

What Happens In District Court After You File The Complaint: “Hurry Up And Wait”

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How to Respond If the Government Files a Motion to Dismiss

- 12(b)(1) – subject matter jurisdiction
- 12(b)(6) – failure to state a claim upon which relief can be granted
- Ripeness, mootness and exhaustion
- Factual claims and the motion stage
- Deadlines and timing

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TROs and Preliminary Injunctions

- Deciding whether to file for injunctive relief
- TRO vs Preliminary Injunction
- Preserving status quo vs compelling action
- Rule 65 standard
- Evidentiary support for injunction motions

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Timing and Substance of the Government's Answer

- Counting the 60-day deadline
- Dealing with requests for extension
- Reviewing the answer and concessions
- Obtaining the administrative record
- What's happening while you are waiting

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When to File a Motion for Summary Judgment. What Are Its Contents?

- Knowing the rules and knowing the judge: Rule 56, local rules and judge's standing orders
- Moving based on the administrative record
- Elements of the brief
- Supplementing the record: affidavits and the material fact in dispute standard

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What Are the Standards of Review in Federal Court?

- APA 706(1): Agency action unlawfully withheld or delayed
- APA 706(2)(A): Arbitrary and capricious, abuse of discretion or otherwise contrary to law
- APA 706(2)(C): *Ultra vires* actions
- APA 706(2)(E): Unsupported by substantial evidence

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How to Argue for No (Or Less) Deference to the Agency

- Plain language of the statute controls (“*Chevron* Step One”)
- Basis for decision vs litigation positions (*Chenery* doctrine)
- Deference vs discretion
- Deference and substantial evidence

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When and How to Discuss Settlement with the Government Attorney

- Understanding who makes decisions on the government’s side: AUSAs, OIL and the agency
- Discussing settlement before the answer is filed
- Status conferences and litigation plans
- Discussing settlement after a motion to dismiss is denied

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Questions? Comments?

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