WYOMING LAW REVIEW

VOLUME 11 *2011* NUMBER 2

FEDERAL ADMINISTRATIVE PROCEDURE ACT CLAIMS: THE TENTH CIRCUIT AND THE WYOMING DISTRICT COURT SHOULD FIX THE CONFUSION ATTENDANT WITH LOCAL RULE 83.7.2

*Sam Kalen**

I. INTRODUCTION

Every law student learns the federal judiciary comprises courts of limited jurisdiction, only capable of hearing cases or controversies assigned to them by either Congress or the Constitution. And so too, every lawyer familiar with litigation against the federal government appreciates that, absent a specific congressional grant of jurisdiction, cases against the federal government seeking non-monetary relief can proceed pursuant to federal question jurisdiction with sovereign immunity waived—and the scope of review defined—by the Administrative Procedure Act (APA).[1] In some instances, Congress grants jurisdiction to a specific court, such as a particular United States court of appeals, to review specific agency decisions. When this occurs, parties generally must follow Federal Rule of Appellate Procedure (FRAP) 15 and file a "petition for review," consistent with the specific congressional statutory grant of appellate jurisdiction.[2] Yet, when no such specific grant of jurisdiction exists, parties must proceed through the normal route and file a complaint in federal district court, asserting the appropriate jurisdictional grant and waiver of sovereign immunity. But, oddly, this is not what is required under the local civil rules for the District of Wyoming.

* Assistant Professor, University of Wyoming College of Law. The author would like to thank the members of the *Wyoming Law Review* for their assistance, recognizing that any errors or omissions are solely those of the author.

[1] 5 U.S.C. §§ 701–706 (2006).

[2] FED. R. APP. P. 15.

Arguably contrary to the Federal Rules of Civil Procedure (FRCP) and the principles of federal jurisdiction, Wyoming Local Rule 83.7.2 purports to transform the United States District Court for the District of Wyoming into a federal appellate court—without any congressional or constitutional sanction.[3] Local Rule 83.7.2 establishes the process governing review of actions by federal administrative agencies, boards, commissions, as well as officers (including social security appeals). For such cases, it requires parties file a "petition for review" and prohibits parties from filing "motions for summary judgment, or affidavits in support thereof."[4]

The reasons animating the court's adoption of the rule are both legitimate and laudable: it sought to end a practice, occurring in some cases, of having the court dispose of administrative law cases against a federal agency without ever having the parties submit the federal agency's administrative record to the court. The United States Court of Appeals for the Tenth Circuit, in *Olenhouse v. Commodity Credit Corp.*,[5] required that lower courts examine the administrative record rather than simply accept a party's representations about the record or permit discovery.[6] In doing so, however, the court perhaps too cavalierly and precipitously suggested that lower courts employ a practice similar to what Wyoming currently requires under Local Rule 83.7.2.

Local Rule 83.7.2 is neither appropriate nor necessary and is possibly undesirable. This article explores the current practice in Wyoming, a review that illustrates the need to examine critically the rule. This article next reviews the potentially troublesome nature of the rule, explaining how the rule ostensibly

---

[3] WYO. U.S.D.C.L.R. 83.7.2.

[4] *Id.* Local Rule 83.7.2(a)(1) specifies, in part:

> Review of action of an administrative agency, board, commission, or officer must be obtained by filing a petition for review or, if specified by the applicable statute, a notice of appeal. . . . The caption of the petition or notice must name each party seeking review. The petition or notice must name the petitioner(s) and the respondent(s), and identify the action, order, or part thereof, to be reviewed. The petition or notice shall also contain a citation of the statute by which jurisdiction is claimed. (Form 3 in the Appendix to the Federal Rules of Appellate Procedure is a suggested form of a petition or notice.) The petition or notice shall not contain factual allegations in the nature of a complaint. Factual allegations in the petition or notice shall be stricken. The respondent is not required to file a response to the petition or notice unless required by statute. If two or more persons are entitled to seek judicial review of the same action and their interests are such as to make joinder proper, they may file a joint petition or notice.

Id.

[5] 42 F.3d 1560 (10th Cir. 1994).

[6] *Id.* at 1579–80.

complies with unfortunate language in *Olenhouse*, and why *Olenhouse* should not—and arguably cannot—mandate the process currently required by Local Rule 83.7.2.

II. WYOMING AND LOCAL RULE 83.7.2

To begin, the need to revisit Local Rule 83.7.2 is apparent from a cursory review of the local practice. A sampling of pleadings involving lawsuits against the United States reveals that many of the cases are initiated by routine complaints for declaratory and injunctive relief. A recent challenge to a Food and Drug Administration's decision involving the treatment of a generic drug, brought pursuant to federal question jurisdiction and under the APA, is a typical federal court complaint.[7] The principal exception to this practice of filing a complaint appears to be the State of Wyoming's challenges to federal agency decisions.[8] This is not to suggest that other litigants do not follow Wyoming's lead.[9] Some only file a petition for review, similar to what is filed in circuit courts, that is, just noting that a particular agency decision is being challenged.[10] And still others file

---

[7] Complaint, Cody Labs., Inc. v. Sebelius, No. 10-CV-147 (D. Wyo. July 21, 2010); *see also* Complaint, Wyo. State Snowmobile Ass'n v. U.S. Fish & Wildlife Serv., 741 F. Supp. 2d 1245 (D. Wyo. 2010) (No. 09-CV-95) (challenging the designation of critical habitat for the Canada Lynx); Complaint, Biodiversity Conservation Alliance v. BLM, No. 09-CV-08 (D. Wyo. Jan. 13, 2009) (challenging applications to drill in the Jonah Infill Drilling Project Area); Complaint, Int'l Leisure Hosts, Ltd. v. Kempthorne, No. 08-CV-32 (D. Wyo. Feb. 4, 2008) (challenging snowmobile restrictions in Yellowstone and Grand Teton National Parks); Complaint, Wyo. Sawmills, Inc. v. U.S. Forest Serv., No. 07-CV-271 (D. Wyo. Oct. 22, 2007) (challenging a Forest Service decision); Complaint, Envtl. Pres. Found. v. BLM, No. 07-CV-165 (D. Wyo. July 24, 2007) (challenging BLM management decision(s)). Complaints are filed when a party seeks review of a federal agency's decision not to disclose information, pursuant to the Freedom of Information Act. *See* Complaint, W. Res. Advocates v. U.S. Dep't of the Interior, No. 09-CV-177 (D. Wyo. July 28, 2009).

[8] *See* Petition for Review, Wyoming v. U.S. Dep't of the Interior, No. 09-CV-118 (D. Wyo. June 2, 2009), 2009 WL 3150064 (challenging the United States Fish and Wildlife Service designation of a northern Rocky Mountain distinct population segment for the gray wolf); Petition for Review, Wyoming v. U.S. Dep't of the Interior, No. 07-CV-25 (D. Wyo. Jan. 24, 2007) (challenging the Department's decision on the State's petition to remove Preble's Meadow Jumping Mouse from the List of Endangered and Threatened Species).

[9] *See* Petition for Review, Smithsfork Grazing Ass'n v. Kempthorne, No. 07-CV-62 (D. Wyo. Mar. 13, 2007) (challenging BLM grazing decisions). Indeed, the same law firm that might file a complaint in one case has filed a petition for review in another. *Compare* Petition for Review, Stanley Energy, Inc. v. BLM, No. 10-CV-47 (D. Wyo. Mar. 12, 2010), *and* Petition for Review, Sesqui Mining, LLC v. U.S. Dep't of the Interior, No. 08-CV-127 (D. Wyo. May 15, 2008), *with* Complaint, *Cody Labs.*, No. 10-CV-147.

[10] *See* Petition for Review, *Sesqui Mining, LLC*, No. 08-CV-127 (challenging an IBLA decision); Petition for Review, Black Diamond Energy, Inc. v. U.S. Dep't of the Interior, No. 07-CV-90 (D. Wyo. Apr. 30, 2007) (challenging an Interior Board of Land Appeals (IBLA) decision).

a document, styled as a petition for review, containing the typical components of a traditional complaint.[11] This disarray is not the litigants' fault but underscores that the rule is not working well.

Nothing, moreover, suggests that a "complaint" is an inappropriate mechanism for initiating an APA lawsuit. After all, the United States District Court for the District of Columbia likely receives more APA lawsuits than any other district court; for decades that court has adjudicated APA-based "complaints," not petitions for review. The ongoing challenge to the winter use plan for snowmobiles in Yellowstone illustrates the contrast in practice between Wyoming and Washington, D.C. In Wyoming, the State's recent challenge to the National Park Service's (NPS) winter use plan was initiated by filing a perfunctory petition for review consisting of only a few pages.[12] By contrast, when an environmental organization challenged plans for recreational snowmobiling in Yellowstone in Washington, D.C., it filed a regular complaint for declaratory and injunctive relief, eventually followed by cross-motions for summary judgment.[13] Similarly, in a recent challenge to the management of the National Wildlife Elk Refuge in Jackson Hole, Wyoming, filed in Washington, D.C., the Defenders of Wildlife filed a "Complaint for Declaratory and Injunctive Relief," which the court disposed of on cross-motions for summary judgment.[14]

Indeed, a reasonable argument exists that the Wyoming District Court may not permit the filing of a "petition for review" in lieu of a "complaint." Local rules, such as 83.7.2, are widespread and endorsed by FRCP 83.[15] FRCP 83

---

[11] *See* Complaint, W. Watersheds Project v. U.S. Forest Serv., No. 07-CV-323 (D. Wyo. Dec. 20, 2007).

[12] *See* Petition for Review, Wyoming v. U.S. Dep't of the Interior, No. 09-CV-0262 (D. Wyo. Nov. 20, 2009).

[13] Complaint, Greater Yellowstone Coal. v. Kempthorne, Civ. No. 08-CV-2138 (D.D.C. Dec. 9, 2008); *see also* Complaint, Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183 (D.D.C. 2008) (No. 07-CV-2111). Also, Wyoming intervened in a case, initiated by a complaint, challenging oil and gas development decisions in the Great Divide Area, Wyoming. Theodore Roosevelt Conservation P'ship v. Salazar, 605 F. Supp. 2d 263 (D.D.C. 2009) (decided on cross-motions for summary judgment), *aff'd*, 616 F.3d 497 (D.C. Cir. 2010). Indeed, in another case involving potential oil and gas development in Wyoming, the United States District Court for the District of Columbia noted that the filing of cross-motions for summary judgment "is appropriate in a case such as this, where this Court's review is based entirely on the administrative record." Memorandum Opinion at 5, Theodore Roosevelt Conservation P'ship v. Salazar, No. 08-CV-1047 (D.D.C. Sept. 29, 2010). The United States Court of Appeals for the Ninth Circuit follows the D.C. Circuit approach: the filing of a complaint, lower court resolution on summary judgment, and then de novo appellate review of a grant of summary judgment. *See, e.g.*, Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143 (9th Cir. 2010).

[14] Defenders of Wildlife v. Salazar, 698 F. Supp. 2d 141, 150 (D.D.C. 2010); Complaint for Declaratory and Injunctive Relief, *Defenders of Wildlife*, 698 F. Supp. 2d 141 (No. 08-CV-945).

[15] *See* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 204–08 (2002) (outlining a history of local rules).

affords district courts the authority to develop local rules, but any such rules "must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2702 and 2075."[16] And, while local rules are considered binding, rules relating to "form" may not be enforced in a manner that prejudices the substantive rights of any party.[17] Aside from the underlying merits of Local Rule 83.7.2, it appears the rule conflicts with FRCP 83 and violates, at the very least, the spirit of federal court jurisdiction.

To begin, the federal rules only contemplate the filing of complaints. FRCP 3 provides that an action is commenced with the filing of a complaint, not by filing a petition for review.[18] And FRCP 4 prescribes the service of summons along with a "complaint"—not just any "pleading."[19] FRCP 7 then provides that only one of seven "pleadings" are allowed, and the only one permitted for a plaintiff would be a document styled as a "complaint."[20] A pleading, in accordance with FRCP 10, must then "state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances," clearly contemplating a document that does more than merely identify a particular federal agency decision being challenged.[21] A document styled other than a "complaint" also inappropriately obviates the need for the opposing party to file an answer. Because Local Rule 83.7.2 purports to expand—and, as such, conflicts with FRCP 3, 4, 7, and 10—it is arguably unenforceable.[22]

---

[16] FED. R. CIV. P. 83(a)(1). Local rules conflicting with a federal rule or statute are invalid. *See* Hollingsworth v. Perry, 130 S. Ct. 705, 710 (2010) (per curiam); D'Iorio v. Majestic Lanes, Inc., 370 F.3d 354, 356 (3d Cir. 2004); Weibrecht v. S. Ill. Transfer, Inc., 241 F.3d 875, 879 (7th Cir. 2001). In *Reed v. Bennett*, for instance, the Tenth Circuit noted that local rules affecting summary judgment must be construed in a manner consistent with FRCP 56—the rule governing a court's treatment of summary judgment motions. 312 F.3d 1190, 1194 (10th Cir. 2002); *see also* Murray v. City of Tahlequah, 312 F.3d 1196, 1200 (10th Cir. 2002) (deciding a similar issue as in *Reed*).

[17] *See Hollingsworth*, 130 S. Ct. at 710; Chelios v. Heavener, 520 F.3d 678, 687 (7th Cir. 2008); United States v. Comprehensive Drug Testing, Inc., 473 F.3d 915, 927 (9th Cir. 2006), *withdrawn and superseded by* 513 F.3d 1085 (9th Cir. 2008); Jetton v. McDonnell Douglas Corp., 121 F.3d 423, 426 (8th Cir. 1997).

[18] FED. R. CIV. P. 3.

[19] *Id.* 4(c)(1).

[20] *Id.* 7(a).

[21] *Id.* 10(b). FRCP 10(a) further contemplates that the appropriate document must be styled as a complaint: "Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties . . . ." *Id.* 10(a).

[22] This is not to suggest that local rules cannot establish different procedures tailored to particular types of lawsuits. Admittedly, for instance, the rules are specific that, generally unless dismissed under FRCP 12 or 55, or after trial, cases can be disposed of on the merits only pursuant to FRCP 56. Yet, Local Rule 83.7.2 provides a specific type of briefing schedule for APA cases. So too, Colorado Appendix F.2 provides a form for the scheduling of cases involving review of administrative records, including the filing of briefs. In New Mexico, for instance, the parties can file opening case briefs and responses to those briefs. *See, e.g.*, New Mexico v. BLM, 459 F. Supp.

III. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND LOCAL RULE 83.7.2

Another reason to question the rule is because it seemingly ignores the spirit of federal court jurisdiction. Early on in our nation's formative years, district courts were established as courts of original jurisdiction, specifically authorized to hear certain cases, while the circuit courts (now the United States courts of appeals) had both original and appellate jurisdiction.[23] But both courts are courts of limited jurisdiction, only authorized to adjudicate cases and controversies assigned to them by Congress and the Constitution.[24] "Congress," after all, "decides whether federal courts can hear cases at all," and in so doing "it can also determine when, and under what conditions, federal courts can hear them."[25] In a variety of instances, Congress has assigned direct review of administrative agency decisions to a United States court of appeals.[26] This is when a party challenging a decision appropriately—and, indeed, must—file a petition for review.[27] For example, challenges to Federal Energy Regulatory Commission decisions must occur before the appellate courts, upon a timely filing of a petition for review.[28] The same is

---

2d 1102 (D.N.M. 2006). Moreover, some courts provide specific procedures for review of certain actions, such as review of social security decisions, e.g., Utah DUCiv R 7-4(a) (precluding the filing of a motion to affirm), and administrative cases may be exempt from certain scheduling conference requirements, see, e.g., Utah DUCiv R 16-1(a)(1)(A)(vi). These tailored procedures for APA type cases vary from jurisdiction to jurisdiction (perhaps warranting a closer examination), but they do not present the principal concern with Wyoming Local Rule 83.7.2.

[23] For a general history, see SURRENCY, *supra* note 15.

[24] The Court recently reaffirmed that federal courts have an independent obligation to ensure that they possess subject matter jurisdiction, even if not questioned by any party. Hertz Corp. v. Friend, 130 S. Ct. 1181, 1193 (2010). Jurisdictional limitations often are strictly applied, to such an extent that a district court cannot issue an order enlarging the required time for a party to seek appellate review. *E.g.*, Bowles v. Russell, 551 U.S. 205, 214 (2007).

[25] *Bowles*, 551 U.S. at 212–13; *see also* Kontrick v. Ryan, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject matter jurisdiction.").

[26] In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, for example, the Court addressed the ability of the party to initiate its complaint in district court where certain types of "review" actions are assigned to the court of appeals. 130 S. Ct. 3138, 3150–51 (2010).

[27] When a party files a complaint in district court that implicates a grant of appellate jurisdiction to a United States court of appeals, the case can be transferred from the district court to the appellate court. *See* 28 U.S.C. § 1631 (2006). In *Defenders of Wildlife v. EPA*, for instance, the district court transferred a claim to its appellate court, reasoning that the issue appropriately belonged in a petition for review in a case pending before that appellate court. 420 F.3d 946 (9th Cir. 2005), *rev'd sub nom*. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).

[28] 15 U.S.C. § 717r(b) (orders under the Natural Gas Act); 16 U.S.C. § 825*l*(b) (orders under the Federal Power Act); *see* Fed. Power Comm'n v. Pac. Power & Light Co., 307 U.S. 156, 159 (1939) ("But the Power Act contains a distinctive formulation of the conditions under which resort to the courts may be made and Congress determines the scope of jurisdiction of the lower

true for many challenges to Environmental Protection Agency decisions.[29] For a district court to permit the same device and process, this effectively transforms that lower court into an "appellate" body without any congressional sanction.

The ostensible basis for Local Rule 83.7.2 is the well-recognized *Olenhouse* decision by the Tenth Circuit.[30] That *Olenhouse* would become the avenue for the Tenth Circuit to announce a rather broad change in procedure for approaching judicial review of administrative agency decisions underscores the oft-repeated refrain: bad cases can make bad law. The case began rather innocuously. On the heels of a federally recognized natural disaster, farmers in Kansas planted their wheat crops late in the season and then challenged the Agricultural Stabilization and Conservation Service's (ASCS)[31] decision reducing the amount of deficiency payments the farmers would receive as a consequence of the late planting.[32] Prior to initiating their lawsuit, plaintiffs pursued—to no avail—an administrative appeal. In court, they sought certification as a class action, challenged the informality and arbitrariness of the appeal process,[33] the lack of any basis for the reduction in deficiency payments, the failure of the ASCS to afford them sufficient notice about the date for crop plantings, and argued reliance as well as estoppel flowing from the government's statements and actions.[34]

Although the plaintiffs had a compelling case, the district court dismissed the lawsuit without receiving any administrative record containing the documents and information before the United States Department of Agriculture (USDA)

---

federal courts."); *see also* Utah Power & Light Co. v. Fed. Power Comm'n, 339 F.2d 436, 437–38 (10th Cir. 1964) (requiring compliance with the jurisdictional review provisions and noting that the APA does not apply).

[29] *E.g.*, 33 U.S.C. § 1369(b); 42 U.S.C. § 7607(b). And, when cases are brought in district court, jurisdiction either exists under 28 U.S.C. § 1331, along with the waiver of sovereign immunity under the APA, or because Congress has vested the lower courts with jurisdiction over citizen suits. *E.g.*, 33 U.S.C. § 1365 (Clean Water Act citizen suit provision); 42 U.S.C. § 7604 (Clean Air Act citizen suit provision).

[30] 42 F.3d 1560 (10th Cir. 1994).

[31] The ACSC later became part of the Consolidated Farm Service Agency, since renamed Farm Service Agency (FSA). Congress established the FSA in the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, §§ 271–280, 108 Stat. 3178.

[32] *Olenhouse*, 42 F.3d at 1564.

[33] Notably, consistent with plaintiffs' claims regarding the arbitrariness of the process, Congress mandated changes to the appeal process within the USDA during the pendency of the farmers' case. *See generally* Christopher R. Kelley, *Recent Developments in Federal Farm Litigation*, 48 OKLA. L. REV. 215 (1995). Another case around this period criticized the appeal process. Doty v. United States, 53 F.3d 1244, 1251–52 (Fed. Cir. 1995).

[34] Olenhouse v. Commodity Credit Corp., 807 F. Supp. 688, 689 (D. Kan. 1992), *rev'd and remanded*, 42 F.3d 1560 (10th Cir. 1994). The initial federal agency decision occurred before a local (county) ASC committee. *Id.* Also, after the plaintiffs received certification as a class action lawsuit from Senior Judge Theis, the court then reassigned the case to Judge Kelly. *See* Olenhouse v. Commodity Credit Corp., 136 F.R.D. 672 (D. Kan. 1991).

supporting its decision.[35] Why this occurred is troubling. Since the 1970s, it has been axiomatic that federal agencies in cases seeking review under the APA need to compile and file administrative records in the court. By the 1990s, therefore, it was commonplace for parties in an APA case to file their motions for summary judgment based on that record as well as any "non-record" documents the court allowed to supplement the record. But that is not what occurred. Without filing (or being asked to file) an administrative record, the government filed what it styled as a "motion to affirm administrative decision reducing [plaintiffs'] deficiency payments."[36] Simultaneously, the plaintiffs filed a motion for summary judgment. The plaintiffs' motion included, as an appendix, only 172 pages excerpted from a 1600 page record.[37] The government's motion merely presented some material appended to its motion as well as statements by the government's counsel about what was in the record.[38] Based on this limited information, the district court concluded the agency's decision was not arbitrary or capricious or otherwise contrary to law.[39]

The Tenth Circuit appropriately questioned the district court's approach and reversed, but in doing so, it unfortunately created an unnecessary solution to what occurred in the lower court. At the outset, it is worth noting that this is one of those instances where bad cases can produce bad law—here, the parties' attorneys and the lower court exhibited little appreciation for rudimentary principles governing APA cases.[40] Indeed, after discussing how the farm program operated and reciting

---

[35] *Olenhouse*, 807 F. Supp. at 693.

[36] *See id.* Judge Kelly apparently misstated what the government actually filed. *Id.* at 690 ("Defendants moved for summary judgment.").

[37] *Olenhouse*, 42 F.3d at 1565 n.1.

[38] *Id.* at 1565.

[39] Somewhat ironically, however, the court observed that the "plaintiffs raise some persuasive arguments, and may in fact have a stronger basis for their contentions than do defendants, this court can only look to the administrative agency's decision and determine if it was arbitrary and capricious." *Olenhouse*, 807 F. Supp. at 693.

[40] The Tenth Circuit exhibited considerable frustration, arguably with the parties for the way in which the case was handled as well as with the lower court. Not only did the Tenth Circuit correct the lower court's mistake on what the government filed, it chastised the court for failing to review any administrative record and ignoring "the standard of review required when agency action is challenged." *Olenhouse*, 42 F.3d at 1565. It also observed that "[n]either the parties in their briefs, nor the District Court in its opinions below, addressed comprehensively the statutory and regulatory scheme governing the wheat program at issue." *Id.* at 1566 (footnote omitted). The court later indicated that its "efforts" to understand the case "are hampered by the less than coherent manner in which the facts have been gathered and presented." *Id.* at 1569 n.16. The court continued by noting that the farmers' attorneys failed to provide the court with information and citations, that the citations provided were not supportive, and while "the government fares better in this regard, it also fails to support factual assertions with references to the record, and often overreaches when it does." *Id.*

the facts of the case, the court then outlined the fundamental principles of judicial review of agency decisions,[41] beginning with the Supreme Court's opinion in *Citizens to Preserve Overton Park v. Volpe*.[42] It was in *Overton Park* and subsequent cases during the 1970s and early 1980s where the Supreme Court articulated the fundamental principles for reviewing federal agency administrative decisions.[43] It seems unfortunate that, after roughly a decade of common practice in APA cases throughout the country, the Tenth Circuit felt constrained to remind—in perhaps more elaborate fashion—the lower court of such fundamental principles. But arguably it was necessary to exhort the lower court: after all, the district court merely accepted counsels' statements about what was in the record; it relied on facts simply asserted in briefs and not even purportedly in any agency record; and it provided its own reasoned analysis of the agency's decision, one not offered by the agency itself.[44] The agency, as the Tenth Circuit observed, "made no findings of fact" and "articulated no explanation for its summary conclusion."[45] This was particularly problematic, because at the district court the government's attorney mischaracterized information in the record (a record that the lower court did not examine, because it was never filed), and then before the Tenth Circuit the government's counsel never addressed the arbitrary and capricious standard under the APA.[46]

This flagrant departure from common practice involving judicial review of federal agency actions under the APA prompted the Tenth Circuit to react legitimately yet seemingly precipitously. The court chastised the lower court's use of "illicit" procedures and emphasized the need to examine the actual administrative record and avoid reliance on extra-record information. It then prohibited the use of motions to affirm an agency's judgment.[47] But the court continued: it indicated that the use of summary judgment is inappropriate in APA cases; rather, in such cases, the district court functions like an appellate court and must process these cases as appeals in accordance with the Federal Rules of Appellate Procedure:

---

[41] *See id.* at 1573–76.

[42] 401 U.S. 402 (1971).

[43] *See generally* Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 483, 501–13 (2009).

[44] As an example, the Tenth Circuit observed that the district court accepted the government's *post hoc* explanation of an affidavit the farmers submitted to the agency during the administrative appeal process, when, in fact, had the lower court examined the affidavit, it would have realized that the affidavit did not support the government's characterization. *Olenhouse*, 42 F.3d at 1577–78.

[45] *Id.* at 1578; *see also id.* at 1579 ("District Court relied upon and mischaracterized a single page of testimony . . . .").

[46] *Id.* at 1569, 1575, 1579.

[47] *Id.* at 1579–80.

> A district court is not exclusively a trial court. In addition to its *nisi prius* functions, it must sometimes act as an appellate court. Reviews of agency action in the district courts must be processed *as appeals*. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure. Motions to affirm and motions for summary judgment are conceptually incompatible with the very nature and purpose of an appeal.[48]

As categorical as the language in *Olenhouse* appears, it would be a mistake to conclude that *Olenhouse* now dictates the practice in Local Rule 83.7.2. At the outset, it is not clear that the court has a problem with complaints *per se*, having resolved cases initiated by complaint without questioning their use. In a recent case, for instance, the Tenth Circuit noted that *Olenhouse* does not preclude a court from dismissing a case pursuant to FRCP 12(b). In doing so, the court repeated that lower courts are not to treat "an APA-based claim 'as a separate and independent action, initiated by a complaint and subjected to discovery and a 'pretrial' motions practice.'"[49] Yet, that case had, in fact, been initiated by complaint.[50] And similarly a complaint initiated another lawsuit resolved by the Tenth Circuit, in *Colorado Wild v. United States Forest Service*.[51]

---

[48] *Id.* at 1580. The court relied primarily on two older cases decided during the development of modern administrative law. Heber Valley Milk Co. v. Butz, 503 F.2d 96 (10th Cir. 1974); Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974). Reliance on these older cases is questionable at best.

The court in *Nickol*, for instance, indicated that summary judgment was inappropriate when reviewing a Department of the Interior decision involving mining claims under the 1872 Mining Act. 501 F.2d at 1392. The rationale the court used was that the lower court needed to examine the administrative record to determine if the agency's decision was supported by substantial evidence. "Thus it would seem that the perquisites for a summary judgment under Fed.R.Civ.P. 56 are absent in a review of the administrative record . . . ." *Id.* at 1390. The court then added that a district court needed to evaluate the conflicting evidence in the record and that doing so would be inconsistent with the summary judgment concept of having no material facts in dispute. "The district court . . . was then called upon to examine these facts in the record, evaluate the conflicts, and to then make a determination therefrom whether the facts supported the several elements which made up the ultimate administrative decision . . . ." *Id.* And, in order for the appellate court to undertake its function, "[w]hen the decision is based on conflicting facts, there need be some indication by the trial court as to how it arrived at its conclusions, and what, in its opinion, were the operative facts for which it found the substantial evidence." *Id.* at 1391. Today, that is not how administrative cases generally unfold, even those where a court is undertaking a review for substantial evidence. Admittedly, in *Nickol*, the court believed that it was reviewing an agency's decision under 706(2)(E) of the APA, but 706(2)(E) substantial evidence review is limited to formal adjudication or formal rulemaking—far from the norm today and surely not dispositive of how to review informal agency decisions, such as the one in *Olenhouse*.

[49] Kane Cnty. Utah v. Salazar, 562 F.3d 1077, 1086 n.3 (10th Cir. 2009).

[50] *Id.* at 1087 n.5.

[51] 435 F.3d 1204 (10th Cir. 2006).

Indeed, although in other jurisdictions within the Tenth Circuit the practice is not necessarily any clearer than in Wyoming, the practice demonstrates that nothing about *Olenhouse* precludes the filing of a complaint.[52] Cases against the Department of the Interior, for instance, have been initiated by the filing of a "Complaint for Declaratory and Injunctive Relief and Petition for Review of Agency Action," as well as by the filing of a "Complaint for Declaratory and Injunctive Relief."[53] When, for instance, the State of New Mexico challenged the Bureau of Land Management's decision expanding mineral leasing and development on public land in Sierra and Otero Counties, it filed a typical "Complaint for Declaratory and Injunctive Relief."[54]

IV. CONCLUSION

Presumably, if *Olenhouse* mandates the practice under Local Rule 83.7.2, then other jurisdictions within the Tenth Circuit have been violating the court's directive for well over a decade. This suggests that Wyoming is free to amend its Local Rule 83.7.2 to conform to the usual practice throughout the country. It also suggests that the Tenth Circuit should avoid parroting its earlier language in *Olenhouse* without further reflecting upon the degree to which it may have overreacted to an ill informed and possibly non-representative approach at the district court level.

---

[52] Although the caption of the document may differ, the selective sample of cases the author reviewed in a quick search of PACER revealed that most cases were initiated by a complaint.

[53] Complaint and Petition for Review, Colo. Envtl. Coal. v. Kempthorne, No. 09-CV-85 (D. Colo. Jan. 16, 2009) (challenging the decision to open certain public lands to oil or tar sands development); Complaint, S. Utah Wilderness Alliance v. Sierra, No. 07-CV-199 (D. Utah Apr. 2, 2007) (challenging an oil and gas leasing decision by the BLM); *see also* Complaint, Twilight Res., LLC v. Salazar, No. 09-CV-442 (D. Utah May 13, 2009) (challenging a BLM oil and gas leasing decision); Complaint, Wildearth Guardians v. BLM, No. 09-CV-414 (D.N.M. Apr. 29, 2009) (challenging a BLM oil and gas decision); Complaint, Nine Mile Canyon Coal. v. Stiewig, No. 08-CV-586 (D. Utah Aug. 6, 2008) (challenging an oil and gas decision by the BLM); Complaint, Wildearth Guardians v. Nat'l Park Serv., No. 08-CV-608 (D. Colo. Mar. 25, 2008) (challenging an agency management decision, although also raising a citizen suit claim under the Endangered Species Act but arguably not appropriately so); Complaint, Utah Shared Access Alliance, Inc. v. Nat'l Park Serv., No. 03-CV-275 (D. Utah Mar. 18, 2003) (challenging a National Park Service decision on personal watercraft at Lake Powell).

[54] Complaint, New Mexico v. BLM, 459 F. Supp. 2d 1102 (D.N.M. 2006) (No. 05-0460). During the course of litigation, New Mexico litigated whether the administrative record could include materials that were not before the BLM when it made its decision, particularly several declarations that were submitted to the agency after its decision but before the agency implemented its decision. The United States responded by relying on *Olenhouse*, not in objecting to the complaint, but rather to the State's effort to have the court consider materials not before the agency when it rendered its decision. Federal Defendant's Response to State Plaintiffs' Motion to Consider Post-Decisional Documents, *New Mexico*, 459 F. Supp. 2d 1102 (No. 05-0460).