

# Untangling Federal Administrative Appeals Practice in the District of Colorado

by W. Cory Haller and Karen E. Robertson

*Federal administrative appeals filed in the District of Colorado are governed by hybridized rules and procedures combining aspects of civil and appellate practice. Fortunately, local rules of practice and a growing body of case law provide significant guidance.*

Although appeals of federal agency decisions are generally heard by federal district courts, they do not fit comfortably within the Federal Rules of Civil Procedure. To address their unique procedural requirements, administrative appeals filed in the District of Colorado are assigned to a special docket, referred to as the AP docket. The AP docket is governed by the Local Rules of Practice of the U.S. District Court for the District of Colorado—AP Rules (LAP Rules), which supplement the local and federal rules of civil procedure.

This article discusses the rules governing federal administrative appeals, referred to as AP practice, in the District of Colorado. The article begins with a brief examination of the history of the AP docket, then discusses the basics of AP practice in the district. Finally, the article addresses some common issues and questions particular to AP practice.

## History of the AP Docket

Before the Tenth Circuit's 1994 decision in *Olenhouse v. Commodity Credit Corporation*,<sup>1</sup> AP practice in the district courts of the Tenth Circuit were governed by an assortment of rules and procedures. Many districts did not distinguish social security or other administrative appeals from routine civil cases, thus conflating practice standards and procedures fundamentally inconsistent with the appellate nature of judicial review under the Administrative Procedure Act (APA).<sup>2</sup> This amorphous treatment adversely impacted the quality and efficiency of administrative appellate review.

Unlike typical civil disputes resolved on the basis of facts developed at the district court level, administrative appeals are reviews of decisions made (or not made) on facts already determined and applied in an administrative process. They are not tried to juries

and with rare exception do not involve discovery or dispositive motions practice. Because district court judges are predisposed to see themselves as "trial" courts and prioritize their caseloads accordingly, social security and other administrative appeals often languished on district court dockets as an afterthought.<sup>3</sup>

In *Olenhouse*, the Tenth Circuit confronted this problem head on, clarifying the unique nature of administrative appeals and declaring explicitly that "[r]eviews of agency action in the district courts must be processed as appeals."<sup>4</sup> The crux of the Tenth Circuit's holding in *Olenhouse* regarding the proper procedure to follow in AP cases is its "explicit[] prohibit[ion]" of "[t]he use of motions for summary judgment or so-called motions to affirm."<sup>5</sup> Because such motions permit the issues on appeal "to be defined by the appellee" and invite reviewing courts "to rely on evidence outside the administrative record," the court declared them fundamentally "inconsistent with the standards for judicial review of agency action under the APA."<sup>6</sup> The Tenth Circuit also admonished that district courts, when engaging in their appellate function, "should govern [themselves] by referring to the Federal Rules of Appellate Procedure."<sup>7</sup>

In light of *Olenhouse*, and in an attempt to alleviate delays burdening the court at the time, the District of Colorado created the AP docket. The AP docket is tasked with pre-merits management of administrative appeals, including appeals arising under the APA and social security appeals.<sup>8</sup> In 2011, the District of Colorado amended and expanded the local rules of practice related to the operation of the AP docket. Those rules address the scope of the AP docket, the procedures relating to filing an administrative appeal, and the general management of AP cases.<sup>9</sup>

Fundamentally, the LAP Rules recognize that administrative appeals present unique procedural challenges. As a result, the LAP

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Rules prescribe a hybridized set of procedures adapting ordinary civil procedures to a quasi-appellate context. Although these rules represent an important first step in codifying AP practice, they form a structural framework only and provide no clear guidance on many common issues facing the AP practitioner. This is likely due to the court's recognition that the nature of a specific appeal shapes the substantive contours of judicial review and, axiomatically, pre-merits practices.

Parties to an administrative appeal must therefore seek guidance from the jurisdictional statute underlying that appeal, as well as the growing body of case law addressing AP practice in the district. This article explores the District of Colorado's LAP Rules and draws on existing case law to focus on some common issues that remain unaddressed.

## The Basics of AP Practice

Cases assigned to the AP docket are governed by a routine set of procedures. Once a case is assigned to the AP docket, it is reviewed by the AP judge. If it has been improperly or unnecessarily assigned to the AP docket, it will be designated for reassignment directly to a merits judge. For example, administrative appeals that do not involve a record review of an agency decision—such as a request for a mandatory injunction or an appeal based on an agency's failure to act—often are re-assigned directly to a merits judge.<sup>10</sup>

After the review is complete and assignment to the AP docket is deemed proper, the court ordinarily will await the filing of an

answer or other responsive pleading. Once an answer or other responsive pleading has been filed, the court will order the parties to confer and submit a Joint Case Management Plan (JCMP). The JCMP sets forth a schedule for: (1) the designation of the administrative record; (2) the resolution of anticipated pre-merits disputes; and (3) briefing of the merits of the appeal. The court reviews the proposed JCMP, resolves any disputes, and issues the JCMP as an order of the court. Once all appropriate pre-merits disputes are resolved and the matter is fully briefed, it will be designated for random assignment to a merits judge.

Despite the seemingly straightforward nature of this process, there are a number of pitfalls that can complicate and delay the resolution of an AP case. From the proper filing of the appeal, to the preparation of the JCMP, to the resolution of record disputes, the LAP Rules and a growing body of case law provide significant guidance. The balance of this article focuses on some common questions and issues relating to AP practice.

## Common Questions and Issues Relating to AP Practice

The new LAP Rules were intended to facilitate the proper filing and perfecting of an administrative appeal in the District of Colorado. Given the recency of the LAP Rules' enactment, common questions and issues arise.

### *Proper Filing of an AP Case*

To properly initiate "a social security appeal, a case commenced or reviewed under 5 U.S.C. § 706, . . . or a bankruptcy appeal," a filing party must pay special attention to the Civil Cover Sheet.<sup>11</sup> The local rules require the filing party to select the box labeled "AP Docket" in the "Brief Description" field of Section VI of the Civil Cover Sheet.<sup>12</sup> Although not required by the local rules, the filing party also should select the box labeled "899 Administrative Procedure Act/Review or Appeal of Agency Decision" under "Other Statutes" in Section IV of the Civil Cover Sheet.<sup>13</sup>

Failure to fully or accurately complete the Civil Cover Sheet may result in the improper assignment of the case and unnecessary delay. The converse, however, is not true. A case that is improperly designated for assignment to the AP docket will not be significantly delayed, because, after review by the AP judge, currently Senior Judge John L. Kane, it will be promptly reassigned to a merits judge. According to Judge Kane, when in doubt, a party should designate the case for assignment to the AP docket so that the AP judge can make the determination of whether the case should be assigned to a merits judge.<sup>14</sup>

### *Ensuring Proper Case Assignment*

If a case is properly filed, it will be assigned to the AP docket. Once the initiating complaint/petition and Civil Cover Sheet have been filed, the filing party can easily verify the proper assignment of the case. Assignment to the AP docket is reflected both in the case number—for example, 12-cv-123-AP instead of 12-cv-123-XXX—and in the notation "ADMAPP" that appears in the top right corner of the docket sheet.

If the case has been improperly assigned to the general civil docket, the parties should notify the court as soon as possible. This can be done either by filing a motion to reassign the case to the AP docket before an answer or other response is due<sup>15</sup> or, in lieu of

reassignment, by asking the assigned judge to apply the AP Rules directly and require submission of the appropriate JCMP.<sup>16</sup>

### *Case Reassignment to a Merits Judge*

Ordinarily, once a case is assigned to the AP docket, it will remain there until the parties have completed their briefing on the merits of the appeal and the case is ready for disposition.<sup>17</sup> At that time, it is drawn to a judge by random assignment.<sup>18</sup> In some circumstances, however, a case will be remitted to the Clerk's Office for random assignment before briefing is completed or other pre-merits matters are resolved. Although not specifically addressed by the local rules, case law illuminates a guiding principle as to when early reassignment can be expected (or requested).

If a party files a motion that raises questions going to the merits so serious and substantial that it necessarily implicates the ultimate outcome of the case, that motion—and the case—likely will be assigned to a merits judge for determination, even if the motion was filed before briefing is complete. Thus, a motion for preliminary injunction, which requires a determination of the likelihood of success on the merits, usually will be drawn to a merits judge.<sup>19</sup>

It is important to note that this guiding principle, although informative, is not dispositive. The ultimate decision to assign a case to a merits judge before completion of briefing on the merits is discretionary with the court, and will turn on the particular facts and circumstances of each case.

Furthermore, it is important to recognize that assignment to the AP docket is procedural, not substantive. It is aimed at facilitating the judicial process, so that the merits of an administrative appeal can be resolved in a timely manner. The LAP Rules will apply and inform the process of judicial review, whether a case is assigned to the AP docket or to a merits judge.

### *Proper Filing of the JCMP*

Whether an appeal is assigned to the AP docket or to a merits judge, the parties' next step is to submit a JCMP. Because Rule 16 does not apply in AP cases,<sup>20</sup> the JCMP serves as the road map for

managing an administrative appeal until it is at issue and ready for a merits-based disposition. The parties should use the JCMP as a means of anticipating, negotiating, and informing the court of pre-briefing issues on which they agree and disagree, or that may delay a ruling on the merits.

The LAP Rules include form JCMPs that prompt parties to provide information relating to common pre-merits stumbling blocks in social security and other administrative appeals.<sup>21</sup> Specifically, parties are prompted to inform the court if they anticipate: (1) defenses related to jurisdiction or justiciability generally; (2) disagreement as to the proper scope and composition of the administrative record; or (3) motions by other parties to intervene.<sup>22</sup> The prompts contained in the form JCMPs are by no means exclusive; parties should use their proposed JCMP to identify any and all issues anticipated to arise that may or will affect the efficiency or value of AP procedure.

Proposed JCMPs also should include plans for resolving existing or anticipated pre-merits disputes. For example, if the parties anticipate that they will disagree as to the proper scope and composition of the administrative record, they should include a plan for resolving their disagreements via consultation or, if necessary, motions practice. Similarly, if the parties are aware that other parties are likely to intervene, they may agree to separate or rolling briefing deadlines to permit intervening parties adequate time to review filings and avoid duplicative or unnecessary argument.

### *Intervening in an AP Case*

As in other civil cases, a party may seek to intervene in an AP case either permissively or as a matter of right.<sup>23</sup> To justify intervention as a matter of right, a party must establish: (1) an adequate interest in the property or transaction that is the subject of the underlying controversy; (2) that its interest could be impaired by the disposition of the action; and (3) that no other party adequately represents its interests.<sup>24</sup> The second and third elements present a minimal burden.<sup>25</sup> Accordingly, a party seeking to intervene as a defendant in an AP case should focus primarily on its interest in the property or transaction at issue.

Although intervention in AP cases often is readily permitted, the AP judge, in the interest of efficiency, often will limit the scope of intervention and carefully circumscribe the role intervenors play in shaping the issues on appeal.<sup>26</sup> As a result, the court often will require counsel for an intervenor and counsel for the party on whose behalf they are intervening to confer before filing any motion or pleading to determine whether their positions may be set forth in a consolidated filing.<sup>27</sup> Intervenors filing separate motions or pleadings will be required to certify that they have conferred with other counsel before filing.<sup>28</sup>

If intervention is anticipated, the parties should draft their JCMP to account for a “conferral and consolidation” condition. Actual or anticipated intervenors should be given sufficient time to review a filing to determine whether a separate filing is necessary.

### *What Rules Apply—Civil or Appellate*

Despite the straightforward nature of the Tenth Circuit’s central holding in *Olenhouse*, its admonition that district courts “should govern [themselves] by referring to the Federal Rules of Appellate Procedure” has created significant confusion relating to the applicability of the Federal Rules of Appellate Procedure to AP practice in the district courts.<sup>29</sup> To understand the import of the reference to the Federal Rules of Appellate Procedure in *Olenhouse*, it is necessary to consider the context in which this statement was made. In its entirety, this passage reads as follows:

A district court is not exclusively a trial court. In addition to its *nisi prius* function, 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.<sup>30</sup>

According to Judge Kane, who participated by special designation on the Tenth Circuit panel that decided *Olenhouse* and authored the panel’s opinion, this passage was intended to direct district courts to “refer” to the Federal Rules of Appellate Procedure where existing civil rules would alter or offend the appellate function of review under the APA.<sup>31</sup> Notwithstanding other references to such a requirement in *dicta*,<sup>32</sup> this was not intended as a directive to apply the Federal Rules of Appellate Procedure in all appeals brought under the APA or to remove administrative appeals from that category of civil actions to which the Federal Rules of Civil Procedure otherwise apply.

This interpretation of *Olenhouse*’s reference to the Federal Rules of Appellate Procedure is reflected in the District Court’s Local Rules of Practice. The LAP Rules do not supplant the more comprehensive Local Civil Rules of Practice; they only supplement them.<sup>33</sup> To date, the only Local Civil Rules supplanted by specific Section III LAP Rules are 1.1, 3.1, 10.2, 10.3, and 16.1.<sup>34</sup> As a result, practitioners should be guided by the Local Civil Rules on all other matters, including fees, formatting, filing, service, motions practice, page numbering, appearances, and the like, unless a specific rule results in practice fundamentally inconsistent with the appellate standard of review under *Olenhouse*.

In practical terms, this means that the determination of when and how appellate rules of practice apply to administrative appeals filed in the district court must be made on a case-by-case basis. An appropriate general rule, however, is that the federal and local civil rules apply to all actions commenced in the district court except where they are inconsistent with the standards for judicial review of agency action under the APA. In that case, courts—and the practitioners appearing before them—should refer to the Federal Rules of Appellate Procedure, but they are not bound by them.<sup>35</sup>

There are, however, three rules of civil procedure so inconsistent with appellate review that they do not apply in AP cases. First, as explicitly addressed in *Olenhouse*, Rule 56, governing summary judgment, will never apply to an AP case.<sup>36</sup> Second, because it is supplanted in the AP context by the LAP Rules and the JCMP, Rule 16, governing scheduling and pretrial orders and any necessarily related conferences or hearings, does not apply.<sup>37</sup> Finally, with the exception of jurisdictional or other discovery relating to justiciability or the procedures relating to the composition of the administrative record, Rules 26 to 37 of the Federal Rules of Civil Procedure do not apply to AP cases.<sup>38</sup>

### *Record Challenges*

The resolution of challenges to the scope and composition of the administrative record is one of the most important functions of the AP docket. As a result, there exists a significant body of case law addressing the standards for establishing that a record has been improperly designated.

Administrative appeals can be divided into two categories: appeals of formal agency decision and appeals of informal agency decisions. Because formal agency decisions—adjudications and formal rulemaking—are characterized by more formal, trial-like proceedings and culminate in a hearing, the record on appeal usually consists of the record before the adjudicating administrative law judge, official, or board at the time of the challenged decision. This stands in stark contrast to informal agency decisions—“notice and comment” rulemaking—which are much more *ad hoc* and informal. In the case of most informal agency decisions, the agency does not assemble the administrative record until after a legal challenge has been filed. As a result, there is a much higher likelihood that a party challenging an informal agency decision also will challenge the composition of the administrative record.

A party seeking to challenge the composition of an administrative record faces a significant burden; if the agency’s designation of the record is consistent with established procedures, it is entitled to a presumption of regularity.<sup>39</sup> To overcome that presumption, the challenging party must show by clear evidence that the designation or composition of the record is somehow irregular.<sup>40</sup> The nature of the evidence required to make that showing varies according to the nature of the challenge to the record. Thus, the first step toward a successful record challenge is a simple, yet surprisingly difficult, one—properly classifying the record challenge.<sup>41</sup>

There are three distinct types of record challenges: motions to strike, motions to complete the record, and motions to supplement the record.<sup>42</sup> Although the distinction between a motion to strike and a motion to complete or supplement the record is relatively

straightforward, the distinction between a motion to complete the record and a motion to supplement the record has proven challenging.<sup>43</sup> In a series of opinions issued in spring 2010, Judge Kane delineated the differences between these similar yet distinct record challenges.<sup>44</sup>

A motion to complete the record seeks to include documents that the decision maker directly or indirectly considered in the process of reaching the challenged decision, but did not include in the administrative record, either because of oversight or based on an assertion of privilege.<sup>45</sup> A motion to supplement the record seeks to include documents that the decision maker did not but should have considered in reaching the challenged decision.<sup>46</sup> This distinction—although subtle—is significant. It shapes both the court’s inquiry and the showing necessary to overcome the presumption of regularity afforded the agency’s designation of the record.<sup>47</sup>

Once the party properly classifies its record challenge, it then must put forth clear evidence that the agency’s designation of the record is in some way improper. A party filing a record challenge should note that the nature of the evidence required to make that

showing varies according to the nature of the challenge to the record.<sup>48</sup>

## Conclusion

The District of Colorado’s AP docket continues to evolve and adapt to the demands of administrative appeals practice. The court’s recent codification of rules governing the AP docket and the growing body of case law reflects the evolution of AP practice in the district. This article has highlighted some of the key principles of AP practice, and provides a useful starting point for all AP practitioners. However, as in all areas of the law, practitioners should monitor changes to the local rules and look to the ever-evolving case law for guidance on many common practice issues.

## Notes

1. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994).
2. The history of the federal administrative appeals docket (AP docket) is based on the authors’ conversations with Senior Judge John L. Kane, who has single-handedly managed the AP docket since its inception. These conversations mirror Judge Kane’s recent comments in a presentation to the Faculty of Federal Advocates. See Kane, “Navigating the AP Docket,” Faculty of Federal Advocates Brown Bag (Nov. 15, 2012) (FFA Presentation), to be published at [www.facultyfederaladvocates.org/links.html](http://www.facultyfederaladvocates.org/links.html).
3. FFA Presentation, *supra* note 2.
4. *Olenhouse*, *supra* note 1 at 1580.
5. *Id.* at 1579-80.
6. *Id.*
7. *Id.* at 1580.
8. Although jurisdictionally and analytically distinct, bankruptcy appeals under 28 USC § 158 were included as a category of cases initially assigned to the AP docket. D.C.Colo.LAPR 1.1C. The inclusion makes sense under *Olenhouse*, given the district court’s appellate rather than fact-finding function in such cases.
9. The rules (LAP Rules) are codified in Section III of the Local Rules at D.C.Colo.LAPR 1.1 *et seq.*
10. See, e.g., *WildEarth Guardians v. Salazar*, No. 10-cv-817-WDM-CBS.
11. D.C.Colo.LAPR 1.1C.
12. D.C.Colo.LCivR 3.1A.
13. An electronic version of the Civil Cover Sheet is available on the District’s website at [www.cod.uscourts.gov/Portals/0/Documents/LocalRules/2012-LR/Civil\\_Cover\\_Sheet.pdf](http://www.cod.uscourts.gov/Portals/0/Documents/LocalRules/2012-LR/Civil_Cover_Sheet.pdf).
14. FFA Presentation, *supra* note 2.
15. D.C.Colo.LCivR 3.1A.
16. D.C.Colo.LAPR 16.1A.
17. D.C.Colo.LCivR 40.1D.
18. D.C.Colo.LCivR 40.1A and 40.1D.
19. See, e.g., *Town of Superior v. U.S. Fish & Wildlife Serv.*, No. 11-cv-3294-AP, Minute Order re: Reassignment (doc. 5). After a motion necessitating reassignment has been resolved, the case may once again be re-assigned to the AP docket for further proceedings. However, this is not typical. Such reassignment requires the consent of both the assigned merits judge and the chief judge of the district. D.C.Colo.LCivR 40.1A.
20. See D.C.Colo.LAPR 16.1A.
21. See D.C.Colo.LR Appendix F.3 and F.4.
22. *Id.*
23. FRCP 24.
24. *WildEarth Guardians v. Nat’l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010).
25. *Id.* at 1199. Furthermore, because the defendant in an administrative appeal is always a governmental agency, the third prong of this test is ordinarily fairly easy to establish.

26. *WildEarth Guardians v. Salazar*, No. 10-cv-2129-AP, 2011 WL 9284 \*5 (D.Colo. Jan. 3, 2011).

27. *See, e.g., Wilderness Workshop v. Crockett*, No. 11-cv-1534-AP, Order on Motion to Intervene (doc. 13) at 2 (July 7, 2011).

28. *See, e.g., id.*

29. *Olenhouse*, *supra* note 1 at 1580.

30. *Id.* (emphasis in original).

31. *See also* FFA presentation, *supra* note 2.

32. *See Ctr. for Native Ecosystems v. Salazar*, 711 F.Supp.2d 1267, 1272 (D.Colo. 2010); *WildEarth Guardians v. U.S. Forest Serv.*, 713 F.Supp.2d 1243, 1252 (D.Colo. 2010); *Colo. Wild v. Vilsack*, 713 F.Supp.2d 1235, 1237 (D.Colo. 2010). In all three cases, the court notes that it “applies” the Federal Rules of Appellate Procedure.

33. D.C.Colo.LCivR 1.1C provides that the Civil Rules apply “in all civil actions filed in the [District Court] . . . *except* as specifically addressed in Section III—AP Rules” (emphasis added).

34. D.C.Colo.LAPR 1.1 pertains to the scope of the local rules; LAPR 3.1 addresses the completion and filing of a civil cover sheet; LAPR 10.2 discusses the commencement of an action and the proper form of pleading; LAPR 10.3 describes the AP docket; LAPR 16.1 details AP case management.

35. *Olenhouse*, *supra* note 1 at 1579. For example, the parties’ briefs are not subject to any page limits; Federal Rule of Appellate Procedure 32(a)(7) does not apply. However, on the parties’ request, which should be noted in the Joint Case Management Plan, the court may impose briefing limitations.

36. *Olenhouse*, *supra* note 1 at 1579-80.

37. D.C.Colo.LAPR 16.1A.

38. If a party seeks to file jurisdictional discovery, it should file a motion seeking limited discovery for that purpose. The motion should be filed either simultaneously to or after filing the motion to dismiss forming the

basis for that request. *See WildEarth Guardians v. Salazar*, No. 10-cv-00011-AP, Order Denying Motion for Jurisdictional Discovery (doc. 18) (July 26, 2010) (denying motion for jurisdictional discovery as premature).

39. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993).

40. *See WildEarth Guardians*, *supra* note 32 at 1253.

41. *See id.* at 1235 n.5.

42. *Id.* *See also Wilderness Workshop v. Crockett*, 2012 WL 1834488 at \*2 (D.Colo. May 12, 2012).

43. *See WildEarth Guardians*, *supra* note 32 at 1253 n.5.

44. *See Ctr. for Native Ecosystems v. Salazar*, 711 F.Supp.2d 1267 (D.Colo. 2010); *WildEarth Guardians*, *supra* note 32.

45. *See, e.g., Ctr. for Native Ecosystems*, *supra* note 44 at 1274.

46. *Id.*

47. *Id.* at 1274 n.7.

48. *See Wilderness Soc’y v. U.S. Forest Serv.*, No. 1:11-cv-246-AP, 2012 WL 1079169 (D.Colo. March 30, 2012) (discussion of the standard applicable to a motion to strike); *Ctr. for Native Ecosystems*, *supra* note 44 at 1275-78, 1278-81 (discussion of the standard applicable to a motion to supplement). ■