributed in that manner." The *Anaconda* case was remanded to the trial court for a determination of whether the article in question was purchased separately by consumers. *Id.*

304. 645 F.2d at 29.

recreation "or otherwise."[305]

The trial court in *Bell Enterprises* had decided that the Skyride was a consumer product because it was used for recreational purposes. In determining this, the trial court relied on *Consumer Product Safety Commission v. Chance Manufacturing Co.*,[306] which also involved an amusement park ride, and on *State Fair of Texas v. Consumer Product Safety Commission*,[307] where an aerial tramway was held to be a consumer product. The appellate court cited a contrary holding, *Walt Disney Productions v. Consumer Product Safety Commission*,[308] where another approach was taken in holding that a Skyride was *not* a consumer product. The *Walt Disney* court had looked to the sections of the Act[309] which require that free samples of the products be provided to the CPSC, and that the CPSC be able to purchase the product at cost. This could not apply to a Skyride; thus, the Skyride could not be subject to the Act.[310]

The Tenth Circuit in *Bell Enterprises* agreed that the Skyride was not a consumer product, but its rationale was different from that used in *Walt Disney Productions*. The court looked to several considerations implied in the section of the Act defining "consumer product:" 1) a "consumer product" is defined in clause (i) of the section, and clause (ii), referring to "personal use, consumption, or enjoyment" of a product, is not an expansion of clause (i);[311] 2) a "consumer product" is one used at the places—that is, households, residences, or schools—and for the purposes stated in the Act, although the latter consideration is not absolute;[312] 3) a "consumer product" is one customarily produced or distributed for sale or distribution to a consumer, or for his "use, consumption, or enjoyment;"[313] 4) a "consumer product," when used, must ordinarily be in the control and possession of the user.[314] After taking these factors into account, the Tenth Circuit concluded

305. *Id.*

306. 441 F. Supp. 228 (D.D.C. 1977). The *Chance* court held that a user's exposure to danger was an important factor in determining whether an article is a consumer product. The Tenth Circuit in *Bell Enterprises* rejected this test, as it is not implied in the statutory definition of a consumer product. 645 F.2d at 30.

307. 481 F. Supp. 1070 (N.D. Tex. 1979), *modified*, 650 F.2d 1324 (5th Cir.), *vacated mem.*, 102 S. Ct. 560 (1981). The *State Fair* court concluded that the ride was a consumer product because it was produced "for the personal use . . . or enjoyment" of consumers "in recreation." This court, like the *Chance* court, also held that in the statutory section defining "consumer product," the term "in recreation" did not modify the preceding phrase "in or around . . . a household." *Id.* at 1077.

308. No. 79-0170-LEW (Px) (C.D. Cal. April 18, 1979), *vacated mem.*, 649 F.2d 870 (9th Cir. 1981).

309. 15 U.S.C. §§ 2066(b), 2076(f) (1976).

310. 645 F.2d at 30. The Tenth Circuit Court went on to mention two cases not involving rides where articles were held to be consumer products. In Kaiser Aluminum & Chemical Corp. v. Consumer Prod. Safety Comm'n, 574 F.2d 178 (3d Cir.), *cert. denied*, 439 U.S. 881 (1978), aluminum wiring was found to be a consumer product because it is an article produced or distributed for the personal use or enjoyment of consumers. In Southland Mower v. Consumer Prod. Safety Comm'n, 619 F.2d 499 (5th Cir. 1980), lawn mowers were held to be governed by CSPC safety standards if they were customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer. 645 F.2d at 30.

311. 645 F.2d at 30.

312. *Id.*

313. *Id.*

314. *Id.*

that a Skyride was not a consumer product, and remanded the case to the district court for entry of judgment in favor of Bell Enterprises.[315]

Judge Weinshienk of the United States District Court for the District of Colorado, sitting by designation, dissented. She stated her belief that the legislative intent of adding clause (ii) to the definition was to expand the coverage of clause (i).

Citing the Report of the House Committee on Interstate and Foreign Commerce on CPSA,[316] Judge Weinshienk asserted that the express intent of the legislators in amending the definition was to extend the Act's coverage to products principally sold to industrial or institutional buyers, so long as they were produced or distributed for the use of consumers.[317] Even though true industrial products were not intended to be covered by the Act and, therefore, are specifically excluded from the definition of a consumer product because they are not customarily produced or distributed for sale to or use of consumers,[318] there are exceptions. The Committee report pointed out that "[i]f the manufacturer or distributor of an industrial product fosters or facilitates its sale to or use by consumers, the product may lose its claim for exclusion if a significant number of consumers are thereby exposed to hazards associated with the product."[319] Thus clause (ii), which covers articles for the *use* of consumers even though such articles may not be sold *to* consumers, adds quasi-industrial products sold for consumer use to the definition of a "consumer product." Judge Weinshienk concluded that manufacturers and distributors selling products to industrial buyers should be liable under the Act when the products are intended solely for consumer use, or when consumers are exposed to hazards associated with the product.[320] Bell Enterprises was such an industrial buyer "because it [was] engaged in the recreation industry and it purchased the Skyride from the Swiss manufacturer for the ultimate recreational use of consumers."[321]

The dissent also differed with the majority's interpretation of the statutory language designating the place and purpose of use as a criterion in determining whether an article is a "consumer product."[322] Judge Weinshienk agreed with the *ASG Industries* court, which held that the "enumeration of locations and activities in which a consumer product may be used is not a limitation on jurisdiction, but rather an assurance of comprehensiveness."[323]

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315. *Id.*

316. H.R. Rep. No. 92-1153, 92 Cong., 2d Sess. (1972).

317. 645 F.2d at 30-31(Weinshienk, J., dissenting).

318. Id. at 31-32.

319. H.R. Rep. No. 92-1153 at 27.

320. 645 F.2d at 32 (Weinshienk, J., dissenting).

321. *Id.* Judge Weinshienk did not believe that the court in ASG Industries v. Consumer Prod. Safety Comm'n, 593 F.2d 1323 (D.C. Cir.), *cert. denied sub nom.* Flat Glass Ass'n of Japan v. Consumer Prod. Safety Comm'n, 444 U.S. 864 (1979), rejected the CPSC's position that clause (ii) expands the clause (i) definition of a consumer product, since the *ASG Industries* court stated that clause (ii) covers "products purchased by an institution for consumer use." 645 F.2d at 32 (quoting ASG Industries v. Consumer Prod. Safety Comm'n, 593 F.2d at 1328). *See* text accompanying notes 298-99 *supra*.

322. *See* text accompanying note 300 *supra*.

323. 645 F.2d at 32 (Weinshienk, J., dissenting) (quoting ASG Industries v. Consumer Prod. Safety Comm'n, 593 F.2d at 1328).

She also pointed out that *Chance Manufacturing Co.*, which the majority opinion cited, stood for the proposition that the term "in recreation or otherwise" contemplated the use of consumer products in locations other than households, residences, and schools.[324] Hence, an amusement park could be a place where a consumer product is used, if it is used for recreational purposes. Also, because the statute used the term "or" rather than "and," Judge Weinshienk rejected the majority's view that *both* the "place" and the "purpose" requirements in the definition must be met, that is, that a consumer product must be used at home or at school *and* for recreation or otherwise: "I would hold that the phrase 'in recreation or otherwise' establishes an independent basis for Commission jurisdiction, and that plaintiff's aerial tramway meets this definitional criterion."[325]

In light of her conclusion that the Skyride is a consumer product within the meaning of the Act, Judge Weinshienk reached the question of the constitutionality of the Act's apparent authorization of warrantless 'constructive searches' and of the CPSC's investigative efforts.[326] She noted that the United States Supreme Court in *Marshall v. Barlow's, Inc.* held that the fourth amendment generally requires an administrative agency to obtain a warrant before entering the premises of one refusing consent to a warrantless entry. Even if a statute authorizes a warrantless search, an agency still must conform to certain procedures to avoid fourth amendment violations: "if the agency actually obtains process which satisfies the Fourth Amendment, the searches under the statute are permissible."[327]

Judge Weinshienk felt that neither the Act nor the CPSC's investigative efforts pursuant to the Act violated Bell Enterprises' fourth amendment rights, since the subpoena enforcement proceedings "provide[d] the same check on abuse of agency power as [would] an administrative search warrant."[328] Like the usual search warrant proceeding, the CPSC's proceeding incorporated an opportunity for judicial review prior to entry, and the standard for enforcing the subpoena did not differ substantially from that required before a search warrant is issued.[329]

Finally, Judge Weinshienk stated she would affirm the district court's ruling that Bell Enterprises lacked standing to challenge the constitutionality of the statutory provisions authorizing civil and criminal sanctions.[330] She commented that the CPSC letter's reference to possible sanctions "[did] not constitute a threat of imminent and immediate prosecution and hence, [did] not establish 'real and immediate' injury or threat of injury"[331] that would give Bell Enterprises standing to challenge the constitutionality of the provisions.

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324. 436 U.S. 307 (1978).

325. 645 F.2d at 32 (Weinshienk, J., dissenting).

326. *Id.*

327. *Id.* at 33 (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 325 n.23 (1978)).

328. 645 F.2d at 33 (Weinshienk, J., dissenting).

329. *Id.*

330. *Id.*

331. *Id.*

XII. STANDING AND MOOTNESS

In *Mountain States Legal Foundation v. Costle*,[332] the Tenth Circuit dismissed a petition challenging the constitutional and statutory authority of the Environmental Protection Agency (EPA) to disapprove portions of the Colorado air quality control implementation plan. The petition was filed by Mountain States Legal Foundation (Mountain States), described as a nonprofit public interest law center,[333] and twenty-seven named members of the Colorado legislature. Mountain States also claimed to represent the sovereign interest of the State of Colorado in an *ex relatione* capacity.[334] Nevertheless, the court ruled that in a lawsuit challenging an EPA ruling of this type, the real party in interest is the state, by and through its attorney general. The Colorado attorney general did not agree with most of the plaintiffs' contentions; in fact, he intervened in the action and filed a brief "in direct, absolute conflict with the contentions raised by Mountain States,"[335] in which he attacked Mountain States' standing to represent the state in an *ex relatione* capacity. Hence, the court dismissed the petition for want of standing. In so doing, the court addressed the issues of mootness and standing, and refused to extend standing to parties lacking a personal stake in the outcome of the controversy.[336]

When the Clean Air Act[337] was amended in 1977, the 1972 Colorado State Implementation Plan (SIP), designed to implement EPA-established ambient air-quality standards for various pollutants, had to be revised. The amendments to the Act dealt with "nonattainment areas," *i.e.*, areas within states that fail to meet air quality standards.[338] Under these amendments, states with nonattainment areas had to submit revised SIP's by January 1, 1979. States that appeared unable to conform to air quality control standards in the nonattainment areas by December 31, 1982, also were required to implement an automobile emission inspection and maintenance (I/M) program.[339] The EPA claimed the Act[340] authorized it to ban new construction in nonattainment areas, and to withhold federal grants and highway funds, if a state failed to comply with the air quality control standards.[341]

The EPA's ruling on Colorado's revised SIP approved it only in part.[342] The ruling stated that the Colorado Senate Bill establishing an I/M program and commissioning a study of the effectiveness of various I/M programs was defective because it did not create "adequate enabling authority."[343] The EPA ruling established deadlines with which the Colo-

332. 630 F.2d 754 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981).
333. *Id.* at 756 n.1.
334. *Id.* at 757.
335. *Id.* at 759.
336. *Id.* at 760-72.
337. 42 U.S.C. § 7401 (Supp. III 1979).
338. *Id.* §§ 7501-7508.
339. *Id.* § 7502(b)(11)(B).
340. *Id.* §§ 7410(a)(2)(I), 7506(a), 7616(b).
341. 630 F.2d at 757.
342. *Id.*
343. *Id.* at 758. *See id.* for a list of the specific deficiencies in the legislation.

rado legislature and governor were to comply in creating an acceptable I/M program.[344]

On the deadline date, March 1, 1980, the EPA announced to the court its intention to disapprove the carbon monoxide and ozone portions of the Colorado SIP, to impose moratoriums on new construction of stationary sources of these pollutants in the nonattainment areas, and to limit federal funds.[345] Mountain States then filed its petition for review, challenging the EPA's actions as "coercive action designed to achieve specific state legislative action,"[346] and as violations of the APA,[347] the first, fifth, and tenth amendments to the United States Constitution, and article IV, section 4 of the Constitution, which guarantees a republican form of government.[348]

The Colorado attorney general, representing the state, disagreed with most of Mountain States' contentions, intervened in the lawsuit, and filed an opposing brief. The attorney general maintained that the EPA administrator acted within his statutory authority in conditionally approving Colorado's SIP; that neither the first nor tenth amendments nor the due process provisions of the fifth amendment, nor the guarantee of a republican form of government, had been violated; and that Mountain States lacked standing to represent the state in an *ex relatione* capacity.[349] The attorney general did argue, however, that the EPA's action in withholding federal funds before final adjournment of the 1980 Colorado General Assembly Session would be "arbitrary and capricious . . . because the General Assembly was making reasonable efforts to cure the deficiencies."[350]

The court stayed the EPA's enforcement of sanctions until after May 1, 1980, and ordered Mountain States to submit its petition for review. After the injunction expired, the EPA administrator again imposed the funding and construction restrictions. Five days later, the state legislature adopted I/M legislation, which Governor Richard Lamm signed into law on May 23, 1980.[351] The EPA notified the court that it tentatively deemed this I/M legislation to be adequate, and that it proposed the legislation's approval as part of the Colorado SIP.[352] On May 29, 1980, the court, upon its own motion, ordered the parties to show cause why Mountain States' appeal should not be "dismissed for mootness."[353] The Colorado attorney general took no position on the mootness question; the EPA urged that the action be dismissed as moot;[354] and Mountain States argued that the issues were not

344. The final deadline, however, was self-imposed by the Colorado legislature. 630 F.2d at 758.

345. 630 F.2d at 758-59.

346. *Id.* at 759.

347. 5 U.S.C. § 551 (1976).

348. 630 F.2d at 759.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.* at 760. The agency pointed out that although the case would be moot technically only after the EPA finally approved the I/M legislation, the EPA would act promptly. The EPA added that it anticipated lifting all sanctions so that no action would be taken under sections 176(a) and 316 of the Clean Air Act, 42 U.S.C. §§ 7506(a), 7616 (Supp. III 1979).

moot and "demanded judicial resolution."[355]

The court first addressed the threshold issue of standing. It agreed with the EPA and with the attorney general that Mountain States did not have standing to sue either in its own right or on behalf of its officers, members, and supporters.[356] The critical question was whether any of the petitioners were "aggrieved persons entitled to judicial review of final agency action,"[357] or had presented a sufficient case or controversy in fulfillment of article III requirements.[358] The court cited *Duke Power Co. v. Carolina Environmental Study Group*[359] for the proposition that "injury in fact" is the "one constant element in judicial statements concerning standing."[360] The Tenth Circuit's interpretation of "injury in fact" is "concrete and certain harm,"[361] whether that harm be out-of-pocket costs to a business because of a new governmental rule, or some other unwanted result of a governmental rule, which result may or may not include pecuniary loss.[362]

To have standing, a plaintiff must allege some particularized injury that "sets him apart from the man on the street,"[363] unless a specific statutory grant of a right of review exists.[364] The injury must result from the defendant's conduct, and "must constitute concrete and certain harm."[365] Additionally, a litigant representing the interests of third parties must demonstrate that the agency's conduct has adversely affected him or has injured those he represents.[366]

The court decided that under these tests, Mountain States lacked standing because first, it lacked standing to sue in its own right. Mountain States failed to show that the challenged EPA actions would impair its functions and activities.[367] The organization did not allege it would suffer from diminished membership, financial losses, or other consequences due to the EPA's actions. Also, the court ruled Mountain States could not fulfill the requirement of section 10(a) of the APA,[368] which grants a right of judicial review to persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a rele-

355. 630 F.2d at 760.
356. *Id.* at 767.
357. *Id.*
358. *Id.* at 764.
359. 438 U.S. 59 (1978).
360. 630 F.2d at 764.
361. *Id.*
362. *Id.* at 764-65 (citing Hunt v. Washington Apple Advertising Comm'r, 432 U.S. 333 (1977), and Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977)).
363. 630 F.2d at 765 (citing United States v. Richardson, 418 U.S. 166 (1974)).
364. 630 F.2d at 765.
365. *Id.* (citing National Collegiate Athletic Ass'n v. Califano, 622 F.2d 1382 (10th Cir. 1980)).
366. 630 F.2d at 765 (citing Sierra Club v. Morton, 405 U.S. 727 (1972) and Data Processing Serv. v. Camp, 397 U.S. 150 (1970)). The court then examined the standing issue with reference to the statutory provisions under which the EPA's actions were challenged, and found that the Clean Air Act calls for exclusive review in the courts of appeals of EPA grants or denials of waivers to companies unable to meet clear air standards. Citizens' suits, then, are authorized under the Act when—but only when—the EPA administrator allegedly fails to perform a non-discretionary duty. 630 F.2d at 765-66.
367. *Id.* at 767.
368. 5 U.S.C. § 702 (1976).

vant statute. . . ."[369] Mountain States had not shown "a sufficient 'personal stake' in the outcome of the controversy" to enable it to sue in its own behalf as an "aggrieved person."[370]

Second, even if Mountain States raised constitutional claims on behalf of its "officers, members, supporters, and the State of Colorado,"[371] this did not give the organization standing. The court quoted *Sierra Club v. Morton*[372] for the proposition that an organization claiming to "vindicate [its] own value preferences through the judicial processes"[373] must itself have "a direct stake in the outcome."[374] Mountain States, however, could show nothing more than "an indirect stake in the action."[375] This did not fulfill the standing requirement of "an injury in fact bringing the party within the zone of interests protected by the Clean Air Act."[376]

The Tenth Circuit held that Mountain States also lacked standing to sue on behalf of its officers, members, and supporters. Nothing in the record indicated that they had "that necessary 'personal stake' demonstrating injury in fact,"[377] since the only resources at stake were membership fees or tax payments, which in themselves are not enough to confer standing. Nor was there any showing that their activities within the organization were or would be affected by the challenged EPA actions. It is necessary, under the APA, for members of organizations to demonstrate that the statute or regulation they challenge possesses "some articulable 'cause-and-effect' relation to an identifiable 'injury' which, in fact, affects them."[378]

Mountain States had requested a court order setting aside the EPA actions as unconstitutional and punitive toward the State of Colorado. Mountain States had invited Governor Lamm to order the attorney general to "represent the state's interest in this grave constitutional matter,"[379] and announced its intent to represent the state *ex relatione*, since the attorney general had manifested no desire to do so.[380] The court described Mountain States' statements as an acknowledgement that their challenges directly affected the interests of the State of Colorado; such challenges may be advanced only by the attorney general who, in this case, refused to equate the state's interests with those alleged by Mountain States.[381]

The petitioners included twenty-seven named members of the Colorado

369. *Id.*
370. 630 F.2d at 767 (citing United States v. SCRAP, 412 U.S. 669 (1973) and Sierra Club v. Morton, 405 U.S. 727 (1972)).
371. 630 F.2d at 767.
372. 405 U.S. 727 (1972).
373. 630 F.2d at 767 (quoting 405 U.S. at 740).
374. 630 F.2d at 767 (quoting 405 U.S. at 740).
375. 630 F.2d at 767.
376. *Id.*
377. *Id.*
378. *Id.* at 768.
379. *Id.*
380. *Id.*
381. *Id.* The court then cited two cases standing for the proposition that neither citizens, nor taxpayers, nor other "private attorney generals" have standing to bring derivative actions on behalf of state or public interests, unless a private injury is alleged. Gallagher v. Continental Ins. Co., 502 F.2d 827 (10th Cir. 1974); Natural Resources Defense Council, Inc. v. EPA, 481 F.2d 116 (10th Cir. 1973).

General Assembly. Mountain States claimed the legislators had standing on the ground that the EPA actions, compelling passage of certain legislation, infringed upon the legislators' freedom of speech and first amendment right to vote according to their constituents' wishes.[382]

The court ruled that the legislators lacked standing to raise these claims, and cited *Lamm v. Volpe*[383] as precedent. In *Lamm*, the court had denied standing to the plaintiff who sought—as a citizen, taxpayer, and legislator—a declaratory judgment that a Highway Beautification Act provision[384] was unconstitutional because it violated the tenth amendment by intimidating the Colorado legislature into passing certain bills without due consideration.[385] A private citizen, whether a legislator, a citizen, or a taxpayer, must demonstrate a personal stake in a lawsuit, and show "that he is the proper party to request adjudication of the particular issue,"[386] in order to have standing.

The *Mountain States* court concluded by affirming that the State of Colorado was the real party in interest, and the only one with standing to challenge the EPA action.[387] It also observed that the Colorado Supreme Court had held that Colorado law[388] grants the attorney general the exclusive right, absent a contrary statute, to represent the state in lawsuits to protect state interests.[389] The attorney general, then, is "the exclusive legal representative of the state in all [public interest] litigation."[390] Mountain States lacked standing to represent the state in an *ex relatione* capacity.

The court declined to rule on Mountain States' constitutional and statutory challenges, since the petitioners were deemed to be without standing, and the state did not advance such challenges.[391]

Finally, the court ruled that all the contentions raised by the State of Colorado, as intervenor, were moot, because while the lawsuit was pending, the EPA finally approved Colorado's I/M program for inclusion in its SIP, and removed the restrictions on federal funding and stationary source contruction.[392] Thus, the petition for review was dismissed.

XIII. AGENCY INVESTIGATIVE AUTHORITY

In *CAB v. Frontier Airlines, Inc.*,[393] the issue was whether the CAB had the authority to inspect all minutes of Frontier Airlines directors' meetings

382. 630 F.2d at 769-70.
383. 449 F.2d 1202 (10th Cir. 1971).
384. 23 U.S.C. § 131 (1976 & Supp. III 1979).
385. 449 F.2d at 1203-05.
386. 630 F.2d at 770.
387. *Id.* at 771.
388. COLO. REV. STAT. § 24-31-101(1)(a) (1973 & Supp. 1980).
389. 630 F.2d at 771 (citing State Bd. of Pharmacy v. Hallett, 88 Colo. 331, 296 P. 540 (1937)).
390. 630 F.2d at 771.
391. *Id.* at 772.
392. *Id.*
393. No. 79-1584 (10th Cir. April 17, 1981), *rehearing granted en banc* (10th Cir. June 18, 1981).

without showing that the minutes sought were relevant to a proper investigatory purpose.

Frontier Airlines, a regulated air carrier, is subject to CAB control over its fares and accounting standards, in relation to the government subsidies the airline receives. The CAB is authorized under the Federal Aviation Act of 1958[394] to "prescribe the forms of any and all accounts, records, and memoranda to be kept by air carriers . . . and the length of time such accounts, records, and memoranda shall be preserved."[395] The CAB is also permitted access, at all times, "to all accounts, records, and memorandums . . . required to be kept by air carriers . . . and it may employ special agents or auditors, who shall have authority . . . to inspect and examine any and all such . . . accounts, records, and memorandums."[396]

During a routine examination of Frontier Airlines' records, CAB auditors requested access to all the minutes of directors' meetings and other committee meetings within the corporation. Frontier Airlines refused to allow CAB to inspect the records until CAB showed "that its request was reasonably definite and relevant to a proper investigative purpose."[397] The CAB responded only that its auditors were noting "the occurrence of all major transactions approved since the period of the last audit."[398] Frontier Airlines agreed to submit to CAB the minutes relating to records of accounts or other information reported to the agency, as well as board-and-committee-approved resolutions.[399]

The CAB petitioned the Federal District Court for the District of Colorado, requesting that the court order Frontier Airlines to allow the CAB to inspect the corporate minutes requested. The district court agreed with Frontier Airlines' assertion that the CAB's inspection authority should be limited to the parts of the record directly relevant to the area under investigation.[400] The district court stated that to rule otherwise would give the CAB "unlimited power of inspection equivalent to a general warrant, powers which . . . the CAB does not have."[401]

The court of appeals reversed in an opinion written by Judge Logan, and remanded the case on the ground that no precedent existed to support limitations on the statutory authority of CAB and other agencies "to inspect the business records they properly require to be kept."[402] The court held that administrative agencies may inspect records reasonably required to be kept, not only in order to obtain information needed for regulatory purposes, but also to determine "whether or not such records are being kept, and

394. Section 407(d), 49 U.S.C. § 1377(d) (1976).

395. *Id.* The Tenth Circuit Court noted that the CAB had exercised its authority under § 407(d) to issue "regulations requiring carriers to preserve permanently the minutes of meetings of directors and of the executive and other directors committees." No. 79-1584, slip op. at 2. *See* 14 C.F.R. § 249.13 (1981).

396. Section 407(e), 49 U.S.C. § 1377(e) (1976 & Supp. III 1979).

397. No. 79-1584, slip op. at 3.

398. *Id.*

399. *Id.*

400. *Id.*, slip op. at 3-4.

401. *Id.*, slip op. at 4.

402. *Id.*, slip op. at 7.

whether or not they are being kept in such a way as to make available the specified information."[403] The question before the Tenth Circuit was whether the CAB could examine the minutes in their entirety, including irrelevant items, or whether it must specify beforehand the portions sought and the reasons therefor, with investigatory power limited to "portions . . . relevant to a proper purpose."[404]

The Tenth Circuit Court first expressed its belief that the CAB could not require air carriers under its jurisdiction to keep certain records, and subsequently enjoy unlimited access to those records. The intent behind the relevant Federal Aviation Act provisions was to permit CAB prescription of, and access to, records "likely to produce material relevant to [CAB's] proper regulatory and investigative authority."[405] Directors' minutes, which are among "the most basic corporate records,"[406] do contain material properly required by an agency that determines amounts a corporation can charge for its principal activity.[407] Hence, the court concluded that the CAB rule[408] requiring regulated airlines to maintain and preserve corporate minutes was within the scope of CAB's authority under the Federal Aviation Act.[409]

Having thus concluded, the court next asked whether there was an implicit limitation on the CAB's power to examine these records. No such limitation was expressed in the Federal Aviation Act.[410]

The court observed that Congress had modeled the authority given to the CAB under the Federal Aviation Act[411] on a provision in the Interstate Commerce Act,[412] which had given the ICC similar authority over the railroads.[413] Cases delineating the boundaries of the ICC's investigatory powers thus apply as well to an analysis of the CAB's authority. The court noted that the United States Supreme Court had considered the ICC's right to inspect railroad records in *United States v. Louisville & Nashville Railroad*.[414] The Supreme Court had indicated that the ICC was not limited in its power to examine "records it properly required to be kept, including corporate minutes."[415] Thus, an administrative agency may inspect records it reasonably requires to be kept, not only for regulatory reasons, but also to make certain the records are being properly kept.[416]

403. *Id.*, slip op. at 6-7 (quoting Fleming v. Montgomery Ward & Co., 114 F.2d 384, 391 (7th Cir.), *cert. denied*, 311 U.S. 690 (1940)).

404. No. 79-1584, slip op. at 3. The parties stipulated that some material in the minutes sought was relevant to the CAB's regulatory purpose, but that it was probable there were also irrelevant items. *Id.*

405. *Id.*, slip op. at 4.

406. *Id.*

407. *Id.*

408. 14 C.F.R. § 249.13(f) (1981).

409. 49 U.S.C. § 1377(d) (1976); No. 79-1584, slip op. at 5.

410. 49 U.S.C. § 1377(e) (1976 & Supp. III 1979); No. 79-1584, slip op. at 5.

411. 49 U.S.C. § 1377(e) (1976 & Supp. III 1979).

412. 49 U.S.C. § 20(6) (repealed 1978).

413. No. 79-1584, slip op. at 5.

414. 236 U.S. 318 (1914).

415. No. 79-1584, slip op. at 5.

416. *Id.*, slip op. at 6-7 (citing Fleming v. Montgomery Ward & Co., 114 F.2d 384, 391 (7th Cir.), *cert. denied*, 311 U.S. 690 (1940)).

Judge Breitenstein dissented from the majority holding. He believed that the information sought by the agency must be "reasonably relevant to a proper investigative purpose within [the agency's] jurisdiction"[417] in order for the agency to have authority to inspect corporate minutes. Judge Breitenstein argued that CAB now enjoyed an "administrative fiat" of a type "odious in both English and American history."[418]

The majority had distinguished *CAB v. United Airlines, Inc.*[419] on the basis that in *United Airlines* no regulation required the keeping of the records sought by the CAB, whereas in the Frontier Airlines case, the records sought were mandated by law. Judge Breitenstein disagreed with this distinction. The question, he maintained, was not whether the records were required, but "whether the information sought is relevant to a proper investigative purpose."[420] Judge Breitenstein maintained that the CAB sought "unqualified access, an impermissible general warrant."[421]

XIV. THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO CHANGE TRIBAL ROLLS

In *Sac & Fox Tribe of Indians of Oklahoma v. Andrus*,[422] the Tenth Circuit held that the Secretary of the Interior had no authority to change the tribal status of certain individuals upon appeal from a tribal committee decision, four years after a tribal roll became final.[423]

In 1967 or 1968, the Bureau of Indian Affairs (BIA) began urging the Sac and Fox tribe to prepare a roll of tribal members by reviewing and correcting the 1937 roll. The roll was to be used in the distribution of Indian claim settlement funds to the Sac and Fox tribe.[424] The tribe revised the roll, removing the names of those who lacked the requisite one-quarter Sac and Fox blood. This requirement was set by the tribe's constitution.[425]

Among the names removed was that of Susan Nawashe, who, according to the tribe's business committee, was not a tribe member but was, instead, a Shawnee married to a Sac and Fox tribe member.[426] The tribe's business committee then reduced the quantum of Sac and Fox blood attributed to the offspring of those removed from the roll, resulting in the further removal of the names of several descendants, including the intervenors, Susan

417. No. 19-1584, dissenting op. at 1 (citing United States v. Morton Salt Co., 388 U.S. 632, 652 (1949)).

418. No. 79-1584, dissenting op. at 2 (quoting Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186, 207 (1945)).

419. 542 F.2d 394 (7th Cir. 1976). In this case, the court held that the CAB did not have the right of unconditioned access to airline records without specifying an investigative purpose and making a reasonably definite demand.

420. No. 79-1584, dissenting op. at 2.

421. *Id.* (citing CAB v. United Airlines, Inc., 542 F.2d 394 (7th Cir. 1976)).

422. 645 F.2d 858 (10th Cir. 1981).

423. The roll determines who can participate in the distribution of federally-derived funds. It does not make those on the roll tribe members for any other purpose. *Id.* at 860.

424. *Id.* at 859.

425. *Id.*

426. *Id.*

Nawashe's great-grandchildren, who no longer were deemed to meet the one-quarter blood requirement.[427] The committee then sent notices to those who were disenrolled or who had their status changed, and advised them of the changes and their right to appeal within a designated time.[428]

The BIA, through a letter from its acting deputy commissioner, approved the updated roll in May 1968, in accordance with federal law.[429] The revised 1937 roll then became final, as did the disenrollment of several former tribe members, including Susan Nawashe and her great-grandchildren.

In 1971, however, the issue was revived. The tribe's business committee passed a resolution affirming the 1968 disenrollment. In September 1972, the BIA deputy commissioner sent the tribe a letter reaffirming the prior approval of the roll, but permitting appeals by the heirs. Susan Nawashe's heirs appealed and, in June 1974, an associate solicitor of the Interior decided that Susan Nawashe *was* a Sac and Fox tribe member, since she had been adopted into the tribe, and BIA policy dictated that those who were recognized as tribe members because of marriage, adoption, or other formality, before the firm establishment of membership rights, were to be regarded as "possessing the blood of the tribe with which they affiliated."[430]

The tribe's request for reconsideration was granted. The acting Secretary of the Interior affirmed the Associate Solicitor's decision. The tribe then sought review in the Federal District Court for the Western District of Oklahoma,[431] which affirmed the Secretary's decision.

The Tenth Circuit reversed on the basis that the Secretary's approval of the revised 1937 role was "final and conclusive."[432] Those whose tribal status was changed had been notified in 1968, and had not appealed. Hence, the approved roll "became the final roll and was conclusive as the the quantum of Sac and Fox blood of the intervenors."[433] The Secretary thus possessed no authority to change the tribal status of individuals upon appeal four years after the roll became final.[434] The court set the Secretary's decision aside and declared the revised and approved 1937 tribal roll to be controlling in regard to the allocation of federal funds to the Sac and Fox tribe.[435]

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427. *Id.*

428. *Id.*

429. 25 U.S.C. § 163 (1976). The applicable provision authorizes the Secretary of the Interior "to cause a final roll to be made of the membership of any Indian tribe." The rolls must contain "the ages and quantum of Indian blood," and, when approved by the Secretary, are deemed "to constitute the legal membership of the respective tribes for the purpose of segregating the tribal funds as provided in section 162 of this title, and shall be conclusive both as to the ages and quantum of Indian blood . . . ." *Id.*

430. 645 F.2d at 860 (citing a letter from Duard Barnes, Associate Solicitor of the Interior, to the Sac and Fox tribe, 1974).

431. 645 F.2d at 860.

432. *Id.* at 861. The court based its decision on the language in 25 U.S.C. § 163 (1976). The court also commented on the inadequacy of the administrative record in this case. Most disturbing to the court was the omission from the record of the letter from the BIA approving the tribal roll. 645 F.2d at 860-61.

433. 645 F.2d at 862.

434. *Id.*

435. *Id.*

XV. AGRICULTURAL ADJUSTMENT ACT PAYMENTS

In *Martin v. Bergland*,[436] the Tenth Circuit upheld the district court's refusal to declare unconstitutional a Department of Agriculture regulation stating that a husband and wife shall be considered as one person for purposes of payments to farmers under the Agricultural Adjustment Act of 1938.[437]

The regulation was promulgated as part of a congressional attempt "to avoid surpluses and shortages in farm products."[438] Farmers taking part in programs designed to achieve this objective receive payments based on a formula in the Act.[439] Because there was public protest against "large payments received by individual farmers who kept their farms idle,"[440] the payments were limited to $20,000 per "person."[441] The Secretary of Agriculture, following a congressional mandate, defined the term "person"[442] as including a husband and wife as one person.[443]

Before they were married, the appellants operated separate farms located in different counties. After marriage, they maintained their respective farms independently. Their accumulative entitlements would have exceeded the $20,000 limit but for the husband-wife rule.[444] The appellants maintained the rule was unconstitutional on equal protection and due process grounds, and because it caused a forfeiture of their contractual rights.[445] The appellants' main argument was that the husband-wife rule denied them equal protection of the laws under the fifth amendment, since the rule impermissibly interfered with the exercise of their fundamental right to marry.[446] Further, the appellants insisted that since one section of the regulation[447] adequately protected the intent to limit payments, the Secretary's refusal to regard the two farms as separate, solely because the appellants were married, was a denial of equal protection.[448]

The court decided that the husband-wife rule was not a sufficient burden on the appellants' freedom to marry to warrant strict scrutiny. The court cited two United States Supreme Court decisions, *Zablocki v. Redhail*[449] and *Califano v. Jobst*,[450] for the proposition that although the right to marry is

436. 639 F.2d 647 (10th Cir. 1981).
437. 7 U.S.C. § 1281 (1976).
438. 639 F.2d at 648.
439. 7 U.S.C. § 1445a (1976).
440. 639 F.2d at 648.
441. Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, 87 Stat. 221.
442. 7 C.F.R. § 795.3 (1981), which designated the generally applicable "conditions in accordance with which an entity will be deemed a 'person' for purposes of the payment limitation." 639 F.2d at 648.
443. 7 C.F.R. § 795.11 (1981).
444. 639 F.2d at 649.
445. *Id.* at 648.
446. *Id.* at 649-50. The appellants admitted that married persons do not constitute a suspect class for purposes of equal protection analysis. *Id.* But because a fundamental right allegedly was involved, they urged that a strict scrutiny test be applied. *Id.*
447. 7 C.F.R. § 795.3 (1981).
448. 639 F.2d at 649-50.
449. 434 U.S. 374 (1978).
450. 434 U.S. 47 (1977).

a fundamental one, not every regulation that interferes with it must be strictly scrutinized.[451] The inapplicability of the strict scrutiny test in this case placed the burden on the appellants of proving the lack of a rational basis for the husband-wife rule. Because the appellants did not demonstrate such a lack of rational basis, the court concluded that the rule rationally furthered the congressional interest "in limiting farm subsidy payments to $20,000 per 'person.' "[452] Limiting each married couple to one payment serves to reduce public hostility against large payments to farmers and farm households for keeping land idle.[453] Also, the "economic interdependency" of married couples—even those who maintain separate farms—provides a rational basis for the Secretary's determination that "married couples are a single economic unit entitled to a single farm support payment."[454]

The appellants objected to the husband-wife rule also on the ground that it created an "irrebuttable presumption" that they constituted a single producer, even though they operated their respective farms independently. Such a presumption, the appellants argued, violated their due process rights.[455] The court rejected this claim on the ground that the irrebuttable presumption doctrine was inapplicable to the case at hand and, in any event, was probably "moribund."[456] However, even if the doctrine were viable and applicable, the appellants could not have prevailed on it, because they misstated the presumption of the husband-wife rule. The rule did not merely presume that a married couple's farming interests were co-managed; it also sought to ensure that each economically interdependent unit received no more than $20,000.[457] The appellants' "irrebuttable presumption" argument failed because they did not challenge the presumption that their farms were economically interdependent.[458]

Finally, the court dismissed the appellants' final challenge, that the husband-wife rule operated as an unconscionable and inequitable forfeiture of their contractual rights, since it was not brought to their attention when they signed their agreement with the government. The rule, it was claimed, thereby "operated as an adhesion clause rendering the agreement unconscionable."[459] This argument was rejected on the ground that "Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents."[460] Also, case law mandates that

451. 639 F.2d at 649-50.

452. *Id.* at 650.

453. *Id.*

454. *Id.* at 651.

455. *Id.* The Supreme Court cases cited by the appellants in support of the use of the irrebuttable presumption doctrine included Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States v. Murry, 413 U.S. 508 (1973); and Vlandis v. Kline, 412 U.S. 441 (1973).

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.* at 652.

460. *Id.* (citing Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947)).

"[t]he law in effect when a government contract is made becomes a part of the contract."[461]

Patricia Lawrence Barrett
Cynthia D. Jones
Jeffrey S. Pagliuca
Kathleen A. Reilly

461. *Id.* (citing Jackson v. United States, 573 F.2d 1189, 1194 (Ct. Cl. 1978)).