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INTRODUCTION

During the past two survey periods, the Tenth Circuit Court of Appeals has shown substantial deference to agency actions and has favored judicial review.[1] The cases discussed herein continue this trend. In *Donovan v. Hackney Inc.*,[2] discussed in Part I, the Tenth Circuit showed deference to the Occupational Safety and Health Administration by refusing to allow court review of the validity of administrative search warrants until the challenging party had exhausted all administrative remedies. In three cases discussed in Part II, two dealing with uranium mill tailings[3] and a third dealing with compound 1080,[4] the Tenth Circuit showed substantial deference to Environmental Protection Agency action on questions involving scientific and technical expertise. In *Edwards v. Valdez*,[5] discussed in Part III, the Tenth Circuit adopted the Social Security Agency's interpretation of the statutory section at issue, once again showing deference. Finally, in the cases discussed in Part IV,[6] the Tenth Circuit favored judicial review where alternative interpretations of the statutes of limitations at issue might otherwise have barred such review.

I. ADMINISTRATIVE SEARCH AND SEIZURE, THE FOUR-CORNERS DOCTRINE, AND EXHAUSTION OF ADMINISTRATIVE REMEDIES: *DONOVAN V. HACKNEY*

In the 1985 case of *Donovan v. Hackney, Inc.*,[7] the Tenth Circuit sanctioned the issuance of an administrative search warrant. In so doing, the Tenth Circuit upheld Judge Russell's contempt citation against appellants Hackney and Schwedland.[8]

A. *Facts*

In January 1982, pursuant to an administrative inspection plan, an Occupational Safety and Health Administration (OSHA) compliance officer appeared at the facility of Hackney, Inc., in Enid, Oklahoma, to perform a regularly programmed inspection of the premises.[9] Hack-

1. *See* Note, Administrative Law, Thirteenth Annual Tenth Circuit Survey, 63 DEN. U.L. REV. 165 (1986); Note, Administrative Law, Twelfth Annual Tenth Circuit Survey, 62 DEN. U.L. REV. 109 (1985).

2. 769 F.2d 650 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 1458 (1986).

3. American Mining Congress v. Thomas, 772 F.2d 617 (10th Cir. 1985); American Mining Congress v. Thomas, 772 F.2d 640 (10th Cir. 1985).

4. National Cattleman's Ass'n v. EPA, 773 F.2d 268 (10th Cir. 1985).

5. 789 F.2d 1477 (10th Cir. 1986).

6. Smith v. Marsh, 787 F.2d 510 (10th Cir. 1986); C.O.D.E., Inc. v. ICC, 768 F.2d 1210 (10th Cir. 1985).

7. 769 F.2d 650 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 1458 (1986).

8. *Id.* at 652.

9. Donovan v. Hackney, Inc., 583 F. Supp. 773, 775 (W.D. Okla. 1984), *aff'd*, 769

ney's plant manager, Wayne Schwedland, refused to allow the inspection. As a result, OSHA sought and was issued an administrative search warrant based on the affidavit of an OSHA supervising industrial hygienist.[10] Upon returning to the plant with the warrant, the OSHA compliance officer was again denied entry. Contempt proceedings were then initiated.[11]

B. *District Court Proceedings*

The initial issue before the district court involved the scope of review to be used in assessing the magistrate's decision to issue the search warrant.[12] Generally, any review of the validity of a search warrant must be limited to an examination of materials presented to the magistrate.[13] Under the rule established by the United States Supreme Court in *Franks v. Delaware*,[14] evidentiary hearings challenging the validity of a search warrant will only be allowed when the challenging party is willing and able to offer proof of deliberate falsehood or reckless disregard for the truth on the part of those who seek the warrant.[15] Hence, the review of both administrative and criminal warrants is ordinarily confined to the "four-corners" of the warrant application.[16] Constitutional challenges to the validity of the warrant are thus limited, since the party subject to the inspection may not challenge the administrative plan upon which the warrant is based. Both the district court and the Tenth Circuit Court of Appeals wrestled with this issue in *Hackney*.

In reviewing applicable cases, the district court noted that courts have adopted two approaches to this problem. Under one approach, if the party named in the inspection refuses to permit the inspection, it can raise challenges to the administrative plan in contempt proceedings.[17] When following the other approach, courts require an exhaustion of administrative remedies, whereby the challenging party allows the search and attacks the validity of the administrative plan upon which the warrant is based in subsequent citation proceedings before the Occupa-

F.2d 650 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 1458 (1986). Apparently the OSHA compliance officer was seeking to perform the inspection as allowed by an OSHA inspection plan. *Id.* at 776; *see* OSHA CPL 2.25B (OSHA inspection plan).

10. *Hackney*, 769 F.2d at 775.

11. *Id.*

12. If reasonable legislative, administrative, or judicially prescribed standards for conducting an inspection are satisfied with respect to a particular dwelling, probable cause to issue an administrative search warrant exists. Michigan v. Clifford, 464 U.S. 287 (1984); Camara v. Municipal Court, 387 U.S. 523, 538 (1967). The probable cause involved in *Hackney* was based on an administrative plan. *See infra* text accompanying notes 16-17 & 33.

13. Franks v. Delaware, 438 U.S. 154 (1978). Although *Franks* involved warrant review in a criminal case, it is generally accepted that the same reasoning applies to administrative inspection warrants. Marshall v. Horn Seed Co., 647 F.2d 96, 100 (10th Cir. 1981); *Hackney*, 583 F. Supp. at 776.

14. 438 U.S. 154.

15. *Id.* at 171.

16. *Hackney*, 583 F. Supp. at 776. For application of the four-corners doctrine, see Franks v. Delaware, 438 U.S. 154 (1978).

17. *Hackney*, 583 F. Supp. at 776. *See also* Weyerhauser Co. v. Marshall, 592 F.2d 373 (7th Cir. 1979); Donovan v. Athenian Marble Corp., 535 F. Supp. 176 (W.D. Okla. 1982).

tional Safety and Health Review Commission (OSHRC).[18] An adverse finding by OSHRC can then be appealed to the court of appeals.[19] The district court, relying on the Tenth Circuit's opinions in *Marshall v. Horn Seed Co.*,[20] and *Robert K. Bell Enterprises v. Donovan*,[21] chose to apply the latter approach.

The fourth amendment of the United States Constitution requires that a search be "reasonable,"[22] and supported by "probable cause."[23] In addition, it is well settled that inspections under the Occupational Safety and Health Act[24] must be made pursuant to a valid administrative warrant.[25] As with criminal warrants, the administrative warrant serves to provide property owners with sufficient information to assure them that the entry is legal.[26]

When opting to follow the second alternative, the district court acknowledged that the search must have taken place in order to avoid contempt citations. Initially, it appears as if "such a procedure fails to protect Defendants against a potentially unconstitutional search."[27] However, it is clear that inspection pursuant to an administrative warrant is a much less substantial intrusion than entering a private home pursuant to a search warrant.[28] Here, the Hackney plant was selected for inspection pursuant to a programmed plan. Accordingly, the court held that Hackney's fourth amendment interests were adequately pro-

18. "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Parisi v. Davidson, 405 U.S. 34, 37 (1972) (quoting McKart v. United States, 395 U.S. 185, 194 (1968)). *Accord* Baldwin Metals Co. v. Donovan, 642 F.2d 768 (5th Cir.), *cert. denied*, 454 U.S. 893 (1981); In Re Worksite Inspection of Quality Products, Inc., 592 F.2d 611 (1st Cir. 1979).

19. *Hackney*, 583 F. Supp. at 777.

20. 647 F.2d 96 (10th Cir. 1981).

21. 710 F.2d 673 (10th Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984).

22. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

23. "[N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

24. 29 U.S.C. § 657 (1970).

25. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

26. United States v. Chadwick, 433 U.S. 1, 9 (1977).

27. *Hackney*, 583 F. Supp. at 777.

28. The fourth amendment protects commercial buildings, as well as private homes. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

Whereas probable cause for the search of a private home must be based on specific evidence of a crime, Brinegar v. United States, 338 U.S. 160, 175-76 (1949); United States v. Matthews, 615 F.2d 1279 (10th Cir. 1980), probable cause for an administrative inspection need only be based on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. *Barlow's*, 436 U.S. at 320; *Camara*, 387 U.S. at 538; *see supra* note 12. An administrative warrant may therefore be based on a "showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the areas . . . ." *Barlow's*, 436 U.S. at 321.

tected by the availability of a post-inspection challenge.[29]

The district court then addressed the issue of whether the warrant application presented to the magistrate indicated the existence of probable cause.[30] Applying the *Franks* four-corners doctrine,[31] the district court found that there was indeed probable cause to issue the warrant, and thus upheld Hackney and Schwedland's contempt citations.[32]

C. *Tenth Circuit Decision*

On appeal, the Tenth Circuit addressed Hackney's attempt to go beyond the four-corners of the warrant application. Hackney argued that the OSHA administrative plan upon which the inspection warrant application was based was improperly promulgated, and thus improperly applied.[33] Relying on *Marshall v. Horn Seed Co.*,[34] the court rejected such an argument.

In *Horn Seed*, an administrative warrant was obtained based on specific employee complaints, rather than pursuant to an administrative plan.[35] When considering the validity of search warrants, the Tenth Circuit mentioned that courts may only review the information which was before the magistrate. However, the Tenth Circuit did not go into any analysis as to the efficacy of the four-corners doctrine.[36]

In *Robert K. Bell Enterprises v. Donovan*,[37] however, the Tenth Circuit did discuss its preference for requiring exhaustion of administrative remedies in challenging an administrative plan,[38] thus limiting a district

29. *Hackney*, 583 F. Supp. at 778. It is interesting to note that the court recognized that a private individual realistically has no opportunity to challenge a search warrant until after his home has been searched. The district court logically refused to allow businesses the opportunity to challenge a warrant issued under a programmed inspection plan until after the search has occurred. *Id.* at 778 n.3.

30. *Id.*

31. *See supra* notes 14-16 and accompanying text. In *Hackney*, only a feeble attempt was made to show "reckless disregard for the truth" or "deliberate falsehood." The district court summarily dismissed these assertions. *Hackney*, 583 F. Supp. at 778 & n.6.

32. *Hackney*, 583 F. Supp. at 779.

33. Donovan v. Hackney, Inc., 769 F.2d 650, 653 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 1458 (1986).

34. 647 F.2d 96 (10th Cir. 1981). "In ruling on the validity of a search warrant, the reviewing court may only consider the information provided the issuing magistrate or judge." *Id.* at 104.

35. *Id.* at 98-103. The standards to be applied in determining probable cause for an administrative warrant based on a specific allegation or complaint are somewhat different from the standards applied to warrants based on administrative plans. When the warrant is based on a specific complaint, the affidavit should include the name of the person who received the complaint, the source of the complaint (though not necessarily the name of the complainant), the underlying facts and circumstances surrounding the complaint, the steps OSHA officials took to verify the complaint, personal observations, the past regulatory history of the employer, the number of prior entries, the scope of the search, and the time of day it is to be performed. *Id.* at 102-03. *See* Michigan v. Tyler, 436 U.S. 499, 507 (1978).

36. "In ruling on the validity of a search warrant, the reviewing court may only consider the information provided the issuing magistrate or judge." *Horn Seed*, 647 F.2d at 104.

37. 710 F.2d 673 (10th Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984).

38. *Bell*, 710 F.2d at 675; *see supra* text accompanying notes 18 & 21.

court's review of a contempt citation to the four-corners of the warrant application rather than the administrative underpinnings upon which the warrant is based. Though *Bell* was not cited by the Tenth Circuit in *Hackney*, the district court relied on that case in its decision.[39]

The Tenth Circuit, in upholding Hackney's contempt citation, found that *ex parte* warrants are to be "executed without delay and without prior notification"[40] and should not have their execution hindered by cumbersome discovery procedure.[41] This further strengthened the requirement that the four-corners doctrine be adhered to in district court contempt proceedings.

The Tenth Circuit next considered whether the magistrate acted on probable cause in issuing the warrant authorizing the inspection of the Hackney plant.[42] While noting that OSHA inspection warrants are issued on a lesser standard of probable cause,[43] the Tenth Circuit relied on the probable cause test language contained in *Camara v. Municipal Court*[44] and *Marshall v. Barlow's Inc.*[45] Accordingly, the court found that the magistrate acted on probable cause in issuing the administrative warrant.[46] The standard of review utilized by the Tenth Circuit in reaching this conclusion was one of "substantial deference" to the magistrate's finding.[47] The Tenth Circuit extended the rule it pronounced in *United States v. Wood*,[48] holding that such deference was "equally applicable" when considering the issuance of administrative warrants.[49] The Tenth Circuit thus affirmed all judgments of the district court.

D. *Analysis*

Any analysis of administrative search issues must begin with the 1978 United States Supreme Court case of *Marshall v. Barlow's, Inc.*[50] *Barlow's* involved a warrantless OSHA search of the defendant's plumbing installation business. In *Barlow's*, the Supreme Court ruled that "[i]f the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations

39. *Hackney*, 583 F. Supp. at 777.

40. *Hackney*, 769 F.2d at 653 (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 316 (1978)).

41. *Id.*

42. *Id.* at 652.

43. *Id.*

44. 387 U.S. 523, 534-39 (1967) (Probable cause upon the basis of which warrants are to be issued for area code-enforcement inspections is not dependent on the inspector's belief that a particular dwelling violates the code but on the reasonableness of the enforcement agency's appraisal of conditions in the area as a whole.).

45. 436 U.S. 307, 315-21 (1977) (Entitlement to a warrant will not depend on the demonstration of probable cause that conditions on the premises violate OSHA but merely that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment.).

46. *Hackney*, 769 F.2d at 652.

47. *Id.* at 653.

48. 695 F.2d 459, 464 (10th Cir. 1982) (magistrate's finding of probable cause to issue a criminal search warrant is entitled to substantial deference).

49. *Hackney*, 769 F.2d at 653.

50. 436 U.S. 307 (1977).

of criminal laws or breaches of other statutory or regulatory standards."[51] A search warrant to inspect Barlow's business was therefore required.[52]

The Court in *Barlow's* did note that certain exceptions to the general warrant requirement exist for "pervasively regulated business[es],"[53] and for "closely regulated" industries "long subject to close supervision and inspection."[54] In addition, administrative entry without a warrant will be allowed in certain exigent circumstances.[55]

In *Barlow's*, the Supreme Court refused to allow a warrantless search of employment facilities. Rather, the Court noted that a warrant must be obtained pursuant to an administrative plan.[56] The issue in *Hackney*, which was left open in *Barlow's*, involved the proper mode of challenging warrants issued under administrative plans, and the appropriate form for challenging the plans themselves. On this issue, the circuits are divided, some requiring exhaustion of administrative remedies,[57] and others allowing direct challenge beyond the four-corners of the warrant in contempt proceedings.[58]

As previously discussed, the Tenth Circuit has opted to apply the four-corners doctrine to challenges of administrative search warrants in contempt proceedings before the district court.[59] Therefore, any challenge to the constitutionality of an administrative plan underlying a search warrant may only occur during an administrative enforcement proceeding before the OSHRC, or on review of OSHRC's decision by a court of appeals.

The courts which have required exhaustion of administrative remedies do so for one of two reasons. The first includes the traditional rationale for requiring the exhaustion of administrative remedies. This traditional rationale emanates from theories, such as: the protection of administrative autonomy; deference to agency expertise; easier judicial review through creation of a factual record by the agency; and judicial economy, given that the controversy may be mooted if the agency grants

51. *Id.* at 312.

52. *Id.* at 325.

53. *Id.* at 313 (quoting United States v. Biswell, 406 U.S. 311, 316 (1972) (firearms regulated under Gun Control Act)); *see* Donovan v. Dewey, 452 U.S. 594 (1981) (underground mines regulated under the Mine Safety and Health Act).

54. *Barlow's*, 436 U.S. at 313 (quoting Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (liquor distribution)). The Eighth Circuit has extended this exception to include inspections of drug manufacturers. *See* United States v. Jamieson-McKames Pharmaceuticals, Inc., 651 F.2d 532 (8th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

55. *See* Michigan v. Tyler, 436 U.S. 499 (1978) (firefighters allowed to enter premises without a warrant in order to extinguish a fire).

56. *Barlow's*, 436 U.S. at 321-23; *see supra* note 28 and accompanying text.

57. *See* Brock v. Brooks Woolen Co., 782 F.2d 1066 (1st Cir. 1986); Baldwin Metals Co. v. Donovan, 642 F.2d 768 (5th Cir.), *cert. denied*, 454 U.S. 893 (1981); Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128 (3rd Cir. 1979); Marshall v. Central Mine Equipment Co., 608 F.2d 719 (8th Cir. 1979); In re Worksite Inspection of Quality Products, Inc., 592 F.2d 611 (1st Cir. 1979).

58. *See* Donovan v. Athenian Marble Corp., 535 F. Supp. 176, 180 (W.D. Okla. 1982).

59. *See supra* notes 33-39 and accompanying text.

the relief sought.[60] The second reason for requiring exhaustion is an equitable one — a court should simply refrain from exercising its equitable jurisdiction unless the challenging party clearly demonstrates that its constitutional rights cannot be adequately adjudicated in the pending or anticipated administrative enforcement proceeding against it.[61] In either case, federal appellate review is available upon exhaustion.[62]

A criticism of the exhaustion approach is that although the procedure may ultimately protect the aggrieved party from citations based on an invalid administrative plan, it does not protect against the unreasonable search itself.[63] Some courts have recognized this problem, and will thus only require exhaustion if the search has already occurred or if the complaining party has commenced OSHRC proceedings.[64]

The Occupational Safety and Health Act is a statute designed to protect worker health and safety through regulatory powers, inspections, and enforcement proceedings.[65] When determining whether to require exhaustion, courts must balance these statutory and regulatory protections against the infringement of employer's constitutional rights which would result from a bad plan underlying a search warrant. In *Hackney*, the Tenth Circuit has favored worker health and safety over what is a somewhat tenuous constitutional issue. Other courts have gone the opposite way, while the Supreme Court has remained silent, and will apparently remain so, given their recent denial of certiorari in *Hackney*.[66]

II. CONVERGENCE OF THE "SUBSTANTIAL EVIDENCE" AND "ARBITRARY AND CAPRICIOUS" STANDARDS OF REVIEW ON QUESTIONS INVOLVING SCIENTIFIC EXPERTISE: THE URANIUM MILL TAILINGS AND COMPOUND 1080 CASES

In two cases[67] challenging regulations issued under the Uranium Mill Tailings Radiation Control Act (UMTRCA),[68] and in another challenging the Environmental Protection Agency's (EPA) decision to lift restrictions on the use of a pesticide designed to kill coyotes,[69] the Tenth

60. *Baldwin*, 642 F.2d at 772; *see also* Parisi v. Davidson, 405 U.S. 34 (1972).

61. Brock v. Brooks Woolen Co., 782 F.2d 1066 (1st Cir. 1986); Marshall v. Central Mine Equipment Co., 608 F.2d 719, 721-22 (8th Cir. 1979); In re Worksite Inspection of Quality Products, Inc., 592 F.2d 611, 615 (1st Cir. 1979).

62. *See* 29 U.S.C. § 660 (1982) (discussion of judicial review).

63. Weyerhauser Co. v. Marshall, 592 F.2d 373 (7th Cir. 1979); Marshall v. Huffhines Steel Co., 488 F. Supp. 988 (N.D. Tex. 1980).

64. *Baldwin*, 642 F.2d at 774 n.13. *Compare* Cerro Metal Products v. Marshall, 620 F.2d 964 (3rd Cir. 1980) (available administrative remedies does not preclude injunction to avoid imminent threat of harm from continued inspections) *with* Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128 (3rd Cir. 1979) (exhaustion required if search has occurred).

65. 29 U.S.C. §§ 651-78 (1982). *See generally* BENJAMIN W. MINTZ, OSHA: HISTORY, LAW, AND POLICY (1984).

66. 106 S.Ct. 1458 (1986).

67. American Mining Congress v. Thomas, 772 F.2d 617 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 2275, 2276 (1986); American Mining Congress v. Thomas, 772 F.2d 640 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 2275, 2276 (1986).

68. 42 U.S.C. §§ 2022, 7901-7942 (1982).

69. National Cattlemen's Ass'n v. EPA, 773 F.2d 268 (10th Cir. 1985).

Circuit for the most part upheld the EPA's decisions over the objections of competing industry/environmental and rancher/wildlife protection interests. In so doing, the Tenth Circuit continued to show deference to the agency's findings of scientific facts necessary to support administrative actions. Indeed, these three cases illustrate that when a court reviews agency action based on scientific evidence, any distinction between the "arbitrary and capricious" and "substantial evidence" standards of review may be illusory.

A. *The UMTRCA Cases*

1. Facts

The two companion cases of *American Mining Congress v. Thomas*[70] involved challenges to regulations promulgated by the EPA under the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA).[71] Two separate sets of regulations were challenged, one set in each case. In the first companion case, regulations controlling inactive uranium mill tailings sites were challenged.[72] In the second companion case, regulations controlling active uranium mill tailings sites were questioned.[73]

The regulations at issue in these two cases were promulgated to combat the health hazards posed by uranium mill tailings.[74] The rules issued by the EPA placed limits on radon released into the atmosphere from the tailings piles, as well as limits on water contamination from the piles.[75] In both situations, initial radon emission limits were set at 2

70. American Mining Congress v. Thomas, 772 F.2d 617 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 2275, 2276 (1986) [hereinafter *Inactive Sites*]; American Mining Congress v. Thomas, 772 F.2d 640 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 2275, 2276 (1986) [hereinafter *Active Sites*].

71. 42 U.S.C. §§ 2202, 7901-42 (1982).

72. *Inactive Sites*, 772 F.2d 617.

73. *Active Sites*, 772 F.2d 640.

74. The purpose of UMTRCA is to:

> provide a program of assessment and remedial action at [inactive mill tailings sites] . . . including, where appropriate, the reprocessing of tailings to extract residual uranium and other mineral values where practicable. . . . [and to provide] a program to regulate mill tailings during uranium or thorium ore processing at active mill operations and after termination of such operations in order to stabilize and control such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public.

42 U.S.C. § 7901(b) (1982).

Tailings are the residue from the uranium milling process. Health hazards arise from the emission of radon gas from radium, a radioactive constituent of tailings. Radon and its radioactive decay products may be potent carcinogens. *Inactive Sites*, 772 F.2d at 621. Persons exposed to radon emissions from tailings piles may be subject to an increased risk of contracting lung cancer. *See* 48 Fed. Reg. 19,584, 19,585-86 (1983) (codified at 40 C.F.R. §§ 192.00-.43) (proposed April 29, 1983). In addition to radon, uranium mill tailings piles contain other hazardous constituents which may have toxic effects when ingested in either food or water. These constituents include arsenic, lead, selenium, and molybdenum. 1 Final Environmental Impact Statement for Standards for the Control of Byproduct Materials from Uranium Ore Processing at 3-8 (EPA, Sept. 1983).

75. 40 C.F.R. §§ 192.00-.43 (1986); *see also Inactive Sites*, 772 F.2d at 622.

$pCi/m^2/s$.[76] After a lengthy comment period supported by extensive technical studies and expert analysis,[77] the EPA issued its final "optimized cost-benefit" radon emission limit of 20 $pCi/m^2/s$.[78] In arriving at this standard, the EPA "evaluated a number of alternatives in terms of their costs and the reductions achievable in potential health effects."[79] This selection method prompted environmental petitioners to question the efficacy of the EPA's use of cost-benefit analysis to set radon emission standards aimed at protecting human health.[80] Industry petitioners, in contrast, contended that the regulations placed an undue financial burden on an economically ailing industry.[81]

2. Issues Raised on Appeal

a. *Inactive Sites*

In *Inactive Sites*, industry petitioners alleged that, in UMTRCA, Congress required the EPA to find a "significant risk" posed by uranium mill tailings piles. Such a finding would serve as a trigger allowing for regulation in this area. Without such a finding, it was argued, regulations could not be imposed.[82] The industry petitioners based their argument on *Industrial Union Department, AFL-CIO v. American Petroleum Institute*.[83]

American Petroleum Institute involved a challenge to Occupational Safety and Health Administration's (OSHA) regulations designed to protect workers from the potentially carcinogenic effects of the chemical benzene.[84] Justice Stevens, writing for the *American Petroleum Institute* plurality, found that under the applicable statutory language,[85] OSHA

76. 46 Fed. Reg. 2556, 2562 (1981) (codified at 40 C.F.R. §§ 192.00-.43) (proposed April 22, 1980). The EPA stated that:

> pCi/m^2-sec stands for picocuries per square meter per second, a measure of the release rate of radioactivity from a surface. A curie is the amount of radioactive material that produces 37 billion nuclear transformations per second. A picocurie is a trillionth of a curie. One picocurie produces a little more than two nuclear transformations per minute.

46 Fed. Reg. 2556, 2559 n.5 (1981) (codified at 40 C.F.R. §§ 192.00-.43) (proposed April 22, 1980).

77. *Inactive Sites*, 772 F.2d at 623.

78. 40 C.F.R. § 192.02 (1986).

79. *Inactive Sites*, 772 F.2d at 624 (quoting 48 Fed. Reg. 590 (1983) (codified at 40 C.F.R. §§ 192.00-.43) (summary of final rule)).

80. *Inactive Sites*, 772 F.2d at 630-32.

81. *Id.*; *see also* United Nuclear Corp. v. EPA, *decided sub nom* American Mining Congress v. Thomas, 772 F.2d 617 and *American Mining Congress v. Thomas*, 772 F.2d 640 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 2275, 2276 (1986). The EPA estimated active site cleanup costs through the year 2000 to be between $310 million and $540 million. *Active Sites*, 772 F.2d at 646. Inactive site cleanup was estimated to be approximately 314 million (1981) dollars. *Inactive Sites*, 772 F.2d at 638.

82. *Inactive Sites*, 772 F.2d at 627.

83. 448 U.S. 607 (1980).

84. A causal connection is believed to exist between exposure to benzene and leukemia, a cancer of the white blood cells. *American Petroleum Institute*, 448 U.S. at 613.

85. The applicable statutory language is found in section 652(8) of the Occupational Safety and Health Act which states:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, *reasonably necessary or appropriate* to provide safe or healthful employment and places of employment.

must find, "as a threshold matter, that the toxic substance in question poses a significant health risk in the workplace," prior to imposing a regulation.[86]

The industry petitioners in *Inactive Sites* argued that a similar requirement of finding a "significant risk" was envisioned by Congress when it enacted UMTRCA.[87] The Tenth Circuit conceded that certain language appearing in the legislative history of UMTRCA might suggest that the EPA must find that radon poses a significant risk before regulating emission.[88] The court did not, however, find any language to this effect in the conference committee report.[89] In addition, the Tenth Circuit concluded that "[t]o hold that [the] EPA must determine that the tailings piles pose a significant risk before regulating would change the entire structure of the statute."[90] Thus, the court refused to impose a significant risk standard, dismissing the industry petitioners' claims that a finding of significant risk was required prior to regulation.

The next major issue raised by all petitioners involved the EPA's use of a cost-benefit analysis[91] in arriving at the standards. Industry petitioners argued that the EPA failed to properly consider costs of disposal and cleanup in light of what they perceived as limited health benefits of the regulation.[92] In contrast, environmental petitioners claimed that health-based standards under UMTRCA should be based primarily on technical feasibility, and to a lesser extent on economic feasibility.[93]

Environmental petitioners argued for an application of "feasibility analysis," basing their assertions on *American Textile Manufacturers Institute, Inc. v. Donovan*.[94] In that case, the Supreme Court held that the controlling section of the Occupational Safety and Health Act[95] precluded a cost-benefit analysis.[96]

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29 U.S.C. § 652(8) (1982) (emphasis added).

86. *American Petroleum Institute*, 448 U.S. at 614.

87. *Compare* 42 U.S.C. § 7901(b) (1982) *with* 29 U.S.C. § 652(8) (1982).

88. *Inactive Sites*, 772 F.2d at 629 n.8 (citing 128 CONG. REC H8816 (daily ed. December 2, 1982) (remarks of Rep. Lujan) and 128 CONG. REC. S13,055-56 (daily ed. October 1, 1982) (remarks of Sen. Wallop and Sen. Simpson)).

89. *Id.* at 629; *see* H.R. CONF. REP. No. 884, 97th Cong., 2d Sess. 44-45, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3592, 3603-21.

90. *Inactive Sites*, 772 F.2d at 629 n.8.

91. "The label 'cost-benefit analysis' encompasses everything from a strict mathematical balancing formula to a less strict standard that merely requires the agency to recognize both the costs and benefits of specific proposed alternatives and consider the differences in choosing an appropriate alternative." *Id.* at 631.

92. *Id.* at 630.

93. *Id.* at 631. The language of the UMTRCA amendments clearly envisioned the EPA's consideration of costs in arriving at the emission standards. "[T]he Administrator shall consider the risk to public health, safety, and the environment, *the environmental and economic costs of applying such standards*, and other factors as the Administrator determines to be appropriate." 42 U.S.C. § 2022(a) (1982) (emphasis added).

94. 452 U.S. 490 (1981).

95. 29 U.S.C. § 655(b)(5) (1982) (requiring health standards to be set at a point which most adequately assures protection of worker health and safety).

96. The Supreme Court in *Donovan* found that Congress, in defining the relationship between cost and benefits of the regulations, placed "the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable." *Donovan*, 452 U.S. at 509. The Court explained that "[a]ny standard based on a balancing of

The Tenth Circuit found that the operative language of UMTRCA, which requires the EPA to consider "the environmental and economic costs" of the standards, precluded feasibility analysis.[97] The court went on to find that the "optimized cost benefit" approach adopted by the EPA was a reasonable outgrowth of the statutory scheme envisioned by Congress.[98]

The court then considered whether the EPA's radium-in-soil concentration standards were valid.[99] Upon a review of the record, the court concluded that there was nothing which would indicate that the actions of the EPA in adopting these standards were arbitrary and capricious.[100]

The final standard considered by the court involved the limitations set forth for the allowable level of indoor radon concentration. Initially, the EPA had set this limit at 0.015 WL.[101] However, the EPA subsequently raised this limit to 0.03 WL, while merely requesting that a reasonable effort be made to achieve a level of 0.02 WL.[102] This change in the allowable level of indoor radon concentration greatly increased the risk of contracting cancer.[103] However, although the change in standards allowed a significant increase in the risk factor, the court determined that the EPA did not act in an arbitrary and capricious manner.[104]

After considering other minor issues,[105] the Tenth Circuit found an

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costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5). Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is." *Id.*

97. *Inactive Sites*, 772 F.2d at 631 (interpreting 42 U.S.C. § 2022(a) (1982)); *see supra* note 93.

98. *Inactive Sites*, 772 F.2d at 632.

99. *Id.* at 635.

100. *Id.*

101. 45 Fed. Reg. 27,370, 27,375 (1980) (codified at 40 C.F.R. § 192.12(b)(1)) (proposed April 22, 1980). A working level or WL means "any combination of short-lived radon decay products in one liter of air that will result in the ultimate emission of alpha particles with a total energy of 130 billion electron volts." 40 C.F.R. § 192.11(c) (1986).

102. 40 C.F.R. § 192.12(b)(1) (1986)

103. *Inactive Sites*, 772 F.2d at 635-36. This change in radon concentration levels increased the risk of contracting lung cancer from 0.8 in 100 to approximately 1.3 in 100. *Id.* at 636.

104. *Id.* at 636.

105. Another issue discussed by the court involved the area to which the emission limits applied. Industry petitioners argued that the EPA exceeded its authority by adopting standards which were to be enforced inside the mill tailing sites. *Id.* The thrust of this argument centered around the fact that the EPA's authority to promulgate environmental standards was limited to locations outside of the mill tailings sites. *Id.* at 629-30. This argument derives from the 1970 Reorganization Plan "which transferred the Atomic Energy Commission (now NRC) authority to set generally applicable environmental standards to the EPA." *Id.* at 629. However, the Tenth Circuit reasoned that since the mill tailings sites are the sources of origin for radon gas, the EPA should have the power to regulate the emission of radon gas from its source. As a result, the Tenth Circuit held that the EPA did not exceed its authority. *Id.* at 630.

The court was also confronted with determining what documents could be reviewed. The court determined that "extra-record" materials could be reviewed to see if they fell within any accepted exceptions. *Id.* at 626-27. The court ultimately felt that reference could be made to some of these extra-record materials, however, they could not be utilized to supplement the record. The only document which was allowed to supplement the rec-

error in the EPA's issuance of guidelines for control of waterborne pollutants. The EPA's proposed guidelines indicated that there was a problem with water contamination. In response to this problem, the EPA initially proposed specific standards which were designed as a means of generally regulating water quality. Pursuant to input received during the comment period, the EPA discarded the proposed regulations, adopting "site-specific" standards instead.[106] While scrutinizing this drastic change in standards, the Tenth Circuit noted that the EPA acknowledged the existence of a problem with water contamination when it initially suggested the adoption of specific standards designed to generally regulate water quality.[107] As a result, the Tenth Circuit remanded, holding that UMTRCA requires the EPA to adopt regulations that have general application.[108]

b. *Active Sites*

In attempting to spur the EPA into promulgating regulations, Congress, in a 1983 UMTRCA amendment,[109] set an October 1, 1983 deadline for promulgation of active mill site standards. If this deadline was not met, the EPA's authority to set standards would terminate in favor of the Nuclear Regulatory Commission.[110] The EPA published proposed standards for the active mill sites in the Federal Register on April 29, 1983.[111] Final standards were signed by the EPA's Administrator on September 30, 1983, and were apparently released to the public on that day.[112] The regulations were not published in the Federal Register, however, until October 7, 1983.[113]

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ord was a transmittal letter. This supplementation was allowed largely because the motion to allow this document to supplement the record was unopposed. *Id.*

The court also faced the issue of whether the radon flux limits set by the EPA impermissibly limited the "engineering or design standard to be selected by the implementing agency." *Id.* at 630. The court noted that although the EPA was only charged with the responsibility of setting the standards, the emission limitations adopted were necessary in order to comply with the mandate that it use a cost-benefit analysis. The court reasoned, that to some extent, the EPA was required to consider methods of implementation in order to effectively complete its cost-benefit analysis. *Id.*

106. *Id.* at 638. *Compare* 46 Fed. Reg. 2556, 2562 (1981) (codified in 40 C.F.R. §§ 192.00-.43) (general standards proposed April 22, 1980) *with* 48 Fed. Reg. 590, 593-95 (1983) (codified in 40 C.F.R. § 192.02) (rationale for abandonment of proposed general standards). The "site specific" standards required each site to be tested, with corrective measures to be ascertained after such testing.

107. *Inactive Sites*, 772 F.2d at 638-39.

108. *Id.* at 638.

109. 42 U.S.C. § 2022(b)(1) (1982). *See infra* note 110.

110. The amendment provides as follows:

> If the Administrator [of the EPA] fails to promulgate standards in final form under this subsection by October 1, 1983, the authority of the Administrator to promulgate such standards shall terminate, and the [Nuclear Regulatory] Commission may take actions under this chapter without regard to any provision of this chapter requiring such actions to comply with, or be taken in accordance with, standards promulgated by the Administrator.

42 U.S.C. § 2022(b)(1) (1982).

111. *Active Sites*, 772 F.2d at 643; 40 C.F.R. § 192.30 (1986).

112. *Active Sites*, 772 F.2d at 643.

113. *Id.*; 40 C.F.R. §§ 192.30-.43 (1986).

Publication of the active mill site standards on October 7, 1983 provided several of the industry petitioners with an opportunity to challenge the EPA's jurisdictional authority by claiming that such regulations were "promulgated" beyond the statutory deadline.[114] Petitioner's claim equated "promulgation" with publication in the Federal Register.[115]

The Tenth Circuit agreed that the cases cited by the petitioners hold that statute of limitations provisions for seeking judicial review begin to run on the date rules are published in the Federal Register.[116] However, the court acknowledged that " 'promulgation' does not have a single accepted meaning in all contexts."[117] The court then went on to find that the September 30 signing and release of the regulations constituted "promulgation" sufficient to satisfy the congressional deadline.[118]

It is important to note that, in the *Active Sites* case, the Tenth Circuit reaffirmed several of the holdings which were set forth in the *Inactive Sites* case.[119] However, unlike the water standards adopted to regulate inactive sites, the EPA adopted a two-part groundwater standard for active sites.[120] Not only did the court determine that the EPA adopted the required general standards, but it also held that the EPA exhibited adequate effort to respond to the concerns of both the environmental petitioners and the industry petitioners during the comment period. As a result, the court held that the EPA's water standards for active mill sites was valid.[121]

Finally, the Tenth Circuit denied standing to one of the petitioners, AMAX, Inc.[122] AMAX challenged the EPA's designation of molybdenum as a hazardous constituent of uranium and thorium mill tailings,[123] claiming that such designation subjected molybdenum to groundwater protection standards. However, neither AMAX nor any of its customers owned or operated any mill tailing sites.[124] The regulations specifically

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114. *Active Sites*, 772 F.2d at 644.

115. *Id.* at 645. Petitioners' argument was based on two cases. In Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802 (D.C. Cir. 1983), the court held that a district court's order to "promulgate" regulations was satisfied by publication of such regulations in the Federal Register. *Id.* at 813. In Laminators Safety Glass Ass'n v. Consumer Product Safety Comm'n, 578 F.2d 406 (D.C. Cir. 1978), the court, for purposes of determining the effective date for calculating a statute of limitations, implicitly equated the date of Federal Register publication with the date of promulgation. *Id.* at 408.

116. *Active Sites*, 772 F.2d at 645. *See Laminators Safety Glass Ass'n*, 578 F.2d at 408-11.

117. *Active Sites*, 772 F.2d at 645.

118. *Id.*

119. The court again held:

> that a finding by the EPA of a 'significant risk' is not a prerequisite to promulgating the regulations; . . . that the EPA may promulgate standards to apply within the boundaries of the millsites; . . . that the EPA's standards do not unlawfully impose management, design, and engineering requirements; . . . and that the EPA properly considered cost-benefit factors in establishing standards.

Id. at 645-46. In addition, the arbitrary and capricious issue was not rediscussed.

120. 40 C.F.R. § 192.32(a)(1)-(2) (1986).

121. *Active Sites*, 772 F.2d at 648-49.

122. *Id.* at 649. AMAX is "one of the world's leading producers of molybdenum." *Id.*

123. *Id.* at 650.

124. *Id.*

state that molybdenum is listed as a hazardous constituent "only for purposes of controlling uranium and thorium byproduct materials."[125] Therefore, AMAX's molybdenum holdings were not covered by the regulations and the court accordingly denied AMAX standing.[126]

c. *Standard of Review*

In both *Inactive Sites* and *Active Sites*, the Tenth Circuit reviewed the EPA's rulemaking record to determine whether its decision was arbitrary and capricious.[127] Except for the remand of the groundwater guidance standards in *Inactive Sites*, the Tenth Circuit affirmed the EPA's decisions in both *Active Sites* and *Inactive Sites*, thus showing substantial deference to the EPA's expertise in a highly technical field.

B. *The Compound 1080 Case*

1. Background

In *National Cattleman's Association v. EPA*,[128] the EPA was caught between competing challenges of the Defenders of Wildlife and those of a number of livestock industry trade associations.

Prior to 1972, Compound 1080 was one of the primary substances used by ranchers to kill coyotes and other predators of livestock. In 1972, the EPA determined that Compound 1080 was leading to a substantial number of deaths of non-target, non-predatory animals.[129] Pursuant to its authority under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[130] the EPA cancelled the registration of Compound 1080 for use as a predacide.[131]

Regulations promulgated under FIFRA allow the Administrator to reconsider a prior cancellation of a pesticide in light of any "substantial

125. *Id.*

126. The Tenth Circuit relied on National Collegiate Athletic Ass'n v. Califano, 622 F.2d 1382 (10th Cir. 1980), in which it held that a plaintiff must allege that he has been or will be "perceptibly harmed" by an agency action, "not that he can imagine circumstances in which he could be affected by the agency's action." *Id.* at 1387 (quoting United States v. SCRAP, 412 U.S. 669, 688-89 (1973)). The Tenth Circuit found that the regulatory impact of UMTRCA was so far removed from the harm AMAX was alleging, that standing did not exist. *Active Sites*, 772 F.2d at 652.

127. The standard of review applied by the Tenth Circuit was the arbitrary and capricious test. *See* 5 U.S.C. § 706(2)(a) (1982). Under this standard, the court reviews the evidence "to determine whether the agency decision was rational and based on consideration of the relevant factors." Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976). As a result, the reviewing court may not "substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). A court may reverse, however, upon a finding that the agency made a clear error of judgment. *Id.*

128. 773 F.2d 268 (10th Cir. 1985).

129. *Id.* at 269.

130. 7 U.S.C. §§ 136a-y (1982). Section 136d(b) of FIFRA allows the EPA's Administrator to cancel or modify the registration of a registered pesticide if it is found to have "unreasonable adverse effects" on the environment. 7 U.S.C. § 136d(b) (1982). Procedures for this process are codified in 40 C.F.R. § 164.1-.133 (1986).

131. *National Cattleman's Ass'n*, 773 F.2d at 269; *see* 37 Fed. Reg. 5720 (1972) (administrative notice disallowing the use of Compound 1080 for predacide purposes).

new evidence" which was not available at the time of cancellation.[132] In 1972, Compound 1080 was predominantly administered in large bait stations.[133] By 1982, two new means of administering the pesticide had been developed: single lethal dose baits (SLD) and toxic collars.[134] These new distribution methods precipitated a 1982 hearing to determine whether they constituted "substantial new evidence" sufficient to require a reversal or modification of the 1972 suspension order.[135]

As a result of the hearing, the Administrative Law Judge (ALJ) found that the advent of toxic collars and SLDs did constitute substantial new evidence, thereafter lifting the ban on use of Compound 1080 when administered by these methods.[136] However, the ALJ imposed certain restrictions on the use of toxic collars and SLDs,[137] while maintaining the ban on large bait stations.

On appeal to the Administrator, the ALJ's ban on large bait stations was upheld and additional restrictions on the use of SLDs and toxic collars were imposed.[138] Both the Defenders of Wildlife and the National Cattleman's Association appealed the Administrator's decision to the Tenth Circuit.

2. The Tenth Circuit Decision

The Defenders of Wildlife asserted that the Administrator's decision to lift the ban on Compound 1080 was not supported by substantial new evidence. The National Cattleman's Association, on the other hand, questioned the EPA's restrictions on the use of SLD baits as well as the EPA's refusal to lift the ban on large bait stations.[139]

The statute requires a reviewing court to sustain the Administrator's decision if it is "supported by substantial new evidence when con-

132. 40 C.F.R. § 164.132(a) (1986).

133. "A large bait station consists of a fifty to one-hundred-pound portion of horse or sheep carcass impregnated with Compound 1080. These bait stations [are] set out during the winter and early spring in rangelands suffering from heavy predation by coyotes." *National Cattleman's Ass'n*, 773 F.2d at 270.

134. "An SLD consists of a bite-size piece of meat or other material containing a lethal dose of Compound 1080 which is placed in a location where it is likely to be taken by a coyote and not likely to be consumed by non-target wildlife . . . . Toxic collars consist of rubber collars with small reservoirs filled with Compound 1080." *Id.* These collars are worn by sheep or goats. Coyotes generally strike at an animal's throat, and are thereby exposed to a lethal dose of 1080. *Id.*

135. *Id.* at 269; *see* 40 C.F.R. § 164.132(a) (1986) (allows reversal or modification).

136. *National Cattleman's Ass'n*, 773 F.2d at 270.

137. The Administrative Law Judge's order required that all Compound 1080 uses be supervised by a federal agency. This requirement was reviewed by the Tenth Circuit. *See infra* notes 140-43 and accompanying text. "Collars could be filled and distributed only by registered users and only administered by certified applicators." SLD baits could only be prepared and distributed by certified state or federal employees. *National Cattleman's Ass'n*, 773 F.2d at 270.

138. Under the Administrator's decision, the certification of SLD applicators would be run solely by the federal government. Additional testing under experimental use permits would also be required. With respect to toxic collars, additional labelling and usage requirements were imposed. *Id.* at 270.

139. *Id.* at 270-71.

sidered on the record as a whole."[140] With regard to the two new delivery methods, the Tenth Circuit found that the EPA's decision was supported by the requisite substantial new evidence in the record.[141]

The Tenth Circuit, however, rejected the EPA's requirement that a federal agency determine the competency of and certify all users of SLD baits. The court held that this requirement exceeded the EPA's statutory authority since FIFRA allows states to adopt certification plans for applicators.[142] Such plans, however, must be approved by the EPA.[143] The Tenth Circuit found that the EPA's requirement of mandatory federal agency certification would have the effect of rejecting state certification plans prior to their submission, thus contravening the statute.[144] In all other respects, the EPA Administrator's decision was affirmed.[145]

C. *Analysis*

In the three cases discussed above, the Tenth Circuit deferred to the EPA's expertise with regard to its interpretations of scientific evidence. In spite of this deference, it is important to note that the UMTRCA cases were reviewed under the arbitrary and capricious standard,[146] while the *Compound 1080* decision was reviewed under the substantial evidence test.[147] Indeed, it is often difficult to distinguish the requisite quantity of evidence needed to uphold a given decision under either of these tests,[148] particularly when the agency action under re-

140. *Id.* at 271 (quoting 7 U.S.C. § 136n(b) (1982)). "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 270 (quoting Consolidated Edison Co. v. NRLB, 305 U.S. 197, 229 (1938)).

141. *Id.* at 271.

142. 7 U.S.C. § 136b(a)(2) (1982) reads:

> If any State, at any time, desires to certify applicators of pesticides, the Governor of such State shall submit a State plan for such purpose. The Administrator shall approve the plan submitted by any State, or any modification thereof, if such plan in his judgment—
>
> (A) designates a State agency responsible for administering the plan throughout the State;
>
> (B) contains satisfactory assurances that such agency has or will have the legal authority and qualified personnel necessary to carry out the plan;
>
> (C) gives satisfactory assurances that the State will devote adequate funds to the administration of the plan;
>
> (D) provides that the State agency will make such reports to the Administrator in such form and containing such information as the Administrator may from time to time require; and
>
> (E) contains satisfactory assurances that State standards for the certification of applicators of pesticides conform with those standards prescribed by the Administrator under paragraph (1) [of this section]. Any State certification program under this section shall be maintained in accordance with the State plan approved under this section.

143. *Id.*

144. *National Cattleman's Ass'n*, 773 F.2d at 272.

145. *Id.* at 273.

146. *See supra* note 127 and accompanying text.

147. *See supra* note 140 and accompanying text.

148. The Second Circuit Court of Appeals stated in Associated Indus. of N.Y. State v. United States Dep't of Labor, 487 F.2d 342, 349-50 (2d Cir. 1973):

> [I]t is difficult to imagine a decision having no substantial evidence to support it which is not 'arbitrary', or a decision struck down as arbitrary which is in fact

view is based on scientific expertise.[149] Thus, in these cases, judicial scrutiny was limited to review for compliance with statutory authority and review for procedural compliance.[150] The Tenth Circuit exhibited almost complete deference to the agency's findings, ensuring only that the agency decision was supported by some evidence.

In these three cases, the Tenth Circuit's decision to strike down certain aspects of the agency's decisions[151] was based on the EPA's attempt to engage in ultra vires actions.[152] The court, after its purported "searching inquiry" into the facts, affirmed the EPA's scientific judgment in all three cases. While it is not suggested that these Tenth Circuit decisions should have been decided differently, it may be that the Tenth Circuit's reluctance to scrutinize scientific evidence[153] blurs any distinction that exists between the arbitrary and capricious test and the substantial evidence test.

This deference reflects the judiciary's preference to rely on the scientific expertise concentrated in the agency. Such deference may be most pronounced where the court, like the agency, finds itself caught between competing interests. Each litigant, sophisticated in the scientific bases of a given regulatory option, may muster their experts to refute an agency choice which has been arrived at through the use of a technically trained staff. Use of skilled agency professionals, however, is

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supported by 'substantial evidence' . . . in the review of rules of general applicability made after notice and comment rulemaking, the two criteria do tend to converge.

The primary difference according to the Administrative Procedure Act is that the substantial evidence test applies to "on the record hearings," 5 U.S.C. § 706(2)(E) (1982), while the arbitrary and capricious test applies to informal rulemaking, 5 U.S.C. § 706(2)(A) (1982). *See* Ethyl Corp. v. E.P.A., 541 F.2d 1, 37 n.79 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); *Associated Industries*, 487 F.2d at 349-50.

149. When scientific or highly specialized subjects are involved, wide-ranging judicial review may strain the technical competence of the court. Levin, *Scope of Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 260 (1986). "When available technological data and research are unfamiliar or untried, the Agency necessarily enjoys broad discretion." Kennecott Copper Corp. v. EPA, 612 F.2d 1232, 1236 (10th Cir. 1979); *see* BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 647 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980). When a court is reviewing an area "fraught with scientific uncertainty," the judicial review function encounters "significant limitations in the substantive aspect." *Id.* (quoting Weyerhauser Co. v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978)).

150. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); CF&I Steel Corp. v. Economic Dev. Admin., 624 F.2d 136 (10th Cir. 1980).

151. *See supra* notes 106-08 and accompanying text (guidance standards in the UMTRCA cases); notes 142-44 and accompanying text (the exclusive Federal agency determination of competency and power to certify users of SLD baits).

152. With regard to the Tenth Circuit's rejection of the groundwater guidance standards in *Inactive Sites*, it is unnecessary to decide whether the court's rejection was based on either statutory or procedural deficiencies. It is sufficient, for the purposes of this argument, to note that the decision was not based on an extensive review of, or inquiry into, the scientific evidence. *See supra* notes 106-08 and accompanying text.

153. This reluctance to scrutinize scientific evidence is by no means out of line with accepted standards. As Justice O'Connor said in Baltimore Gas and Electric Co. v. Natural Resources Defense Council, 462 U.S. 87 (1983), "a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must be at its most deferential." *Id.* at 103.

the purpose of rulemaking procedures.[154] It would be unreasonable, if not erroneous, for a court to pick a side in a scientific debate among experts.[155] Thus, the logical result, as exemplified by the Tenth Circuit decisions discussed herein, is deference to the administrative agency's "middle ground," regardless of the legal standard by which the agency decision is reviewed.

III. JOINING THE SOCIAL SECURITY/UNEMPLOYMENT COMPENSATION OFFSET BANDWAGON: *EDWARDS V. VALDEZ*

In *Edwards v. Valdez*,[156] the Tenth Circuit reversed Judge Weinshienk's district court opinion,[157] thereby upholding nearly identical federal and state provisions allowing unemployment benefits received by those who have begun to collect their social security pensions to be offset by the monthly amount of social security received. This decision brought the Tenth Circuit into accord with all other federal circuits that have construed the federal statute at issue.[158]

A. *The District Court Opinion*

Edwards involved three Colorado residents who began to receive social security benefits upon retirement. Each of these three individuals subsequently acquired new employment, became unemployed, and filed for unemployment benefits. Pursuant to their interpretation of the Federal Unemployment Tax Act (FUTA),[159] the defendants deducted each

154. *See* O'Brien, *Marbury, the APA, and Science—Policy Disputes: The Alluring and Elusive Judicial/Administrative Partnership*, 7 HARV. J. OF L. AND PUB. POL'Y 443 (1984).

155. For a different characterization of these issues, see Stever, *Deference to Administrative Agencies in Federal Environmental, Health, and Safety Litigation—Thoughts on Varying Judicial Application of the Rule*, 6 W. NEW ENG. L. REV. 35 (1983).

156. 789 F.2d 1477 (10th Cir. 1986).

157. Edwards v. Valdez, 602 F. Supp. 361 (D. Colo. 1985), *rev'd*, 789 F.2d 1477 (10th Cir. 1986).

158. *See* Peare v. McFarland, 778 F.2d 354 (7th Cir. 1985); Mayberry v. Adams, 745 F.2d 729 (1st Cir. 1984); Watkins v. Cantrell, 736 F.2d 933 (4th Cir. 1984); Bowman v. Stumbo, 735 F.2d 192 (6th Cir. 1984); Rivera v. Becerra, 714 F.2d 887 (9th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984).

159. 26 U.S.C. §§ 3301-11 (1982). The FUTA section applied in *Edwards* reads:

> [T]he amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week except that—
>
> (A) the requirements of this paragraph shall apply to any pension, retirement or retired pay, annuity, or other similar periodic payment only if—
>
> (i) such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period employer (as determined under applicable law), and
>
> (ii) in the case of such a payment not made under the Social Security Act or the Railroad Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar payment, and

plaintiffs' social security benefits from their unemployment benefits. Plaintiffs challenged this interpretation.[160]

Consequently, the primary issue in *Edwards* was the construction of section 3304(a)(15)(A)(i) of FUTA and a similar Colorado provision.[161] These provisions allow a state to "offset unemployment compensation by the amount of social security benefits received whenever the 'base period' employer participates in the social security program."[162] One of the likely reasons for the enactment of this provision was the prevention of 'double-dipping.'[163]

Plaintiffs' primary claim was that section 3304(a)(15) of FUTA only applied to persons who worked for a base period employer, retired, and then went back to work for the same employer for the time necessary to become eligible for unemployment compensation. The district court agreed that such a construction could be inferred from the statutory language,[164] thus concluding that the language was "ambiguous."[165] This conclusion forced the court to resort to the legislative history in order to determine the meaning of the statutory provision.[166]

The most compelling evidence supporting the construction urged by the plaintiffs was a statement by Senator Bradley which indicated that it would be possible for an individual to lose his unemployment benefits during the offsetting process if the individual's pension benefits were higher than his unemployment benefits.[167] Indeed, Judge Weinshienk

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(B) the State law may provide for limitations on the amount of any such a reduction to take into account contributions made by the individual for the pension, retirement or retired pay, annuity, or other similar periodic payment;

26 U.S.C. § 3304(a)(15) (1982).

160. *Edwards*, 789 F.2d at 1478.

161. COLO. REV. STAT. § 8-73-110 (Supp. 1986) reads in pertinent part:

(3)(a) An individual's weekly benefit amount shall be reduced (but not below zero) by the prorated weekly amount of a primary insurance benefit under Title II or the federal "Social Security Act," a pension, retirement or retired pay, annuity, or any other similar periodic payment from a plan or fund which has been contributed to by a base period employer.

162. *Edwards*, 789 F.2d at 1479. "The 'base period' is the period of time an employee must be employed before he is eligible for unemployment benefits. The 'base period employer' . . . is the employer who paid wages during this eligibility period." *Id.* at 1479 n.2.

163. " '[D]ouble-dipping' in this context refers to the collection of both pension benefits and unemployment benefits based on the same period of work and contributions by the same employer." *Id.* at 1479 n.5.

164. "One logical meaning of [29 U.S.C. § 3304(a)(15)] (A)(i) would be that social security payments are offset only if the base period employer was one who 'contributed to' the social security benefits of the specific employee before retirement." *Edwards*, 602 F. Supp. at 364 (D. Colo. 1985).

165. *Id.* at 365.

166. The general rule is that where the plain language of the statute is clear, resort should not be had to the legislative history. Tennessee Valley Authority v. Hill, 437 U.S. 153, 183 n.29 (1978); *Ex parte* Collett, 337 U.S. 55, 61 (1949). It is only where an ambiguity in the statutory language exists that the legislative history should be consulted. Nichols v. Denver & R.G.W.R. Co., 195 F.2d 428, 431 (10th Cir. 1952). The Tenth Circuit, by its own admission, has been far from consistent in applying these general rules. *Edwards*, 789 F.2d at 1481 n.7.

167. Senator Bradley stated:

A worker at company A retires at age 65 after 35 years of service there and begins collecting a pension of $600 per month. He unsuccessfully seeks new employment and files an unemployment insurance claim. The State computes this indi-

accorded great weight to these remarks.[168] As such, she concluded that "Congress intended social security benefits to be offset only if the base period employer was the same as the social security employer and not when the base period employer merely participates in the federal social security system."[169] She, therefore, held that the plaintiffs were not subject to the offset provisions of section 3304(a)(15).[170]

B. *The Tenth Circuit Decision*

When construing section 3304(a)(15)(A)(i), the Tenth Circuit ignored the inconsistent language in the legislative history,[171] finding the language to be "clear and unambiguous."[172] The majority concluded that "[t]he language of the statute, standing alone, compels only one interpretation: that social security benefits offset unemployment benefits if the base period employer makes social security contributions."[173]

In reviewing plaintiffs' equal protection claims, the Tenth Circuit found the classification justified by the governmental interests of fiscal integrity, ease of administration, diminished possibility of truly retired workers collecting unemployment, and the prevention of a requirement that would force employers to fund two wage-replacement programs for the same period of employment.[174]

The Tenth Circuit reversed the district court's decision.[175] Judge Seymour dissented, finding that the language of the statute was ambiguous, and further concluded that the legislative history supported the district court's conclusions.[176]

C. *Analysis*

The Tenth Circuit's *Edwards* decision is consistent with decisions of all other federal circuits that have looked at section 3304(a)(15),[177] as well as the Secretary of Labor's interpretation of the provision.[178] In

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vidual's unemployment benefit rate at $130 per week, or $520 per month, because of the past earnings reported to the State. This individual would not be eligible for unemployment insurance payments, because the amount of the pension received from the base period employer exceeded the unemployment insurance payments that were to be paid.

126 CONG. REC. 26,041 (daily ed. Sept. 18, 1980) (remarks of Senator Bradley).

168. *Edwards*, 602 F. Supp. at 368; *see generally* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-27 (1982) ("Remarks . . . of the sponsor of the language ultimately enacted are an authoritative guide to the statute's construction.").

169. *Edwards*, 602 F. Supp. at 369.

170. *Id.*

171. *See supra* note 167 and accompanying text.

172. *Edwards*, 789 F.2d at 1481.

173. *Id.*

174. *Edwards*, 789 F.2d at 1483.

175. *Id.* at 1484.

176. *Id.* (Seymour, J., dissenting).

177. *See supra* note 158 and accompanying text.

178. *See* Unemployment Insurance Program Letter No. 7-81, 47 Fed. Reg. 29,905 (1982); Unemployment Insurance Program Letter No. 7-81 (Change 1), 47 Fed. Reg. 29,908 (1982); Unemployment Insurance Program Letter No. 7-81 (Revised Change 2), 48 Fed. Reg. 37,740 (1983) (revokes Change 1 and reinstates the position stated in original

Unemployment Insurance Program Letter (UIPL) 7-81, the Secretary interpreted section 3304(a)(15)(A)(i) to allow states to deduct "dollar for dollar, the amount of any pension payment received without regard to the proportion of base period wages that may have been paid by the employer who contributed to or maintained the pension."[179]

The Secretary also interpreted the pension offset provision to be the minimum deduction required by federal law. Under this interpretation, states are free to broaden the scope of deductions of pension payments beyond this federal minimum.[180] In *Watkins v. Cantrell*,[181] the Fourth Circuit looked at the statutory language, the legislative history, and the Secretary's interpretation of section 3304(a)(15) to conclude that the State of Virginia's pension offset provision,[182] which offset unemployment benefits in excess of the amounts required to be offset by section 3304(a)(15), did not contravene the statutory requirements of FUTA.[183]

Three other federal circuits which have interpreted section 3304(a)(15) under similar fact situations have arrived at the same conclusion as the Tenth Circuit.[184] Furthermore, recent district court decisions have been consistent with the federal circuit opinions.[185] It therefore seems fair to conclude that social security and other pension benefits may be offset from unemployment insurance benefits, though the extent of these offsets will vary according to the laws of the individual states.

IV. Good Timing — Finality of Judgment, Motions for Reconsideration, and Statutory Limitations In Filing Appeals From Administrative Actions

In *C.O.D.E., Inc. v. ICC*,[186] and *Smith v. Marsh*,[187] the Tenth Circuit addressed the issue of timeliness in filing appeals for judicial review of

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Unemployment Insurance Program Letter No. 7-81, 47 Fed. Reg. 29,905 (1982) which allows "[s]tates greater latitude in taking into account an unemployed individual's contributions to a pension fund"); *see also* Cabais v. Egger, 690 F.2d 234 (D.C. Cir. 1982) (holding that this directive, with the exception of Unemployment Insurance Program Letter No. 7-81 (Change 1), 47 Fed. Reg. 29,908 (1982), was an interpretative rule, thus not subject to the notice and comment rulemaking requirements of the Administrative Procedure Act).

179. Unemployment Insurance Program Letter No. 7-81, 47 Fed. Reg. 29,905 (1982).

180. "Although a State may broaden the scope of its deduction of pension payments beyond the conditions in which deduction is required under the Federal law, it may not adopt less stringent conditions which fall short of the Federal requirements." Unemployment Insurance Program Letter No. 7-81, 47 Fed. Reg. 29,905, 29,906 (1982).

181. 736 F.2d 933 (4th Cir. 1984); *see also* Note, *Federal Pension Offset Provisions: Minimum Standard or Federal Mandate?*, 42 WASH. & LEE L. REV. 647 (1985) (discussing *Watkins*).

182. VA. CODE ANN. § 60.1-48.1 (1950 & Supp. 1987).

183. *Watkins*, 736 F.2d at 946.

184. *See* Peare v. McFarland, 778 F.2d 354 (7th Cir. 1985); Bowman v. Stumbo, 735 F.2d 192 (6th Cir. 1984); Rivera v. Becerra, 714 F.2d 887 (9th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984).

185. *See, e.g.*, Bleau v. Hackett, 598 F. Supp. 727 (D. R.I. 1984); Duso v. Ratoff, 600 F. Supp. 3 (D. N.H. 1983).

186. 768 F.2d 1210 (10th Cir. 1985).

187. 787 F.2d 510 (10th Cir. 1986).

administrative agency decisions. In both cases, the Tenth Circuit found that the petitions for review were filed in a timely manner. In *C.O.D.E.*, the Tenth Circuit decided that the filing of a discretionary appeal to the agency tolled the statute of limitations for appeal to the court. This allowed for court review if the petitioner filed its appeal within sixty days of the agency's denial of the discretionary appeal.[188] In *Smith*, the court found that refusal by a military review board to upgrade an undesirable discharge was a separate administrative action, distinct from the original discharge decision, and thus reviewable on a petition filed within the statutory time period.[189] The two cases raise issues regarding the finality of agency action, the exhaustion of administrative remedies, the effect of motions for reconsideration on limitation of action provisions, the exercise of the court's equitable jurisdiction, and the tendency of courts to favor judicial review.

A. C.O.D.E. v. ICC

In *C.O.D.E.*, the petitioner sought review of an Interstate Commerce Commission (ICC) decision allowing a competing company to operate as a common carrier. The initial decision was made by the Commission's Review Board No. 2, which held that petitioners "failed to demonstrate that [the Board's] grant of the application would be inconsistent with public convenience and necessity."[190] C.O.D.E. then appealed to Commission Division 1, which denied its appeal.[191] Finally, C.O.D.E. filed a discretionary appeal to the full commission, seeking to have portions of the case declared as matters of General Transportation Importance (GTI).[192] This appeal was also denied.

Regarding the statute of limitations, section 2344 of the Administrative Orders Review Act (the Hobbs Act) requires any party aggrieved by an agency decision to seek judicial review within sixty days after a final agency order is entered.[193] This statutory review provision is jurisdictional,[194] and may not be altered or enlarged by the court.[195] There-

188. *C.O.D.E.*, 768 F.2d at 1212.
189. *Smith*, 787 F.2d at 511-12.
190. *C.O.D.E.*, 768 F.2d at 1211.
191. *Id.*
192. *Id.*; 49 U.S.C. § 10322(g)(2)(A) (Supp. 1986) provides that:

"The Commission may grant a rehearing, reargument, or reconsideration of an action of the Commission that was taken by a division or an employee board designated by the Commission if it finds that—

(A) the action involved a matter of general transportation importance . . . ."

See also 49 C.F.R. 1115.3(b)(2) (1986) (matters of general transportation importance as a prerequisite to an administrative appeal).

193. 28 U.S.C. § 2344 (1970) provides in part that:

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

194. Failure to file within the statutory time period will therefore divest the court of its powers of review. *See* Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 666 F.2d 595 (D.C. Cir. 1981); Chem-Haulers, Inc. v. United States, 536 F.2d 610 (5th Cir. 1976); Microwave Communications, Inc. v. FCC, 515 F.2d 385 (D.C. Cir. 1974).

fore, the primary issue before the Tenth Circuit in *C.O.D.E.* was whether the petitioner's appeal should have been filed following the decision of Division 1 (in which case the action would have been barred as untimely), or whether filing within sixty days of the denial of the discretionary appeal to the full commission allowed judicial review.[196]

In deciding this issue, the Tenth Circuit relied on the Eighth Circuit case of *B.J. McAdams, Inc. v. ICC*.[197] In *McAdams*, a motion for reconsideration was filed by McAdams on September 19, 1975, after his application to transport candy and confections was denied on August 12, 1975. This petition was ultimately denied by the Commission. The notice of denial was served on McAdams on January 7, 1976. Subsequently, on January 15, 1976, McAdams filed a petition requesting a declaration that certain issues were matters of general transportation importance. This petition was also denied by the Commission. McAdams was served with notice of the denial on February 3, 1976. McAdams filed a petition for court review on March 31, 1976.[198] The issue presented to the Eighth Circuit was when the 60 day limitation period began to run. The court held that although the GTI petition was not necessary for purposes of exhaustion, the 60 day time period began to run from the date of its denial.[199]

The Tenth Circuit, following the *McAdams* decision, concluded that requiring an appeal to be filed with the court prior to the Commission's ruling on a discretionary appeal would be premature.[200] The court thus held that "[i]t is in the interest of judicial economy and agency responsibility to allow the Commission to reconsider its orders . . . rather than to compel an applicant to invoke immediate judicial review."[201]

In making its determination, the Tenth Circuit distinguished *C.O.D.E.* from *Selco Supply Co. v. EPA*.[202] In *Selco*, the Tenth Circuit held that a motion for reconsideration did not toll the running of a sixty day statute of limitations imposed by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[203] The court held that *Selco* was distinguishable from *C.O.D.E.* on policy grounds, since "resolution of EPA orders under FIFRA, like orders under other environmental protection statutes, should be made promptly."[204]

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195. *Chem-Haulers*, 536 F.2d at 614; *see* FED. R. APP. P. 26(b) which provides in part that:
> [The court of appeals may not] enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

196. *C.O.D.E.*, 768 F.2d at 1211.

197. 551 F.2d 1112 (8th Cir. 1977).

198. *Id.* at 1114.

199. *Id.* at 1114-15.

200. *C.O.D.E.*, 768 F.2d at 1211 (citing *McAdams*, 551 F.2d at 1115).

201. *Id.* (quoting *McAdams*, 551 F.2d at 1115). For a discussion of similar policy reasons for requiring exhaustion of administrative remedies, see *supra* notes 18 & 60-64 and accompanying text.

202. 632 F.2d 863 (10th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

203. *Id.* at 865; *see* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(n)(b) (1982).

204. *C.O.D.E.*, 768 F.2d at 1212 (quoting *Selco*, 632 F.2d at 863). Judge Seymour con-

Here, the court held that C.O.D.E.'s appeal was filed in a timely manner. However, in reaching this conclusion, the court noted that decisions as to the tolling of the statutes of limitations of agencies other than the ICC were not controlling.[205]

B. Smith v. Marsh

1. Administrative Proceedings and the District Court's Decision

Smith v. Marsh[206] involved the refusal of a military review board to upgrade the status of a former serviceman's undesirable discharge.[207] Mr. Smith's first claim was that the Army's 1971 denial of his conscientious objector application was improper and that his constitutional and regulatory rights had been violated.[208] He further claimed that the subsequent reviews of the 1971 decision, by the Army Discharge Review Board (ADRB) and Army Board for Correction of Military Records (ABCMR) denying his upgrade, were arbitrary, capricious, and unsupported by substantial evidence.[209] The district court agreed with the latter claim, and the Army appealed.[210]

2. Tenth Circuit Decision

The Army's primary contention on appeal was that each of Mr. Smith's claims were time-barred by 28 U.S.C. sec. 2401(a).[211] The Tenth Circuit agreed with the district court, finding that the petitioner's first claim was time-barred since it accrued in 1972.[212] It also affirmed the trial court's acceptance of Smith's second claim, holding that the statute of limitations began to toll in 1983.[213] Review of this decision

curred with the *Selco* majority opinion, yet took issue with the majority's adoption of a separate, stricter rule denying the tolling of the statute of limitations for EPA orders under FIFRA. "Prompt resolution of environmental orders is an important goal. It is not self-evident, however, that there is a lesser need for quick determination of issues before . . . the Interstate Commerce Commission." *Selco*, 632 F.2d at 866 (Seymour, J., concurring).

205. *C.O.D.E.*, 768 F.2d at 1212.

206. 787 F.2d 510 (10th Cir. 1986).

207. *Id.* John Smith received an undesirable discharge from the U.S. Army in 1972. In 1980, Smith applied to the Army Discharge Review Board (ADRB) to have his discharge upgraded. The ADRB denied his claim. Mr. Smith then applied to the Army Board for Correction of Military Records (ABCMR), which also denied his claim in November 1983. *Id.* at 510-11.

208. *Id.* at 511.

209. *Id.*

210. *Id.*

211. *Id.*; 28 U.S.C. § 2401(a) (1982) states in part that: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

212. *Smith*, 787 F.2d at 511.

213. *Id.* at 512. The Tenth Circuit, in reaching this conclusion, relied on Geyen v. Marsh, 775 F.2d 1303 (5th Cir. 1985), a case which was "practically indistinguishable on its facts from [*Smith*]." *Smith*, 787 F.2d at 511. In *Geyen*, the Fifth Circuit found that Geyen's first cause of action, in which he challenged his "activation and the Army's denial of his hardship applications," *Geyen*, 775 F.2d at 1308, was barred by the six-year statute of limitations. Geyen's second cause of action, in which he alleged "that the ABCMR's 1982 decision denying him an upgraded discharge was arbitrary, capricious, unsupported by substantial evidence and erroneous in law," *Id.*, was not time barred since it accrued at the time of the 1982 ABCMR decision. *Id.* at 1309.

was therefore not time-barred. The Tenth Circuit then found that the ABCMR's decision was indeed arbitrary and capricious, and affirmed the trial court's order requiring the Army to issue Mr. Smith an honorable discharge.[214]

In *Smith*, the Tenth Circuit refused to follow the rule most recently expressed in *Hurick v. Lehman*.[215] In *Hurick*, the Federal Circuit held that "the failure of the Correction Board to set aside a military discharge does not give rise to a separate and independent claim, since that action is merely ancillary to the discharge that the former serviceman is seeking to change."[216]

C. *Analysis*

Statutes of limitations represent a "legislative judgment that it is unjust to fail to put the adversary on notice to defend [an action] within a specified period of time, and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' "[217] In the administrative law context, time limits impart "finality into the administrative process, thereby conserving administrative resources and the reliance interests of those who might conform their conduct to administrative regulations."[218] Although the federal courts have recognized these concerns, they have not applied statutory time limits in a consistent manner.

The Tenth Circuit's *Smith* decision, when contrasted with the Federal Circuit's *Hurick* decision, exemplifies how a differing characterization of an agency action may either allow review of or bar identical claims. Likewise, the Tenth Circuit's *C.O.D.E.* and *Selco* decisions demonstrate how a motion for reconsideration in one instance may toll the statute of limitations,[219] while in another instance, it may not.[220]

Other considerations, such as ripeness,[221] the application of a rule

214. *Smith*, 787 F.2d at 512.

215. 782 F.2d 984 (Fed. Cir. 1986).

216. *Id.* at 987.

217. U.S. v. Kubrick, 444 U.S. 111, 117 (1979) (quoting Railroad Tel. v. Railway Express Agency, 321 U.S. 342, 349 (1944)).

218. Illinois Cent. Gulf R.R. Co. v. ICC, 720 F.2d 958, 960 (7th Cir. 1983); *see also* Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 666 F.2d 595, 602 (D.C. Cir. 1981).

219. *See* American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532 (1970) (motion for reconsideration upheld); Pennsylvania v. ICC, 590 F.2d 1187 (D.C. Cir. 1978) (motion for reconsideration tolled statute of limitations); Outland v. CAB, 284 F.2d 224, 227 (D.C. Cir. 1960) ("Where a motion for rehearing is in fact filed there is no final action until the hearing is denied.").

220. *See also NRDC*, 666 F.2d at 602 (sixty day period for seeking judicial review may not be enlarged by courts); Provisioners Frozen Express, Inc. v. ICC, 536 F.2d 1303 (9th Cir. 1976) (denial of petition to reopen by commission will not allow judicial review of administrative decision after sixty day limitations period has elapsed, but review may be had to determine whether denial of petition to reopen was arbitrary and capricious).

221. Where the right to review is limited by a statute of limitations, but such regulation is not ripe for review for lack of the necessary information, petitioner may delay reconsideration until such information becomes available. This decision can then be appealed under § 553(e) of the Administrative Procedure Act. *See* Eagle-Picher, Inc. v. EPA, 759 F.2d 905, 912-15 (D.C. Cir. 1985); Baltimore Gas and Electric Co. v. ICC, 672 F.2d 146,

or regulation to a specific situation,[222] uncertainty as to the applicability of agency actions,[223] and equitable considerations,[224] may also toll the running of statutes of limitations. Indeed, these examples are consistent with the general willingness of courts to allow judicial review, if possible.[225] The Tenth Circuit's *C.O.D.E.* and *Smith* decisions exemplify this willingness, even where strictly construed statutes of limitations might otherwise preclude such review.

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149 (D.C. Cir. 1982); Geller v. FCC, 610 F.2d 973, 978 n.35 (D.C. Cir. 1979); Investment Co. Inst. v. Board of Governors of Fed. Reserve Sys., 551 F.2d 1270, 1280-81 (D.C. Cir. 1977).

222. A statute of limitations will only bar direct review of an administrative rule. However, subsequent application of a rule may allow a court to review both the underlying rule and its application to the situation at bar. Texas v. United States, 730 F.2d 409 (5th Cir. 1984), *cert. denied sub nom.*, ICC v. Texas, 105 S.Ct. 3513 (1985); Functional Music, Inc. v. FCC, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

223. Where an agency leaves room for doubt as to the applicability of its actions, the statutory review period is tolled until the doubt is eliminated. Recreation Vehicle Indus. Ass'n v. EPA, 653 F.2d 562, 569 (D.C. Cir. 1981).

224. A statute of limitations may be tolled on "clear evidence that a failure to consider a petitioner's claims would work a manifest injustice." Brotherhood of Locomotive Engineers v. ICC, 761 F.2d 714 (D.C. Cir. 1985) (quoting *Eagle-Picher*, 759 F.2d at 909), *cert. granted*, 106 S.Ct. 1457 (1986).

225. The Administrative Procedure Act's "generous review provisions" should be given "hospitable interpretation." Only on a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review. Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).