Denver Law Review

Volume 54
Issue 1 *Tenth Circuit Surveys*

Article 5

February 2021

Administrative Law

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ADMINISTRATIVE LAW

In the last term, the Tenth Circuit decided several cases which were primarily concerned with questions of administrative law. Questions raised in these cases related to, among other things, access to agency information, allowance of benefits, and issuance of certificates and permits under statutory provisions and agency regulations implementing these statutes. In general, the decisions reached by the court were justified on the basis of traditional administrative law theories. The court continued to defer to the determinations made by administrative agencies on questions subject to agency discretion where the court found the evidence sufficient to support the determination, thus narrowing the scope of judicial review. However, the court also continued to maintain its role as final arbiter on questions of statutory interpretation and other questions of law. The decisions by the court were generally consistent with its prior decisions and also with the decisions of other circuits.

What is perhaps most significant about the cases heard by the court is not the final theories under which the cases were decided, but the types of questions which are being raised under various federal statutes before the various agencies. Although the court's decisions covered a broad range of topics, the heaviest concentration of cases occurred in the areas of equal employment opportunity, social security administration, regulation of natural gas, and access to administrative information; it is in these areas that the court made its most significant contribution to the body of case law in the Tenth Circuit.

I. Freedom of Information Act

The Freedom of Information Act (FOIA)[1] was the subject of review in *Campbell v. United States Civil Service Commission*[2] and *Climax Molybdenum Co. v. NLRB*.[3] In both cases, the scope of one of the exemptions from the disclosure requirements of the FOIA[4] was involved. In each case, the Tenth Circuit concluded

[1] 5 U.S.C. § 552 (1970 & Supp. IV 1974).

[2] 539 F.2d 58 (10th Cir. 1976).

[3] 539 F.2d 63 (10th Cir. 1976).

[4] The FOIA provides that each governmental agency shall make available to the public information specified in the Act. 5 U.S.C. § 552 (1970 & Supp. IV 1974). Certain

that the requested materials were exempt based on principles adopted by other circuits for determining the scope of an exemption.

In *Campbell*, employees of the Environmental Research Laboratory in Boulder, Colorado, sought disclosure of a report containing two parts and three appendices[5] compiled as the result of a routine investigation of the laboratory's personnel management. After the Civil Service Commission denied disclosure of the entire report on the grounds that each component was protected from disclosure by an exemption,[6] the employees brought an action in the district court pursuant to the FOIA to compel disclosure.[7] When the district court ordered disclosure of only Part I and Appendix III to the report the plaintiffs appealed[8] the decision to the Tenth Circuit. By the time the Tenth Circuit reviewed the case, the only question for determination was whether Appendices I and II were exempt from disclosure.[9]

The Tenth Circuit first analyzed the question under exemption six of the FOIA, which provides an exemption from disclosure for "personnel and medical files and similar files," the dis-

types of information, however, fall within one of nine exemptions from disclosure. *Id.* The relevant exemptions, for this Overview, provide that disclosure requirements do not apply to matters that are included in either (1) "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," or (2) "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . interfere with enforcement proceedings . . . ." *Id.* § 552(b)(6), (7)(A).

[5] The two parts contained appraisals and evaluations of personnel. Appendix I listed employees erroneously classified in the Service; Appendix II named employees who had been promoted contrary to Commission regulations; and Appendix III included a statistical analysis of the responses of laboratory employees to certain questionnaires. 539 F.2d at 60.

[6] *Id.*

[7] The FOIA authorizes the district court of the complainant's residence to enjoin an agency from withholding records and to order production of records improperly withheld. 5 U.S.C. § 552(a)(4)(B) (Supp. IV 1974).

[8] 539 F.2d at 60.

[9] Following the ruling of the district court, the Court of Appeals for the District of Columbia ruled that Civil Service Commission personnel management evaluation reports were not exempt from disclosure. Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975). In *Vaughn*, however, the question of disclosure of appendices, similar to Appendices I and II of the laboratory report, was not addressed; the plaintiffs in that case did not appeal a decision of the district court exempting such appendices from disclosure. After the decision in *Vaughn*, the Civil Service Commission released both parts of the report as well as Appendix III. Campbell v. United States Civil Serv. Comm'n, 539 F.2d at 61.

closure of which would "constitute a clearly unwarranted invasion of personal privacy."[10] Based upon the decisions of other courts,[11] the Tenth Circuit quickly concluded that both appendices fell within the "similar files" clause of the exemption.[12] Hence, the court was left with only one issue to determine: whether or not disclosure "would constitute a clearly unwarranted invasion of personal privacy."

The court noted that Congress had recommended the balancing of an individual's right of privacy against the public's right to government information.[13] The court then identified three factors which had been considered in prior cases[14] applying this balancing test:

> 1. Would disclosure result in an invasion of privacy and, if so, how serious?
> 2. The extent or value of the public interest purpose or objective of the individuals seeking disclosure.
> 3. Whether the information is available from other sources.[15]

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[10] 5 U.S.C. § 552(b)(6) (Supp. IV 1974). *See* note 4 *supra*.

[11] Department of the Air Force v. Rose, 425 U.S. 352, 371-82 (1976) (case summaries of honor code violations are "similar files" within the meaning of exemption 6); Wine Hobby USA, Inc. v. United States Internal Revenue Serv., 502 F.2d 133, 135 (3d Cir. 1974) (list of names and addresses of wine producers held to be similar files); Robles v. EPA, 484 F.2d 843 (4th Cir. 1973) (files on homes with high radiation levels discovered in EPA study held to be similar files). It is not clear that the *Robles* court actually concluded that the files in question were "similar files." While the court found the argument to that effect persuasive, it precluded exemption from disclosure because disclosure would not have resulted in a clearly unwarranted invasion of privacy.

[12] Based on *Rose*, the court claimed that since the appendices included "personnel information, it cannot be effectively argued that these are not 'similar files.'" 539 F.2d at 61. In addition, the court construed both *Wine Hobby* and *Robles* to give a "broader interpretation to the term [similar files] than we are required to give here." *Id.*

[13] The legislative history of the Freedom of Information Act with respect to exemption 6 provides: "The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Governmental information by excluding those kinds of files the disclosure of which might harm the individual." H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2428.

The Supreme Court has concluded with respect to exemption 6 that, "Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

[14] *See, e.g.*, Rural Hous. Alliance v. United States Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); Gettman v. NLRB, 450 F.2d 670, 674-77 (D.C. Cir. 1971).

[15] 539 F.2d at 61.

Under the FOIA and cases interpreting the Act, the burden lies with the Government to shift the balance in favor of non-disclosure to establish the exemption.[16]

In *Campbell*, the Tenth Circuit concluded that the district court had not abused its discretion in finding the balance in favor of non-disclosure with respect to Appendices I and II. The court reasoned that (1) a serious potential invasion of privacy would result if information regarding an individual's job classification and salary were made publicly available,[17] and that (2) the public interest is best served by "disclosure of general agency performance rather than by specific revelation of individual problems."[18] Hence, the information contained in the Appendices was deemed to be too specific to warrant general public availability at the expense of individual privacy. The Tenth Circuit affirmed the exemption of the Appendices from disclosure, even though the general policy of the FOIA favors disclosure.[19]

The scope of exemption 7(A)[20] of the FOIA was considered in *Climax Molybdenum Co. v. NLRB*.[21] Pursuant to a charge of unfair labor practices by the Oil, Chemical, and Atomic Workers International Union, the NLRB filed a complaint against the company; Climax then requested that the NLRB make available affidavits and statements obtained from company employees relative to the charges made in the complaint.[22] The NLRB denied the request based on the fact that the affidavits were investigatory records compiled for law enforcement proceedings, the production of which would interfere with the proceedings, and that the affidavits were therefore exempt from disclosure by exemption 7(A) of the Act.[23] In a suit brought by Climax to compel

[16] The agency seeking the exemption has the burden of establishing the exemption. 5 U.S.C. § 552(a)(4)(B) (Supp. IV 1974). *See, e.g.*, Rural Hous. Alliance v. United States Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); Gettman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971).

[17] 539 F.2d at 62.

[18] *Id.*

[19] The exemptions from the disclosure requirements of the Freedom of Information Act "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

[20] 5 U.S.C. § 552(b)(7)(A) (Supp. IV 1974). *See* note 4 *supra*.

[21] 539 F.2d 63 (10th Cir. 1976).

[22] *Id.* at 64.

[23] *Id.*

disclosure, the district court concluded that the affidavits were exempt.[24]

On appeal to the Tenth Circuit, Climax argued that the NLRB had failed to meet the burden necessary to establish the exemption. Specifically, Climax denied that the NLRB had established that "disclosure would interfere with enforcement proceedings . . . ."[25] The Tenth Circuit rejected Climax's argument and adopted the contention of the NLRB: "[D]isclosure of employee statements in any unfair labor practices case would interfere with enforcement proceedings."[26] The court justified its position by reasoning that the relationship between an employer and an employee is sensitive, and that a "labor case is peculiarly susceptible to employer retaliation, coercion, or influence to the point that there is *no need for an express showing of interference* in each case to justify giving effect to the exemption contained in Section 7(A) . . . ."[27] The Tenth Circuit's conclusion that documents obtained in NLRB enforcement proceedings are absolutely protected from disclosure while the proceedings are pending is consistent with the decisions of the First and Second Circuits.[28]

II. Civil Rights Act of 1964

Three Tenth Circuit cases considered the retroactivity of the 1972 amendment to Title VII of the Civil Rights Act of 1964.[29] In

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[24] Climax Molybdenum Co. v. NLRB, 407 F. Supp. 208 (D.C. Colo. 1975).

[25] 539 F.2d at 64.

[26] *Id.*

[27] *Id.* at 65 (emphasis added).

[28] Goodfriend W. Corp. v. Fuchs, 535 F.2d 145 (1st Cir. 1976); Title Guaranty Co. v. NLRB, 534 F.2d 484 (2d Cir. 1976). The court in *Title Guaranty* found it "unnecessary to make the broad determination that any investigative information obtained in connection with a pending enforcement proceeding is per se nondisclosable." 534 F.2d at 491. The court did note, however, that disclosure of statements and affidavits of employees obtained by the NLRB in connection with law enforcement proceedings could well result in interference with the enforcement proceeding. *Id.* Without requiring the NLRB to establish that such interference would occur, the court held that the exemption did apply to such information. Relying on the *Title Guaranty* decision, the First Circuit in *Goodfriend W. Corp.* rejected the district court's conclusion that the exemption applied to employee affidavits obtained in NLRB enforcement proceedings. Instead, the court adopted the *Title Guaranty* holding that "all statements of employees obtained in connection with unfair labor practice proceedings pending before the NLRB are exempt from disclosure under § 552(b)(7)(A)." 535 F.2d at 146.

[29] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

each of the cases,[30] although the effective date of the amendment was March 24, 1972, the court concluded that the amendment should be given retroactive effect. In a subsequent, unrelated case, the United States Supreme Court also gave the amendment retroactive effect.[31] With the advantage of hindsight, the Tenth Circuit's decision on this question seems unassailable.[32]

In *Weahkee v. Powell*,[33] a former employee of the EEOC brought an action against agency officials, alleging unlawful discrimination against himself and others as American Indians.[34] Prior to this suit, both the EEOC and the United States Civil Service Commission rendered administrative determinations adverse to Weahkee.[35] The district court granted defendants' motion for summary judgment on the theory that the complaint did not point out any specific objections to the administrative record. The district court did *not*, however, hold that the administrative decision was supported by the record. The Tenth Circuit reversed, holding that the failure "to examine the administrative record and determine whether the administrative record contains substantial evidence supporting agency action" was error.[36]

By disposing of the case in this manner, the Tenth Circuit was able to avoid the determination of whether *federal* employees are entitled to a trial de novo in district court as other Title VII claimants are, a question on which the circuits were then split.[37]

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[30] EEOC v. Duval, 528 F.2d 945 (10th Cir. 1976); EEOC v. Wilson & Co., 535 F.2d 1213 (10th Cir. 1976); Weahkee v. Powell, 532 F.2d 727 (10th Cir. 1976).

[31] International Union of Electrical, Radio & Mach. Workers Local 790 v. Robbins & Meyers, Inc., 429 U.S. 229, 241-42 (1977). The issue of retroactivity had evaded review in two Supreme Court decisions during the 1975 Term. Washington v. Davis, 426 U.S. 229, 238 n.10 (1976); Brown v. General Servs. Admin., 425 U.S. 820, 824 n.4 (1976).

[32] At the time the Tenth Circuit decided these cases, *supra* note 2, there was a split in the circuits on whether the amendment should be given retroactive effect with the Second, Fourth, and D.C. Circuits favoring retroactivity. Brown v. General Servs. Admin., 507 F.2d 1300 (2d Cir. 1974), *aff'd on other grounds*, 425 U.S. 820 (1976); Koger v. Ball, 497 F.2d 702 (4th Cir. 1974); Womack v. Lynn, 504 F.2d 267 (D.C. Cir. 1974). The Sixth Circuit had opposed retroactivity. Place v. Weinberger, 497 F.2d 412 (6th Cir. 1974), *vacated*, 426 U.S. 432 (1976).

[33] 532 F.2d 727 (10th Cir. 1976).

[34] 42 U.S.C. § 2000e-16 (Supp. II 1972).

[35] The plaintiff had also presented the trial court with claims under 42 U.S.C. §§ 1981, 1982, and 1985 (1970), but these claims did not affect the administrative law questions. 532 F.2d at 730.

[36] 532 F.2d at 729. *See* 5 U.S.C. § 706(2)(E) (1970).

[37] Four courts of appeals had held that federal employees had a right to a trial de novo

The Supreme Court subsequently held, in *Chandler v. Roudebush*,[38] that federal employees also have a right to a trial de novo in the district court. Under *Chandler*, the district court cannot substitute a review of the administrative record in lieu of a trial de novo.

> On the contrary, the options which Congress considered were entirely straightforward. It faced a choice between record review of agency action based on traditional appellate standards and trial *de novo* of Title VII claims. The Senate committee selected trial *de novo* as the proper means for resolving the claims of federal employees. The Senate broadened the category of claims entitled to trial *de novo* to include those of private-sector employees, and the Senate's decision to treat private-sector and federal-sector employees alike in this respect was ratified by the Congress as a whole.
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> . . . .
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> The respondents' contention that administrative dispositions of federal employee discrimination complaints would . . . furnish an adequate basis for "substantial evidence" review cannot overcome the import of the statutory language and the legislative history.[39]

Following *Chandler*, the 1975 Tenth Circuit decision of *Salone v. United States*,[40] which held that federal employees did not have a right to a trial de novo, was vacated.[41] Therefore, in light of the above decisions, on remand Weahkee must be given a trial de novo by the district court, as opposed to the more limited review of the administrative record.[42]

The appellant, Weahkee, also claimed that the district court's refusal to review the administrative record was a denial of due process. This claim was based upon the Administrative Procedure Act.[43] The Tenth Circuit, however, concluded that the

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under section 717(c), 42 U.S.C. § 2000e-16(c) (Supp. II 1972). Abrams v. Johnson, 534 F.2d 1226 (6th Cir. 1976); Caro v. Schultz, 521 F.2d 1084 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); Hackley v. Roudebush, 520 F.2d 108 (D.C. Cir. 1975); Sperling v. United States, 515 F.2d 465 (3d Cir. 1975), *cert. denied*, 426 U.S. 919 (1976). Three courts of appeals had held that federal employees had no right to a trial de novo. Haire v. Calloway, 526 F.2d 246 (1975), *vacated*, 537 F.2d 318 (8th Cir. 1976); Chandler v. Johnson, 515 F.2d 251 (9th Cir. 1975), *rev'd sub nom.*, Chandler v. Roudebush, 425 U.S. 840 (1976); Salone v. United States, 511 F.2d 902 (10th Cir. 1975), *vacated*, 426 U.S. 917 (1976).

[38] 425 U.S. 840 (1976).

[39] *Id.* at 861-63 (footnote omitted).

[40] 511 F.2d 902 (10th Cir. 1975), *vacated*, 426 U.S. 917 (1976). *See also* 53 DEN. L.J. 29 (1976).

[41] 426 U.S. 917 (1976).

[42] 532 F.2d at 729.

[43] 5 U.S.C. §§ 551, 701-706 (1970).

APA was inapplicable by reasoning that the 1972 amendment provided the *exclusive* administrative procedure for federal employee discrimination charges. The same conclusion was subsequently reached by the Supreme Court in *Brown v. General Services Administration.*[44]

In *EEOC v. Duval,*[45] the Tenth Circuit upheld the Commission's authority to file suits in district court during the same ninety-day period during which the charging party can file suit.[46] As a preliminary matter, the court noted that the EEOC's right to file suit does not terminate upon the expiration of the 180-day period following the filing of the charge and during which the EEOC can conduct an investigation and attempt conciliation.[47] During this initial 180 days, the charging party cannot initiate a Title VII suit.[48] This period is designed to provide the EEOC an opportunity to investigate the charge and to attempt conciliation. Of course, in practice, neither goal is completed within the 180-day period because of the serious backlog in charges pending before the Commission.[49]

The Tenth Circuit's conclusion, which allows the EEOC to file an action after the 180-day period, was not accompanied by much helpful discussion. The court simply noted that other circuits had reached the same result. Among the considerations

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[44] 425 U.S. 820 (1976). In his opinion for the Court in *Brown*, Justice Stewart stated:

> [T]he congressional intent in 1972 was to create an exclusive, pre-emptive *administrative* and judicial scheme for redress of federal employment discrimination. We need not, however, rest our decision upon this inference alone. For the structure of the 1972 amendment itself fully confirms the conclusion that Congress intended it to be exclusive and pre-emptive.

Id. at 829 (emphasis supplied).

[45] 528 F.2d 945 (10th Cir. 1976).

[46] 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972).

[47] 528 F.2d at 947. *Accord*, EEOC v. Occidental Life Ins. Co., 535 F.2d 533 (9th Cir.), *cert. granted*, 429 U.S. 1022 (1976).

[48] The charging party is not barred from initiating other available legal actions, such as 42 U.S.C. § 1981 (1970), by the fact that he or she has filed a Title VII claim and the fact that the charging party has filed a Title VII charge does not toll the statute of limitations on other claims. International Union of Electrical, Radio & Mach. Workers Local 790 v. Robbins & Meyers, Inc., 429 U.S. 229 (1976); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

[49] The charging party is precluded from filing a Title VII suit in district court during this initial 180 days in order to afford the EEOC time to effect a voluntary conciliation agreement with the employer free of the interference of a pending law suit. 528 F.2d at 948. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. at 461.

which led other circuits to reach this conclusion was the fact that Title VII expressly limits the employee's right to file suit to a ninety-day period while no similar express limitation is imposed upon the EEOC.[50] Moreover, at the time of the enactment of the 1972 amendment, which authorized the EEOC to file actions in district court, Congress was aware that the EEOC was not able to complete most of its investigations and conciliation procedures within 180 days. With this knowledge, courts have been unwilling to attribute to Congress an intent to limit the EEOC enforcement powers to the initial 180 days because such a construction would largely defeat the remedial purpose of the amendment.[51]

The more difficult question confronting the Tenth Circuit was whether the charging party had the exclusive authority to initiate suit during the ninety-day period following receipt of the "right-to-sue" letter.[52] In *Duval*, the EEOC filed a complaint before this ninety-day period had elapsed and before the charging party had acted. The charging party subsequently sought to intervene. The corporate defendant obtained a dismissal on the ground that the charging party alone could initiate legal action during this ninety-day period. The district court viewed the EEOC's suit as " 'duplicitous.' "[53]

This issue of multiple actions was previously raised in *Crump v. Wagner Electric Corp.*,[54] a case before the Missouri federal district court. In *Crump*, the charging party filed an action fourteen days after the EEOC filed its action. The district court dismissed the charging party's suit without prejudice to intervention, which is specifically provided for by Title VII,[55] in the EEOC's suit. The approach taken in *Crump* was approved by the Tenth Circuit in *Duval* and the dismissal was, therefore, reversed.[56]

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[50] 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972). *See* EEOC v. E.I. duPont de Nemours & Co., 516 F.2d 1297 (3d Cir. 1975).

[51] EEOC v. Louisville & N.R.R., 505 F.2d 610, 613 (5th Cir. 1974), *cert. denied*, 423 U.S. 824 (1975).

[52] 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972).

[53] 528 F.2d at 947. *Accord*, EEOC v. Missouri Pac. R.R., 493 F.2d 71, 75 (8th Cir. 1974).

[54] 369 F. Supp. 637 (E.D. Mo. 1973).

[55] 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972).

[56] 528 F.2d at 948-49.

When confronted with a similar situation,[57] the Ninth Circuit subsequently concluded that multiple actions could be avoided by consolidation under Rule 42(a),[58] rather than by dismissal with leave to intervene. When simplicity and the avoidance of possible confusion are considered, the Ninth Circuit's solution appears preferable if both the EEOC and the charging party have actually filed separate suits. However, where one or the other has filed first, intervention would seem to be the preferable manner for joining the fray by the remaining litigant since this is expressly provided for by statute.

The principal issue decided by a divided panel in *EEOC v. Wilson & Co.*[59] was whether a case was "pending" before the EEOC when the 1972 amendment to Title VII became effective.[60] In October of 1970 and January of 1971, the charging party, Bernal, filed discrimination charges with the EEOC. In November of 1971, the Commission's Albuquerque office forwarded the file to headquarters in Washington, D.C. Later Bernal requested a "right-to-sue" letter which was given to him on January 27, 1972.

Prior to the 1972 amendment, a charging party was given thirty days to bring his or her private action.[61] The main issue in *Wilson* involved the interpretation of a Commission regulation which required the agency to *suspend* further action upon the issuance of a "right-to-sue" letter unless the Commission determines that it is in the "public interest" to continue or the Commission is requested to continue by the charging party.[62] Neither of these two contingencies occurred in *Wilson* and, thereafter, upon lapse of the thirty-day period during which the charging party could have filed suit, but did not, the district court concluded that the "*suspension*" was, in effect, a "*termination.*" This resulted in the further determination that the case was, therefore, not "pending" before the Commission on the effective

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[57] EEOC v. North Hills Passavant Hosp., 544 F.2d 664 (9th Cir. 1976).

[58] "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions; it may order all the actions consolidated." FED. R. CIV. P. 42(a).

[59] 535 F.2d 1213 (10th Cir. 1976). Judge McWilliams wrote for himself and Judge Doyle while Judge Barrett filed a vituperative dissent.

[60] *See* text accompanying notes 1-4 *supra*.

[61] 42 U.S.C. § 2000e-5(e) (1970).

[62] The trial court relied upon 29 C.F.R. § 1601.25a(d) (1971). 535 F.2d at 1215. This regulation is no longer in force.

date of the 1972 amendment which gave the Commission the right to sue.[63] This issue was raised by the lower court *sua sponte* and, because of this, the Tenth Circuit remanded the case for further development of the record on the question of whether the charge was pending before the Commission on March 24, 1972. Nevertheless, the Tenth Circuit suggested, in rather strong language, that, in its opinion, the charge was still pending on that date.[64]

Judge Barrett, as noted in his dissenting opinion, would have affirmed the district court's holding for reasons in addition to those advanced by the trial court. First, the charging party had not filed his charge with the appropriate state agency before submitting his charge to the EEOC.[65] Second, the Commission did not file suit until six months after conciliation had failed and "[t]his 'lapse' constitutes further and utter jurisdictional failure, even under the 'liberalized' 1972 amendments."[66] Third, Judge Barrett concluded that the Commission had not filed suit in conformance with 42 U.S.C. § 2000e-5(d) as it appeared prior to the 1972 amendment. The panel majority, however, was unpersuaded by his arguments.

In *EEOC v. Navajo Refining Co.*[67] the issue before the court concerned the timeliness of a complainant's motion for intervention in an EEOC action filed within ninety days after the complainant received a "right-to-sue" letter.[68] Navajo argued that the ninety-day period within which a complainant could bring suit or intervene began to run when he received notice that conciliation efforts had failed. The court held, instead, that the ninety-day period began to run from the date of receipt of a "right-to-sue"

[63] By its express terms the 1972 amendment applies to charges pending before the Commission on the date of its enactment. Pub. L. No. 92-261, § 14, 86 Stat. 103, 113. *See* International Union of Electrical, Radio & Mach. Workers Local 790 v. Robbins & Meyers, Inc., 429 U.S. 229, 241-42 (1976).

[64] 535 F.2d at 1215-16.

[65] 42 U.S.C. § 2000e-5(c) (1970).

[66] 535 F.2d at 1217.

[67] No. 75-1542 (10th Cir., June 16, 1976) (Not for Routine Publication).

[68] 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972); 29 C.F.R. § 1601.25 (1975). The complainant filed a charge with the EEOC on August 18, 1971, and on July 25, 1973, the EEOC informed him that conciliation efforts had failed, and that, if he desired to bring suit, he should request a "right-to-sue" letter, which he did. On December 3, 1974, the EEOC instituted this action, which was based, in part, upon the complainant's charge. On December 13, 1974, the EEOC issued a "right-to-sue" letter.

letter, and that therefore the application to intervene was timely.[69] The Tenth Circuit was advised that the EEOC had discontinued the "two-letter" procedure after the controversy in this case began, so the issue in this case is of marginal significance.[70]

III. OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

In two cases the Tenth Circuit reviewed and upheld administrative orders issued pursuant to the Occupational Safety and Health Act of 1970.[71] Both the legal construction accorded certain safety regulations and the constitutionality of those regulations were reviewed in *Clarkson Construction Co. v. Occupational Safety & Health Review Commission.*[72] Clarkson Construction Company sought review of a Commission order[73] affirming the citation and civil penalty imposed against Clarkson as a result of its violation of a certain safety regulation. The applicable safety regulation required that trucks on certain worksites be equipped with an audible backup warning signal or, in the alternative, that trucks without such a device be permitted to back up only after the driver received assurance from a lookout that it was safe to do so.[74] In this case, a truck, owned by one of Clarkson's subcon-

[69] For cases upholding the two-letter procedure and further holding that the 90-day period begins to run from the date of receipt of the "right-to-sue" letter, see Williams v. Southern Union Gas Co., 529 F.2d 483 (10th Cir. 1976), and Tuft v. McDonnell Douglas Corp., 517 F.2d 1301 (8th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

[70] No. 75-1542 at 6.

[71] 84 Stat. 1590 (codified in scattered sections of 5, 15, 18, 29, 42, 49 U.S.C.).

[72] 531 F.2d 451 (10th Cir. 1976).

[73] [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 19,071.

[74] 29 C.F.R. § 1926.601(b)(4) (1976). This section reads: "No employer shall use any motor vehicle equipment having an obstructed view to the rear unless: (i) The vehicle has a reverse signal alarm audible above the surrounding noise level or: (ii) The vehicle is backed up only when an observer signals that it is safe to do so." Covered employers must comply with these regulations. 29 U.S.C. § 654 (1970). These regulations are issued under the authority of 29 U.S.C. § 655 (1970). Escalating civil penalties, and ultimately a criminal penalty, may be imposed for violation of these regulations in proportion to the willfulness and danger of the violation and whether or not a violation causes death. 29 U.S.C. § 666 (1970). Clarkson was cited for a "serious violation" in which case the Commission could have assessed a penalty of up to $1,000. 29 U.S.C. § 666(b) (1970). Clarkson was actually assessed only $500. [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 19,071. A "serious violation" is

> deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable

tractors and operated by the subcontractor's employee, while being operated in violation of this safety regulation, struck and killed a workman.

Clarkson challenged the safety regulation on constitutional grounds alleging that (1) the enforcement procedures were penal in nature, rather than remedial or regulatory; (2) the enforcement procedures violated the fifth amendment; (3) the regulatory scheme denied Clarkson its right to a public trial in accordance with the sixth amendment which requires, *inter alia*, the right to a jury and the right to confront witnesses; and (4) if this regulatory scheme were truly civil, it denied Clarkson's seventh amendment rights. The Tenth Circuit apparently viewed Clarkson's arguments as unfounded and dismissed each of them rather summarily.[75]

The primary question in this case, the consideration of which divided the panel, with Judges Doyle and Hill forming the majority and Judge Seth dissenting, was the appropriate construction of section 1926.601(b)(4) of 29 C.F.R. According to this regulation, "[n]o employer shall use any motor vehicle" in the proscribed manner. More specifically, the court was concerned with the meaning to be ascribed to the word "use." In other words, was the statutory scheme intended to incorporate the common law conception of an employer-employee relationship, as Judge Seth contended, or the more flexible conception of vicarious liability and responsibility, as urged by Judges Doyle and Hill. According to Judge Seth's dissenting opinion, Clarkson would not be deemed responsible for the operation of the truck in violation of the regulation because the truck was owned by a subcontractor and driven by an employee of the subcontractor. Therefore, the subcontractor, not Clarkson, had a greater amount of direct control over the driver and, under the traditional common law view, the driver was not to be considered an employee of the prime contractor.[76]

Although the majority opinion included a lengthy explana-

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diligence, know of the presence of the violation.
29 U.S.C. § 666(j) (1970).

[75] 531 F.2d at 455-56. *Accord*, Stockwell Mfg. Co. v. Usery, 536 F.2d 1306 (10th Cir. 1976). *See* Note, *Due Process and Employee Safety: Conflict in OSHA Enforcement Procedures*, 84 YALE L.J. 1380 (1975).

[76] 531 F.2d at 459.

tion justifying the expanded definition of the employment relationship, the true basis of the decision seemed to be founded in equity. In the words of Judge Doyle: "We are unable to overlook the fact that the truck driver who ran over and killed the employee was serving the objects and purposes of Clarkson."[77]

To justify legally its decision, the court reasoned that administrative interpretations of the remedial scope of legislation are entitled to great weight.[78] In addition, both the Secretary of Labor and the Commission had interpreted the regulation in the same manner and, in a case where two specialized administrative bodies are in agreement, a court should be hesitant to impose its own inconsistent interpretation.[79] Furthermore, in view of the legislation's remedial purpose of offering protection to workers from industrial injury, a federal court should not feel bound, when construing federal statutes, to adhere to the states' common law conceptions which provide different bases of liability depending upon how the relationship is defined.[80]

Against this background, the majority of the court was unwilling to accept Clarkson's contention that the regulation in issue should be construed in such a manner as to equate the term "using" with "operating." Clarkson argued that it, as the prime contractor, was not "operating" the subcontractor's truck and, therefore, Clarkson was not the responsible employer within the meaning of the regulation because it was not "using" the truck. The majority concluded, however, that, in practical terms, Clarkson was "using" the truck since the truck was, at the time of the accident, being operated in furtherance of Clarkson's project. The court, also, considered the prime contractor to be in a better position to require the installation of the safety devices or, if

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[77] *Id.* at 457.

[78] The majority cited for this proposition Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) and Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Supreme Court subsequently narrowed the broadest reaches of the rule calling for such difference in General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976). In *Gilbert* the Court held that administrative regulations are less persuasive where they are not expressly authorized and where they are issued many years after the legislation which they seek to implement and, especially, where they follow prior inconsistent administrative interpretations of the same statute. 96 S. Ct. at 410-12.

[79] 531 F.2d at 457 (citing Budd Co. v. Occupational Safety & Health Review Comm'n, 513 F.2d 201, 204-06 (3d Cir. 1975)).

[80] 531 F.2d at 458.

necessary, to provide the necessary lookouts for those trucks not equipped with safety devices.[81] This opinion was, in fact, confirmed by Clarkson's post-accident conduct which ordered all trucks to be equipped with the warning devices.[82]

The Tenth Circuit's opinion in *Clarkson* clearly indicates a preference for that construction of a regulation which will place the responsibility for dangerous conditions on the party most capable of guaranteeing worker safety throughout the entire worksite. For the same reason, *i.e.*, protection of workers, the court refused to relieve Clarkson of liability even though the accident occurred on a road immediately adjacent to the worksite, as opposed to on the "off-highway jobsite," as required by the literal terms of the regulation.[83] The court refused to apply the regulation literally where, as here, the employees were walking in the actual construction site, or nearby road shoulder, and the truck was being used to further the project at the worksite.[84]

In *Stockwell Manufacturing Co. v. Usery*,[85] the petitioner sought review of an order of the Occupational Safety and Health Review Commission alleging that certain of its constitutional rights had been violated by the issuance of an administrative citation. The respondent moved to dismiss the proceeding for lack of jurisdiction because Stockwell never sought review of the Commission's decision and order.

Stockwell had been cited for nonserious occupational safety violations. The company contested the citation,[86] and a hearing was held before an administrative law judge, who affirmed some of the violations and vacated all proposed penalties. No member

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[81] *Id.*

[82] *Id.* at 454. The Fifth Circuit concluded, in Southeast Contractors, Inc. v. Dunlop, 512 F.2d 675 (5th Cir. 1975), that a contractor should not be held responsible for the conduct of its subcontractor, and therefore, would have reached the same result as Judge Seth. The Fifth Circuit's decision was per curiam, however, and simply adopted the dissenting view expressed by Chairman Moran of the Occupational Safety & Health Review Commission in the administrative decision. *Id. See* [1973-1974] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 17,787. Chairman Moran dissented from the Commission's decision for the same reason in the *Clarkson* case. [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 19,071.

[83] 29 C.F.R. § 1926.601(a) (1976).

[84] 531 F.2d at 459.

[85] 536 F.2d 1306 (10th Cir. 1976).

[86] 29 U.S.C. §§ 651, 666(c) (1970).

of the Commission directed a review of the decision, and Stockwell did not petition for review. The report of the administrative law judge then became the final decision of the Commission.[87]

The Tenth Circuit declined to consider the Commission's allegation that Stockwell had failed to exhaust its administrative remedies,[88] finding a more serious jurisdictional defect in Stockwell's failure to raise the constitutional issues before the administrative law judge or the Commission.[89] Section 660(a) of 29 U.S.C. provides that, on judicial review, the court of appeals shall not consider any objection not urged before the Commission unless "extraordinary circumstances" excuse the failure. Although Stockwell contended that the constitutional violations before the court for review were such "extraordinary circumstances," the court held that since the alleged constitutional violations were known to Stockwell at the time of the administrative hearing, its failure to raise them at that time barred appellate review.[90] The court went on to add that its review of the record revealed substantial evidence to sustain the findings of the Commission.

IV. BLACK LUNG BENEFITS ACT

In 1969, Congress enacted legislation which provides payments to coal miners who become totally disabled from pneumoconiosis, commonly known as black lung disease, and also to surviving dependents of coal miners whose death is attributable to the disease.[91] The Secretary of Health, Education, and Welfare was initially responsible for promulgating regulations to aid in the determination of whether a miner is totally disabled or whether his death is due to the disease.[92] Since proof of death or total disability due to pneumoconiosis[93] is complicated, Congress established several presumptions to aid potential claimants in

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[87] 29 U.S.C. § 661(i) (1970).

[88] *See* Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L.J. 817 (1976).

[89] 536 F.2d at 1309.

[90] *Id.* 29 C.F.R. § 2200.66 (1970) sets forth the duties of a hearing judge in the conduct of a hearing. These duties include the duty "to adjudicate all issues."

[91] 30 U.S.C. § 901 (1970 & Supp. IV 1974).

[92] *Id.* § 921. The Secretary of Health, Education, and Welfare administers claims under the Act filed prior to December 31, 1973.

[93] Pneumoconiosis is defined as a "chronic dust disease of the lung arising out of employment in a coal mine." 30 U.S.C. § 902(b) (Supp. IV 1974).

meeting their burden.[94] The pertinent regulations reflect this policy and establish the same or similar presumptions.[95]

The applicability of two[96] of the regulatory presumptions was at issue in *Felthager v. Weinberger*.[97] The claimant was the widow of a coal miner who was killed in an accident while employed as an assistant foreman at a coal mine, a position he had held for fifteen years.[98] At the time of his death, the miner was suffering from a severe respiratory impairment.[99] The claimant sought to establish, by presumption, that the miner's death was due to pneumoconiosis because he was totally disabled at the time of his death from the respiratory ailment.[100] The Secretary determined that the miner was not totally disabled from the ailment, therefore precluding the presumption that death was due to pneumoconiosis, and accordingly, denied benefits.

On appeal, the Tenth Circuit examined the criteria of total disability established both by statute and by regulation.[101] It

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[94] *Id.* § 921(c).

[95] *See, e.g.*, 20 C.F.R. §§ 410.414, .418, .454, .458, .490 (1976).

[96] 20 C.F.R. §§ 410.414(b), .454 (1976). The first of these two presumptions provides:

> (1) Even though the existence of pneumoconiosis is not established . . . [by medical evidence], if other evidence demonstrates the existence of a totally disabling chronic respiratory or pulmonary ailment . . . , it may be presumed, in the absence of evidence to the contrary . . . , that a miner is totally disabled due to pneumoconiosis, or that a miner was totally disabled due to pneumoconiosis at the time of his death.

20 C.F.R. § 410.414(b). Section 410.454(b) raises the same presumption relative to the finding that the miner's death was due to pneumoconiosis. Both presumptions can be rebutted by evidence showing that the miner is not, or did not, suffer from pneumoconiosis. *See* 20 C.F.R. §§ 410.414(b)(2), .454(b)(2) (1976).

[97] 529 F.2d 130 (10th Cir. 1976).

[98] While working at his job, the decedent became so exhausted from shortness of breath that he had to sit down. He sat on the shuttle car tracks in the mine and was subsequently run over by a shuttle car. He died a few hours later. The immediate cause of death was listed as a compound fracture of the left leg, fractured pelvis, and pulmonary edema. 529 F.2d at 132.

[99] The Tenth Circuit stated: "There is no doubt the deceased miner suffered from severe respiratory impairment . . . ." *Id.*

[100] 20 C.F.R. § 410.414(b). *See* note 96 *supra*.

[101] The statute provides:

> The term "total disability" has the meaning given it by regulations of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time.

noted that a person could be employed in a mine and yet be totally disabled from a respiratory ailment if his employment was characterized by sporadic work or poor performance.[102] The decedent, however, was employed in a job he had held for over a decade; although he worked with great difficulty, there was no evidence of sporadic work or poor performance.[103] Also, his job was not considered to be a "make-work" position offering only marginal earnings.[104] Based on the facts in the record, the court felt that "the fact he [the decedent] was doing his usual work in the mines at the time of his death, if not conclusive, is at least substantial evidence in support of the Secretary's finding the deceased was not totally disabled due to pneumoconiosis."[105] Accordingly, the Tenth Circuit affirmed the denial of benefits.[106]

V. SOCIAL SECURITY ACT

In *Grider v. United States*[107] and *Sturgell v. Weinberger*,[108] claimants of disability benefits under the Social Security Act[109] appealed the denial of benefits by the Department of Health, Education, and Welfare. The issue in both cases was whether the claimants had established sufficient evidence that they were "disabled" as defined by the Act. To be disabled, a claimant

30 U.S.C. § 902(f) (Supp. IV 1974). The regulations defining total disability from pneumoconiosis promulgated by the Secretary are nearly identical. 20 C.F.R. § 410.412(b) (1976).

[102] "Under the statutory definition, the mere fact of employment does not preclude a finding of total disability." 529 F.2d at 133.

[103] Sporadic work or poor performance were factors that had been instrumental in findings of total disability. In Dellosa v. Weinberger, 386 F. Supp. 1122 (E.D. Pa. 1974), the widow of a coal miner sought black lung disease benefits because her husband, who was killed in an explosion in a mine, was totally disabled due to pneumoconiosis. Although the decedent was working at the time of his death, his work had been sporadic for several years. In addition, the decedent was not able "to adequately perform his mine work." *Id.* at 1126. On these considerations, the district court remanded the case to the Secretary for further findings in light of such factors. *Id.* The same questions were addressed in Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975), in which the court concluded that the deceased miner's employment was not so poor or so sporadic that he was totally disabled.

[104] A miner employed at his death may, also, be found to be totally disabled if the miner is working at some make-work job not comparable to his usual coal mine work. *See* Lawson v. Weinberger, 401 F. Supp. 403 (W.D. Va. 1975); Rowe v. Weinberger, 400 F. Supp. 981 (W.D. Va. 1975).

[105] 529 F.2d at 135.

[106] *Id.*

[107] No. 75-1903 (10th Cir., June 2, 1976) (Not for Routine Publication).

[108] No. 75-1933 (10th Cir., July 21, 1976) (Not for Routine Publication).

[109] 42 U.S.C. § 401 (1970 & Supp. II 1972).

must, *inter alia*, be unable to perform, and engage in, substantial gainful activity as the result of a medically determinable physical or mental impairment which is expected to last for a continuous period of not less than twelve months.[110] Although the claimants in both *Grider* and *Sturgell* introduced evidence of their disability, in both cases the Secretary concluded that the claimants' burden had not been met.[111] The Tenth Circuit affirmed both decisions after finding that the decisions of the Secretary were supported by substantial evidence.[112]

Similarly, a claimant's failure to meet his burden of proof caused the denial of benefits in *Anderson v. Weinberger*.[113] To qualify as disabled, a claimant must also show that his impairment is of "such severity that he is *not only unable to do his previous work but cannot*, considering his age, education, and work experience, *engage in any other kind of substantial gainful work* which exists in the national economy . . . ."[114] Prior to his disability, the claimant in *Anderson* had held numerous jobs, although none on a routine basis.[115] In the administrative hearing, the claimant asserted that he had unsuccessfully attempted to return to his prior activities.[116] The administrative law judge concluded, however, that the claimant could successfully engage in work of the general type he had previously performed and that the claimant was not disabled in terms of the Social Security

[110] The Act defines the term disability 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 12 months . . . ." 42 U.S.C. § 423(d)(1)(A) (1970).

[111] Both claimants introduced, as evidence, medical reports of disability and testified personally as to their pain and disability. The claimant in *Grider*, however, failed to establish her disability under the Act "by the required medically acceptable clinical and laboratory diagnostic techinques . . . ." No. 75-1903 at 5. Similarly, the Tenth Circuit found in *Sturgell* that "there was sufficient evidence in the record as a whole to conclude that appellant failed to meet statutory prerequisites." No. 75-1933 at 4.

[112] According to the Social Security Act, the standard of review for agency decisions requires that "[t]he findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . ." 42 U.S.C. § 405(g) (1970). This standard is interpreted in Richardson v. Perales, 402 U.S. 389 (1971).

[113] No. 76-1270 (10th Cir., Aug. 12, 1976) (Not for Routine Publication).

[114] 42 U.S.C. § 423(d)(2)(A) (1970) (emphasis added).

[115] The claimant lost sight in one eye during a scuffle following an assault. No. 76-1270 at 2. Prior to the injury, he had been employed as a carpenter, truck driver, construction foreman, and common laborer. *Id.*

[116] *Id.* at 3.

Act.[117] Again, the Tenth Circuit affirmed the decision after finding substantial evidence to support the determination of the administrative law judge.[118]

As in *Anderson*, the severity of an impairment was also the dispositive question in *Kirk v. Weinberger*.[119] Unlike the situation in *Anderson*, however, the claimant in *Kirk* was able to establish that she was unable to perform the work in which she had been engaged immediately prior to her disability.[120] She failed to prove, however, that she was unable to work in occupations in which she had previous experience and training.[121] Hence, she did not meet the statutory burden placed on claimants and was, therefore, not considered to be disabled. Again, the Tenth Circuit found that the decision of the administrative law judge was supported by substantial evidence and affirmed.[122]

The importance of *Kirk* is the burden of proof required by the Tenth Circuit to establish statutory disability. The Tenth Circuit stated:

> [I]f a claimant has any training or experience in a field of employment other than the one in which she was working prior to disability, she must not only show her physical disability to continue at her former occupation, but also that she is physically unable to perform the other work for which she is qualified.[123]

By this statement, the court has clarified the standard it will require for proving disability in claims for disability benefits under the Social Security Act.[124]

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[117] The Tenth Circuit noted the administrative law judge's conclusion that "Anderson was able to perform substantial gainful activity of a light or sedentary nature." *Id.* In fact, the claimant conceded that he could probably work in a gas station or drive a pick up truck. *Id.* at 4. Thus, the claimant did not establish that he was unable to return to the general type of work he had been performing prior to his disability.

[118] *Id.* at 3, 4. *See* note 112 *supra*.

[119] No. 75-1652 (10th Cir., Apr. 27, 1976) (Not for Routine Publication).

[120] *Id.* at 2.

[121] *Id.* at 3.

[122] *Id.* at 6.

[123] *Id.* at 4.

[124] In several prior cases, the Tenth Circuit stated that a claimant need only establish his inability to perform his usual vocation. *See, e.g.*, Gardner v. Brian, 369 F.2d 443 (10th Cir. 1966); Kirby v. Gardner, 369 F.2d 302 (10th Cir. 1966). Once this fact was established, the burden shifted to the Secretary to show that suitable employment opportunities in the immediate geographical area were available to the claimant. Failure by the Secretary to meet this burden would thus entitle the claimant to disability benefits.

In *Kirk*, the court concluded that the claimant must not only prove his disability to

VI. RAILWAY LABOR ACT

In *Denver & Rio Grande Western Railroad v. Blackett*,[125] the railway filed suit in district court to set aside an award of additional wages in favor of a railroad employee, pursuant to the Railway Labor Act.[126] Although the district court denied the railroad's claim that the National Railroad Adjustment Board[127] lacked jurisdiction to make the award, the court substantially reduced the amount of the award.[128] As a result, the decision of the district court was appealed to the Tenth Circuit.

The dispositive issue on appeal was the reviewability of the amount of the award made by the National Railroad Adjustment Board.[129] The Tenth Circuit considered two factors in deciding the question. First, the court noted that although the Railway Labor Act empowers district courts to set aside awards of the Board, the reviewable aspects of board action are limited only to "lack of jurisdiction, the Board's acting outside the law or the presence of fraud or corruption on the Board."[130] Second, the court inferred,

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continue in his usual vocation but, also, must establish his disability to perform any other kind of work for which he might be qualified. It is only after both facts are established that the burden shifts to the Secretary either to identify suitable employment opportunities or, upon failure to identify such opportunities, to award the claimant disability benefits. Thus, the holding in *Kirk* expands the claimant's burden.

[125] 538 F.2d 291 (10th Cir. 1976).

[126] 45 U.S.C. § 151 (1970).

[127] *Id.* The Board is empowered to hear and decide numerous disputes, including disputes between an employee and a carrier concerning rates of pay. *Id.* § 153(i).

[128] 538 F.2d at 292.

[129] The Administrative Procedure Act provides that a person suffering legal wrong or adversely affected by agency action is entitled to judicial review. 5 U.S.C. § 702 (1970). Such review is not available, however, where either a statute precludes judicial review or the agency action is committed to agency discretion by law. *Id.* § 701(a). *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

[130] 538 F.2d at 293. The Railway Labor Act limits the scope of review of judicial decisions and, therefore, provides its own standard of review. *See* note 129 *supra*. The Act states:

> The [district] court shall have jurisdiction to affirm the order of the division [of the National Railroad Adjustment Board], or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside . . . for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

45 U.S.C. § 153(g) (1970).

from both the design and history of the Act, an intent to preclude judicial review of matters relating to the amount of an award.[131] Consistent with a prior decision on the same question,[132] the Tenth Circuit concluded that the "district court lacked jurisdiction to thus modify the award,"[133] and, therefore, reversed the decision.[134]

VII. FEDERAL AVIATION ACT OF 1958

In *Morton v. Dow*,[135] the Tenth Circuit upheld the authority of the Federal Aviation Administrator under the Federal Aviation Act of 1958[136] to revoke, by emergency order, the petitioner's certificate of airworthiness. In so holding, the court relied upon (1) the well-established principle that an agency may take emergency action if the public health, safety, or welfare is endangered[137] and (2) the Administrator's statutory revocation authority.[138] The determination of the administrative law judge that the evidence was sufficient to support revocation[139] was upheld on the basis of a finding that the petitioner's aircraft did not conform to its type certificate.[140]

Although the petitioner also alleged that the statutory provisions providing for review only after the revocation order had been entered were violative of due process, the court summarily dismissed the allegation noting: "Congress recognized that the deci-

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[131] 538 F.2d at 293.

[132] Brotherhood of R.R. Trainmen v. Denver & R.G.W.R.R., 370 F.2d 833 (10th Cir. 1966).

[133] 538 F.2d at 294.

[134] *Id.* at 295.

[135] 525 F.2d 1302 (10th Cir. 1975).

[136] 72 Stat. 731 (codified in scattered sections of 14, 15, 16, 31, 40, 49, 50 U.S.C.).

[137] *See, e.g.*, Air East, Inc. v. National Transp. Safety Bd., 512 F.2d 1227 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975) (public safety outweighs licensee's right to pre-revocation hearing).

[138] 49 U.S.C. § 1429 (1970 & Supp. IV 1974) provides that the Administrator may suspend or revoke, in whole or in part, any airworthiness certificate, if he determines that safety in air commerce and the public interest so require.

[139] The administrative law judge held that the Board lacked the authority to investigate and determine that an emergency existed and, thereby, limited his review to a determination of the sufficiency of the evidence. 525 F.2d at 1306.

[140] 49 U.S.C. § 1423 (1970) requires that an aircraft be in safe operating condition and conform to its type certificate. Morton had used an identification number and type certificate which he had obtained from parts salvaged from another aircraft. The plane which he built from the salvaged parts was not the same type of aircraft as evidenced by the type certificate. 525 F.2d at 1304-05.

sion must be determined quickly by persons with expertise in aviation matters."[141]

VIII. COMMUNICATIONS ACT OF 1934

In *KAKE-TV & Radio, Inc. v. United States*,[142] the petitioner sought judicial review of the FCC's certification of a cable-TV franchise. The court considered three basic administrative law issues under the Communications Act of 1934:[143] (1) the scope of FCC certification proceedings; (2) the necessity of a formal hearing; and (3) the scope of FCC discretion.

KAKE sought review of orders which were granted pursuant to Aircapital Cablevision, Inc.'s application for certification to commence cable-TV service in Wichita, Kansas. Aircapital had been granted a cable-TV franchise by the city of Wichita, pursuant to a city ordinance, and the city had advised the FCC that the franchise was valid.[144] When considering Aircapital's application for certification, the FCC applied a presumption that the franchise was also valid for FCC purposes. In contrast, KAKE contended that the validity of the franchise should be decided anew by the Commission, instead of resorting to this presumption.

The Tenth Circuit affirmed the Commission's decision not to decide the validity question on the grounds that "[i]t is not the function of the F.C.C. to provide a forum to litigate such an issue, and, furthermore, the Commission is not a tribunal equipped to do so."[145] The matter of a defect in the franchise, the court concluded, "can be decided in the Kansas courts between the proper parties."[146]

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[141] 525 F.2d at 1306. *See also* Air East, Inc. v. National Transp. Safety Bd., 512 F.2d 1227 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975).

In addition, the petitioner challenged the admission of certain evidence by the administrative law judge. The court, however, merely relied upon the standard proposition that "agencies are not bound by the strict rules of evidence governing jury trials" and upheld the validity of the admissions. 525 F.2d at 1307.

[142] 537 F.2d 1121 (10th Cir. 1976), *cert. denied*, 97 S. Ct. 808 (1977).

[143] 48 Stat. 1064 (as amended and codified in scattered sections of 15, 18, 46, 47 U.S.C.).

[144] Subsequently, the Kansas Supreme Court held that cities in Kansas did not have authority to franchise cable-TV and voided the ordinance. But, the Kansas legislature then passed an act validating cable-TV franchises theretofore granted. 537 F.2d at 1122.

[145] *Id.* at 1123.

[146] *Id.* KAKE had pressed legal proceedings in the state courts; however, during the

The court also affirmed the procedures of the FCC relative to the certification order. Although the Commission had not held hearings on Aircapital's application, it had received documents, statements of position, objections, and other data both supporting and opposing the granting of the certificate of compliance.[147] Not only did the court find that there is no statutory requirement for a formal hearing on cable-TV applications,[148] but it found that the FCC's bases for decision were sufficiently disclosed to permit effective court review.[149]

The question of whether Aircapital was in "substantial compliance" with FCC regulations was considered to be solely within the discretion of the Commission.[150]

IX. NATURAL GAS ACT

In the three cases which confronted the Tenth Circuit concerning the Natural Gas Act[151] and the Federal Power Commission, the court decided the issues by resorting to fundamental administrative law principles concerning the scope of judicial review.

In *Kansas-Nebraska Natural Gas Co. v. FPC*,[152] the petitioner, after filing for a rate increase, sought review of the Com-

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pendency of the FCC proceedings, the Kansas Supreme Court decided that KAKE did not have sufficient interest in the franchise to enable it to litigate the question and dismissed the state action. In actuality, KAKE did not have a forum to contest the validity of the franchise.

[147] Such procedures are in accordance with 47 C.F.R. § 76.27 (1976) which provides procedures for submission of written objections and replies thereto in certification proceedings. 47 C.F.R. § 76.7 (1976) provides procedures for submission of written data on petitions for special relief, but empowers the Commission to request oral argument or hearing or decide on the pleadings.

[148] 47 U.S.C. § 309(e) (1970) provides for hearings only when a substantial and material question of fact is presented or the Commission is unable to find that public convenience and necessity would be served by granting an application.

[149] 537 F.2d at 1122. The court detailed the order of the Commission in order to demonstrate its conclusion that the Commission adequately disclosed the bases of its decision, thereby meeting the requirements of Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962), and SEC v. Chenery Corp., 332 U.S. 194 (1947).

[150] 537 F.2d at 1122-23. 47 C.F.R. § 76.31(b) (1976) provides the method for determining a franchise fee. KAKE alleged that the franchise fee to the City was too high to comply with this regulation. Despite the fact that the court viewed this matter as being within the discretion of the Commission, it noted that the record showed that the interested parties planned a downward revision and later review. 537 F.2d at 1123.

[151] 15 U.S.C. § 717-717w (1970).

[152] 534 F.2d 227 (10th Cir. 1976).

mission's determinations which changed several elements of the ratemaking process.[153] The basic issue was whether the FPC's decision to depart from the Mcf mile method, proposed by Kansas-Nebraska, for allocating transmission costs had a rational basis, particularly since there had been no change in petitioner's circumstances. Kansas-Nebraska also questioned the validity of the FPC's closing the case on the adjustment of zone boundaries for cost allocation, in view of the Commission's statement that further hearings were necessary.[154]

When considering the argument that the FPC's decision lacked a rational basis, the Tenth Circuit applied both *SEC v. Chenery Corp.*'s[155] standard of review of agency action and the presumption of agency correctness,[156] and quickly disposed of the issue. In addition, the court concluded that "[t]he theories used by the FPC in arriving at the end result are peculiarly within its discretion"[157] and a departure from the Mcf method was within the agency's regulatory authority.[158] Because the Commission had determined that " 'Kansas-Nebraska's method of applying mileages to its allocation of costs results in unreasonable differences in rates charged to customers' "[159] the FPC's actions were, indeed, justified by a change of conditions.

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[153] The FPC issued two opinions "which changed cost allocations in the two zones; used a different formula for allocating transmission costs; changed the classification of gathering costs; changed rate design, and excluded some of the capitalization for rate of return computations." *Id.* at 229.

[154] The FPC determined that " 'based on the data contained in the record, it would be most difficult to draw a zone line that would be meaningful and reasonable in this case.' " 534 F.2d at 230. However, the idea of completing the record was rejected, because it would have had the effect of prolonging the case for some four years.

[155] 332 U.S. 194 (1947). *Chenery* established the principle that:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Id. at 196. *See also* Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263 (1960).

[156] In Amoco Prod. Co. v. FPC, 491 F.2d 916 (10th Cir. 1973), the court held that "[t]he FPC's interpretation is entitled to great weight, since a presumption of validity attaches to a Commission's exercise of its expertise." *Id.* at 921.

[157] 534 F.2d at 230.

[158] *Id. See also* Colorado Interstate Gas Co. v. FPC, 324 U.S. 581 (1945), which held that the Commission had wide latitude in determining allocation formulas.

[159] 534 F.2d at 231. Kansas-Nebraska's rate structure formula had been considered by the Commission in 1961.

Although the FPC's orders resulted in a refund by petitioner, the court upheld the orders by reasoning that:

> It is apparent that the Commission cannot dispose of all the problems before it in any one case. As before any administrative body many issues are decided on a case by case basis, on how the issue arises, and how the record is developed . . . . [T]here comes a point where the record must be closed and the case be decided.[160]

Kansas-Nebraska also alleged that the FPC action had resulted in undercollection in one zone. Although noting that "[u]nfortunately this is not an unusual happening," the court held that "the company took the risk that an undercollection as to one segment might occur."[161]

The Tenth Circuit, in *Skelly Oil Co. v. FPC*,[162] clearly expressed its view that agency decisions on matters of law are subject to judicial review. In *Skelly*, Skelly and Lone Star Gas had entered into a twenty-year contract, which, by amendment, provided that if the gas pressure from the properties involved should drop below the point where delivery would be impossible, the agreement would terminate. Subsequently, after a continuing pressure drop in the wells, the parties agreed that the contract had expired,[163] and entered into a second contract. When Skelly's application for a rate increase under the second contract was

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[160] *Id.* The FPC indicated that the staff method of allocation would be "'adopted subject to a complete record being developed' in another case." *Id.* The court interpreted this statement to mean that the staff's formula would not necessarily be applicable in future cases.

[161] *Id.* at 232. The procedure set forth in 15 U.S.C. § 717c(e) (1970) provides that when proposed rate changes go into effect, at the expiration of the suspension period, "the Commission may, by order, require the natural-gas company . . . to refund any amounts ordered by the Commission." Thus, the statute does not provide for any resulting undercollection. *See also* FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 153 (1962), wherein the Supreme Court recognized that such an adjustment policy was consistent with the policy of the Natural Gas Act.

The court found no merit in the petitioner's objection to the FPC determination that field gathering costs should be treated, for ratemaking, as 100% commodity costs, rather than as "demand" and "commodity costs." Similarly, the court found no basis for an objection to the adjustment of Kansas-Nebraska's rate of return on capitalization, inasmuch as "[t]his is at most a difference in policy or theory, and the FPC determination was well within its discretion." 534 F.2d at 232 (citing Cities Serv. Gas Co. v. FPC, 424 F.2d 411 (10th Cir. 1969)).

[162] 532 F.2d 177 (10th Cir. 1976).

[163] *Id.* at 178. After the expiration of the base contract, Lone Star agreed to install the compression equipment itself and to buy the gas under a new arrangement based upon compression by the purchaser. *Id.* at 179.

denied by the Commission on the basis that it was not a "replacement contract" because the original contract did not expire "by its own terms,"[164] Skelly sought judicial review of this denial.

In the court's opinion, the question of whether the original contract expired by its own terms, was governed by "ordinary contract law, a Williston-Corbin problem," and not subject to the Natural Gas Act.[165] Moreover, the court found that the record disclosed no evidence or claim that the parties themselves brought the pressure clause into operation, but rather the evidence revealed that the clause became operative through objective, measurable events, which were not within the parties' control.[166] Since the question was one of law and the determination of the Commission was, therefore, not entitled to judicial deference, the court was able to find that the pressure clause was a "typical condition under the Corbin definition" and therefore did expire by its own terms.[167]

In *McCulloch Interstate Gas Corp. v. FPC*,[168] McCulloch sought judicial review of two FPC orders which allegedly would have permitted "the sale and delivery of gas by Phillips [Petroleum Company] to Panhandle [Eastern Pipe Line Company] 'in direct competition with other volumes of natural gas produced and sold to McCulloch Interstate by other producers of

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[164] *Id.* at 178. The replacement contract policy was established in several FPC opinions: Opinion No. 639, 48 F.P.C. 1299 (1972); Opinion No. 699, 51 F.P.C. 2212 (1974); and Opinion No. 699-H, 52 F.P.C. 1604 (1974). This policy required that "where a new contract is executed with respect to an existing interstate sales [*sic*] where the previous sales contract has expired by its own terms . . . such gas will be eligible for the R-389-B [base national] rate." 51 F.P.C. at 2275.

[165] 532 F.2d at 179. The court cited several cases supportive of the proposition that the Natural Gas Act does not alter ordinary contractual relationships between parties. *See, e.g.*, United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956). In Warren Petroleum Corp. v. FPC, 282 F.2d 312 (10th Cir. 1960), the court had previously indicated that a decision by the FPC is not entitled to judicial deference when such a decision is based upon contract law rather than the Commission's special expertise.

[166] Because the court found that Skelly and Lone Star had not subjectively agreed to terminate the contract, the court was able to distinguish Mobile Oil Corp., 49 F.P.C. 239 (1973), wherein the parties had agreed to add additional acreage and the base contract had no provision for termination.

[167] 532 F.2d at 180. The court carefully limited its decision to the question of termination, refusing to decide how that determination might relate to other issues raised or other factors.

[168] 536 F.2d 910 (10th Cir. 1976).

natural gas in the same fields,' "[169] resulting in McCulloch buffering " ' a diminution in its required supplies of natural gas.' "[170]

McCulloch intervened in the proceedings before the FPC when Phillips sought the FPC's authorization to sell uncommitted gas to Panhandle at the mill compressor station owned by Panhandle and operated by Phillips. To accomplish the sale, Phillips proposed to construct approximately thirty-five miles of pipeline to connect Phillips' wells to the mill station.

The FPC ruled that the proposed pipeline was not within its jurisdiction because, it concluded, the facilities were gathering facilities of an independent producer which are not subject to the requirements of the Natural Gas Act. The FPC, therefore, did not consider the merits of Phillips' application. When McCulloch's petition for rehearing was denied, it did not seek judicial review of the decision.[171]

In the subsequent FPC hearing, wherein Phillips was granted a temporary certificate for the sale of gas, the jurisdictional issue was not considered, inasmuch as the FPC felt that McCulloch's failure to seek judicial review "effectively forecloses further consideration thereof."[172] Thereafter, without a hearing, the FPC entered an order granting Phillips a permanent certificate. Again, when McCulloch's application for rehearing was denied, judicial review was not sought. On appeal, the Tenth Circuit reasoned that "[t]he controlling issue is whether FPC should have exercised jurisdiction over the pipelines . . . . It declined to do so because they were exempt gathering facilities. Agency decisions on jurisdiction are subject to court review."[173]

In spite of the court's recognition of the reviewability of jurisdictional issues, it found that the procedures for judicial review prescribed explicitly in the Natural Gas Act were exclusive.[174] Because "[t]he mode of challenging an agency's jurisdictional

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[169] *Id.* at 911.

[170] *Id.*

[171] 15 U.S.C. § 717r (1970) sets forth the procedures for judicial review of FPC determinations.

[172] 536 F.2d at 912.

[173] *Id.* at 912-13 (citing Utah Copper Co. v. Railroad Retirement Bd., 129 F.2d 358 (10th Cir.), *cert. denied*, 317 U.S. 687 (1942)).

[174] 536 F.2d at 913.

decision is by direct attack"[175] and "[a] party may not collaterally attack the validity of a prior agency order in a subsequent proceeding,"[176] McCulloch was estopped from seeking judicial review of the jurisdictional issue by his failure to seek court review after the denial of his petition for rehearing. The court also found that McCulloch's failure to seek court review was dispositive of McCulloch's contention that it was under no compulsion to seek review until a final disposition was made on Phillips' certification.[177] Additionally, the court upheld the informal proceedings in which the FPC granted Phillips a permanent certificate on the grounds that the pertinent facts were not contested and "[n]o evidentiary hearing is required when the proceeding involves only a question of law."[178]

X. Mineral Leasing Act

The petitioners in *Hunter v. Morton*,[179] appealed from decisions and rulings of the Department of Interior which denied them coal prospecting permits in Utah. The petitioners had properly filed three applications for such permits, pursuant to the Mineral Leasing Act[180] and the regulations promulgated thereunder.[181] The manager for the Utah State Land Office of the Bureau of Land Management (BLM) rejected one application in its entirety. In a second decision, the manager rejected the other applications as to part of the acreage and conditioned the issuance of any permits as to the remaining acreage on the applicants' meeting certain conditions.[182]

The applicants did not attempt to meet the conditions im-

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[175] *Id.*

[176] *Id.* The principle that a party may not collaterally attack the validity of a prior agency order in a subsequent proceeding has been often applied to administrative cases. *See, e.g.*, United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966); Callanan Road Improvement Co. v. United States, 345 U.S. 507 (1953); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). These cases also justify the court's contention that "[a]n agency's determination of facts underlying its conclusion that jurisdiction was lacking must be given effect in subsequent litigation." 536 F.2d at 913.

[177] 536 F.2d at 913.

[178] *Id. See also* Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125 (D.C. Cir. 1969).

[179] 529 F.2d 645 (10th Cir. 1976).

[180] 30 U.S.C. § 201(b) (1970).

[181] 43 C.F.R. §§ 3510, 3511 (1976).

[182] 529 F.2d at 647.

posed on that acreage which was not rejected and did not appeal the manager's decision not to issue permits on such acreage. An appeal was perfected, however, from the decisions of the manager insofar as those decisions rejected their applications.[183] Before final action in the appellate process was taken, the Secretary of the Interior promulgated Order Number 2952 which suspended the issuance of all such coal prospecting permits until further notice and rejected all pending applications.[184] Accordingly, the appeals were rejected and the permit applications were denied.[185]

The petitioners raised three important questions in an appeal to the Tenth Circuit after the district court rejected petitioners' claims to any coal permits.[186] First, petitioners argued that they had not received proper notice of "the choices presented in the administrative appeals when part of the application was rejected and part was not."[187] Although the decision stated that the applicants had a right to appeal such a determination and identified the procedure to follow,[188] the court noted that the decision left "much to be desired in the way of clarity in the notice of right to appeal" that portion of the decision conditioning the issuance of a permit.[189] The court dismissed the argument, however, because the decision was "sufficient to advise the applicant to take some action as to the acreage not rejected if he wants to move toward a perfected application."[190]

Secondly, the petitioners argued that they had acquired an interest or a right by their applications to the extent they were not rejected, and that rejection of their pending applications pursuant to the Secretary's order was erroneous.[191] Citing ample pre-

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[183] *Id.* at 647-48.

[184] 38 Fed. Reg. 4,682 (1973).

[185] 529 F.2d at 647.

[186] The applicants brought an action in district court seeking a "decree that petitioners owned the permits, for mandamus to direct their formal issuance, and to enjoin the Secretary from advancing claims adverse to applicants' 'ownership.'" *Id.*

[187] *Id.* at 648.

[188] The decisions contained the following clause:

> Thirty days from receipt of this decision are allowed in which to meet the requirements above indicated or appeal to the Director, Bureau of Land Management. If no action is taken, the case will be closed on the records of this office, as to the available lands, without further notice.

Id. at 647.

[189] *Id.* at 648.

[190] *Id.*

[191] *Id.* at 647.

cedent, the court dismissed this argument on the basis that the applicants acquired no property rights by simply filing their offer.[192] Accordingly, the court found that there had been no wrongful rejection of the applications pursuant to the Order.

In their third argument, petitioners claimed that the Administrative Procedure Act[193] was not followed in the issuance and application of Order 2952.[194] The court rejected this argument and held that such action was an exercise of discretion (by the Secretary of Interior) over public land administration and was therefore exempted from the standard rulemaking procedures of the Administrative Procedure Act.[195]

XI. ADMINISTRATION OF INDIAN ESTATES

The same factual setting presented the Tenth Circuit with two separate questions during the last term.[196] Two attorneys had presented a claim of $8,250 against the estate of an Otoe Indian for legal services rendered to the decedent during his life.[197] The

[192] The provisions of the Mineral Leasing Act give the Secretary discretion to issue coal prospecting permits: "Where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of Interior may issue . . . prospecting permits . . . ." 30 U.S.C. § 201(b) (1970). The Tenth Circuit concluded that, because the Secretary has discretion to issue prospecting permits after application, such applications do not create a property right. This conclusion is consistent with decisions establishing that an application for an oil and gas lease does not create a vested property right if the issuance of such a lease is also discretionary with the Secretary. *See, e.g.*, Udall v. Tallman, 380 U.S. 1 (1965); Hannifin v. Morton, 444 F.2d 200 (10th Cir. 1971); Thor-Westcliffe Dev., Inc. v. Udall, 314 F.2d 257 (D.C. Cir.), *cert. denied*, 373 U.S. 951 (1963). *See also* Woods Petroleum Corp., GFS (Min) 73 (1973); E.L. Lockhardt, GFS (Min) 74 (1973).

[193] 5 U.S.C. § 551 (1970 & Supp. IV 1974).

[194] 529 F.2d at 647.

[195] 5 U.S.C. § 553 (1970 & Supp. IV 1974). This section of the Administrative Procedure Act sets forth procedures to be followed by an agency when promulgating rules and regulations. The provisions of the section, however, do not apply to the extent that rulemaking is "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." *Id.* § 553(a)(2). The Tenth Circuit, in *Morton*, found that the issuance of Order No. 2952 constituted an exercise of discretion by the Secretary in administering federal property and "comes well within the exceptions to the application of the Administrative Procedure Act in that it is a general application of policy and concerns federal property." 529 F.2d at 649.

[196] Hill v. Morton, 525 F.2d 327 (10th Cir. 1975) [hereinafter cited as *Hill I*]; Hill v. Morton, No. 76-1164 (10th Cir., Aug. 30, 1976) (Not for Routine Publication) [hereinafter cited as *Hill II*].

[197] Determination of Heirs and Approval of Wills, Except as to Members of the Five Civilized Tribes and Osage Indians, 43 C.F.R. §§ 4.200-4.297 (1976).

Secretary of the Interior determined the reasonable value of the services to be $1,500 and awarded the claimants that amount.[198]

The attorneys sought judicial review of the Secretary's determination in the District Court for the Western District of Oklahoma. In a two sentence judgment, the district court concluded that the Secretary's determination was arbitrary and capricious and ordered the Secretary to pay the full amount of the claim.[199] On appeal, the Tenth Circuit vacated the judgment and remanded the matter for further proceedings[200] because the district court had not met its "affirmative duty upon . . . reviewing administrative action to engage in substantial inquiry of the relevant facts as developed in the administrative record and then to define, specifically, those facts which it deems supportive of the agency decision if that is the court's resolution of the matter."[201] Since the district court had merely stated that the action was arbitrary and capricious, without further explanation, the Tenth Circuit did not have an adequate basis for appellate review.[202]

On remand, the district court, again, held the Secretary's determination to be arbitrary and capricious.[203] The court reasoned that the evidence presented by the attorneys as to the time spent in representing the decedent, and the rate of compensation therefor, was binding on the Secretary in the determination of fees.[204] When this decision was appealed, the Tenth Circuit concluded that the Secretary correctly viewed the rate of compensa-

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[198] *Hill II*, No. 76-1164 at 2.

[199] *Hill I*, 525 F.2d at 327.

[200] *Id.* at 328.

[201] *Id.*

[202] In reaching this decision, the court relied on both Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974), and Heber Valley Milk Co. v. Butz, 503 F.2d 96 (10th Cir. 1974). In essence, *Hill I* somewhat expanded the holding of these cases. Both *Nickol* and *Heber Valley* involved a district court's granting of summary judgment. The court, in each case, concluded that summary judgment is inappropriate where the question for review is whether an administrative decision is supported by substantial evidence. *See* Comment, *The Propriety of Summary Judgment in Judicial Review of Administrative Decisions*, 52 DEN. L.J. 46 (1975). Even though *Hill I* differed procedurally from *Nickol* and *Heber Valley* since the district court did not consider summary judgment, the Tenth Circuit felt that the "minor dissimilarity is without real significance in this case in view of the proceedings in the district court which were, for all practical purposes, summary in nature." 525 F.2d at 328. *Hill I*'s extension of the *Nickol* rule appears to be limited in scope, however, since it is dependent upon the nature of the review proceedings in the trial court.

[203] *Hill II*, No. 76-1164 at 2.

[204] *Id.* at 5.

tion and hours spent in representation as only two of many factors to be considered in determining the reasonable value of attorneys' services.[205] After reviewing all of the relevant factors, the court concluded that the Secretary's allowance of only $1,500 for services rendered did not constitute an arbitrary disregard of the evidence so as to render the action capricious.[206] Accordingly, the court upheld the Secretary's determination.

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[205] *Id.* Among other factors considered by the court were the "novelty and difficulty of the issues involved, the amount involved and the results obtained, and the experience, reputation, and skill of the lawyers performing the services." *Id.*

[206] *Id.* at 9. The Administrative Procedure Act provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A) (1970).