No. 12-16980

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BLACK MESA WATER COALITION, *et al.*, Plaintiffs/Appellants,

v.

SALLY JEWELL, in her official capacity as U.S. Secretary of the Interior, Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona

APPELLANTS' SUPPLEMENTAL BRIEF

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Matt Kenna
Public Interest Envtl. Law
679 E. 2nd Ave., Suite 11B
Durango, CO 81301
(970) 385-6941
matt@kenna.net

Walton D. Morris, Jr.
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
(434) 293-6616
wmorris@charlottesville.net

Brad A. Bartlett
Western Energy Justice Project
P.O. Box 3662
Durango, CO 81301
(970) 799-6145
brad.bartlett@frontier.net

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QUESTION PRESENTED

What standard of review should this Court apply when reviewing agency determinations under the "entitlement" prong of 43 C.F.R. § 4.1294(b)?

SUMMARY OF THE ARGUMENT

The overarching standard of review is "abuse of discretion." However, the Court has been clear that as with every legal issue, legal questions presented in attorney fee disputes are reviewed "*de novo*." Because the primary question presented to the Court in this appeal involves a purely legal question (namely, whether the "entitlement" prong of 43 C.F.R. § 4.1294(b) always requires an attorney fee applicant to show that it "caused" the favorable result on the merits), the standard is "*de novo*" here.

ARGUMENT

I. The Overarching Standard of Review is "Abuse Of Discretion," with Legal Questions Reviewed "*De Novo*."

The overarching standard of review for attorney fee disputes is "abuse of discretion," within which legal questions are reviewed "*de novo*." While this Court has not previously considered what appellate

standard of review should be applied specifically to the "entitlement" prong of the Secretary's attorney fee regulation pursuant to the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 ("SMCRA"), 43 C.F.R. § 4.1294(b), other courts that have considered the question have held that the overarching standard is "abuse of discretion." *West Va. Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 245-46, 248 (4th Cir. 2003).

Likewise, this Court has held that the overarching standard of review for attorney fee awards generally (which often involve factually-intensive issues) is "abuse of discretion." *St. John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1058 (9th Cir. 2009). There is no reason for the Court to rule differently with respect to the "entitlement" prong of 43 C.F.R. § 4.1294(b).

Importantly however, under the abuse of discretion standard, this Court has been clear that legal questions presented in attorney fee disputes, like legal issues presented in any context, should be reviewed "*de novo.*" *St. John's Organic Farm,* 74 F.3d 1054 at 1058; *Harris v. Maricopa County Superior Court,* 631 F.3d 963, 970 (9th Cir. 2011), citing, *inter alia*, *Tutor–Saliba Corp. v. City of Hailey*, 452 F.3d 1055,

1059-60 (9th Cir.2006). In *Harris*, the Court held that the *de novo* standard extends to "the methodology that the district court used to determine the amount of fees attributable to those claims for which fees were appropriate." 631 F.3d 963 at 970.[1]

Accordingly, it is settled law that the *de novo* standard applies to legal questions within the "entitlement" prong of 43 C.F.R. § 4.1294(b).

II. *De Novo* Review is Appropriate because Appellants are Challenging the Methodology Used by the Secretary to Determine Entitlement—*i.e,* the Secretary's Application of a Causality Test.

The primary issue in this case concerns an "element of legal analysis": namely, whether a causality test should be applied in every instance under to the "entitlement" prong of 43 C.F.R. § 4.1294(b). This is a purely legal question rather than a factual one.

The Administrative Law Judge ("ALJ") below applied a strict "but-for" causality test to determine whether Appellants Black Mesa Water

[1] In his concurrence/dissent, Judge Bybee took no issue with the salutary holding of the majority that legal issues within the context of attorney fee disputes should be considered *de novo*, and agreed that "[o]ur cases demonstrate that we have reviewed certain issues in fee awards *de novo* when they relate to some 'element[ ] of legal analysis.'" *Id.* at 983, citing *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir.1991). He simply took issue with the majority's finding that the "method of fee calculation" was a legal issue. *Id.*

Coalition *et al.* ("BMWC") are entitled to recovery of fees and costs. Excerpts of Record ("ER") 16, 41, 46, 47.[2] Thereafter, the ALJ advanced factual arguments in alleged support of the lack of a "but-for" causal connection between BMWC's substantial contribution to the consolidated proceedings and the relief granted. *Id.*

Similarly, even though the decision of the Interior Board of Land Appeals' ("IBLA") construed the entitlement prong to require a "causal nexus" test rather than a "but-for" causal test (ER 21), the question that IBLA considered was the same: did BMWC's participation strictly "cause" the ALJ to grant the relief requested by both Nutumya and BMWC, or did BMWC not "cause" it because the ALJ happened to rule

[2] The ALJ applied two strict "but-for" causality tests: (1) if an ALJ does not rely on a petitioners' substantial contribution to consolidated proceedings in rendering a decision, petitioner is not entitled to fees and costs; and, (2) petitioners who do not sufficiently contribute to the winning summary judgment motion (*i.e.* make the winning argument) in consolidated cases are not entitled to fees. ER 44-48. At oral argument, the Secretary seemed willing to take this a step farther asserting that even if a petitioner *had* advanced the winning argument in a separately filed motion for summary judgment, if the ALJ did not grant relief by directly ruling on that particular summary judgment motion, the petitioner would not be entitled to fees.

on Nutumya's summary decision motion first, causing the ALJ to forgo consideration of BMWC's motions?[3]

As BMWC has conceded, *if* entitlement turns on a causality test, *whether* BMWC meets it would be a factual question reviewed for an abuse of discretion. BMWC Reply Brf. at 10 n.4. But BMWC's primary argument is that the tribunals below erred as a matter of law in concluding that the entitlement prong of 43 C.F.R. § 4.1294(b) turns on a "but-for" causality test in every circumstance. *Id.* and acc. text.[4]

The bright line rule for entitlement is a "substantial contribution to a full and fair determination *of the issues*." 43 C.F.R. § 4.1294(b) (emphasis added). And while a strict causal connection between a party's actions and the relief granted can certainly prove substantial contribution, the absence of a causal connection does not disprove substantial contribution. *See e.g., Association of Cal. Water Agencies v. Evans*, 386 F.3d 879, 887 (9th Cir. 2004) (plaintiffs recovered fees even

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[3] The district court appeared to utilize this test as well. ER 4-5.

[4] Likewise, if it were relevant to the entitlement question how many hours BMWC spent on coordinating with Nutumya, that question would be a factual question subject to the "abuse of discretion" standard. *See* BMWC Op. Brf. at 23 n.3. But *whether* that question is properly part of the "entitlement" prong is a legal one that should be reviewed *de novo*.

where related litigation in another court by different plaintiffs rendered litigation moot). This principle is especially applicable in consolidated proceedings like those below, in which the luck of the draw (*i.e.* which summary judgment motion the ALJ happened to pick up first) can deprive a party of any chance to "cause" the deciding forum to grant the specific relief sought.

In sum, because the primary issue related to BMWC's entitlement to fees concerns an "element of legal analysis," namely whether a causality test should be required, this Court's review is *de novo*.

III. Where, as Here, the Record is Clear, the Court should Make the Entitlement Determination Itself.

In the absence of a causality test, which was the ALJ & IBLA's *sole* basis for denying BMWC's entitlement, there is no reasonable argument that BMWC did not make "a substantial contribution to a full and fair determination of the issues." *See* BMWC Op. Brf. at 5-7, 23; Reply Brf. at 13-14. Thus, in addition to announcing the correct test for entitlement, this Court should concurrently determine that BMWC is entitled to fee and cost recovery. *See Beck v. City of Upland*, 527 F.3d 853, 866-67 (9th Cir. 2008) (Court can chose to decide factual issues instead of remanding where record is clear).

As discussed at oral argument, in the absence of a causality test, it cannot be disputed that BMWC substantially contributed to the issues before the ALJ in the consolidated proceedings. There is no dispute that BMWC raised the underlying issues resolved by the ALJ in public comment, appealed these issues to the ALJ, conducted extensive discovery on these and other issues, submitted three separate summary judgment motions, defended against multiple summary judgment motions from the government and intervenors, contributed to the successful summary judgment motion of its co-petitioner Nutumya, and obtained the relief it requested on its National Environmental Policy Act and Endangered Species Act claims. BMWC Op. Brf. at 4-9; Reply Brf. at 10; ER 84-87.

As the Supreme Court has instructed, "a request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Where, as here, the record of petitioner's substantial contribution to the issues before the ALJ on consolidated appeal is clear, the Court should use its discretion to resolve this issue without the need for additional litigation.

IV. The Secretary is Not Entitled to Deference.

In her primary brief and at argument, the Secretary argued that the Administrative Procedure Act's "arbitrary and capricious" standard, along with the deference standard sometimes applicable to an agency's interpretation of a statutory provision under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), applies here. *See* Sec. Brf. at 18-19. However, the Secretary's argument is founded on judicial review standards that apply to the merits of challenges underlying agency actions, rather than to attorney fee applications once arbitrary and capricious agency action has already been found. *See* Sec. Brf. at 18-19 (only citing merits decisions).

In contrast with the standards that apply to the Secretary's substantive actions, courts do not defer to her decisions implementing fee-shifting law where, as here, an administrative agency bases its interpretation of statutory language on judicial precedent rather than the agency's own considered interpretation of the statute. In such instances, the Court owes no *Chevron* deference to the agency's position. *Blackburn v. Reich*, 79 F.3d 1375, 1377 n.3 (4th Cir. 1996). As the Tenth Circuit has held, "[w]hen the administrative interpretation is not

based on expertise in the particular field, however, but is based on general common law principles, great deference is not required." *Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292-93 (10th Cir. 1978). The tribunals below adopted their causal tests from case law, not from the Secretary's considered interpretation of the fee regulation, let alone SMCRA itself such as might be produced through rulemaking. ER 16-17, 21.

The Secretary adopted the fee-shifting regulation at issue here in the wake of the Supreme Court's decision in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983). 50 Fed. Reg. 47,224 (Nov. 15, 1985). In doing so, the Secretary retained the "substantial contribution" test for entitlement based on this Court's subsequent decision in *Carson-Truckee Water Conservancy District v. Secretary of the Interior*, 748 F.2d 523, 526 (9th Cir. 1984). It is important to note that the regulation at issue here does not prescribe a causal test for entitlement, particularly in cases such as this one, where the Secretary initially consolidates a host of related administrative proceedings *sua sponte* for hearing and decision and then effectively disposes of them by deciding, and granting

relief on, the summary judgment motion that the ALJ happens to pick up first. ER 31, 261 ¶2.

The decisions below that BMWC challenges in this appeal interpreted 43 C.F.R. § 4.1294(b) to require a causation test for entitlement based on prior case law. That case law grew exclusively out of ordinary administrative proceedings in which a single plaintiff obtained relief and the question was whether the plaintiff's litigation efforts, rather than the Secretary's completely voluntary acts, led to that relief. Here, because the circumstances could not be more different, this Court has no reason to defer to the Secretary's reliance on interpretations of her fee-shifting regulation that do not contemplate "entitlement" in the context of the Secretary's disposition of consolidated cases such as those before the ALJ below.

CONCLUSION

For these reasons, while the overarching standard of review is "abuse of discretion" when reviewing agency determinations under the "entitlement" prong of 43 C.F.R. § 4.1294(b), legal questions are reviewed "*de novo*." Because the primary question before the Court is a purely legal one (namely, whether the "entitlement" prong of 43 C.F.R.

§ 4.1294(b) always requires a causation test), the standard here is "*de novo*."

RESPECTFULLY SUBMITTED December 11, 2014.

/s/*Matt Kenna*
Matt Kenna
Public Interest Environmental Law
679 E. 2nd Ave., Suite 11B
Durango, CO 81301
(970) 385-6941
matt@kenna.net

Brad A. Bartlett
Western Energy Justice Project
P.O. Box 3662
Durango, CO 81301
(970) 247-9334
brad.bartlett@frontier.net

Walton D. Morris, Jr.
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
(434) 293-6616
wmorris@charlottesville.net

Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that I electronically filed this brief with the Clerk of the Court by using the appellate CM/ECF system, on December 11,2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Matt Kenna
Matt Kenna