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 REPLY BRIEF

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I. Regardless of the Applicable Overall Standard of Review the Issue Before the Court is Legal and Therefore Reviewed *De Novo*.

Regardless of the overall standard of review, the Court determines legal questions *de novo*, and that applies to legal questions within the entitlement prong of 43 C.F.R. § 4.1294(b). *See St. John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054 (9th Cir. 2009) and *Harris v. Maricopa County Superior Court*, 631 F.3d 963 (9th Cir. 2011). While the Court may employ certain levels of deference to the government's position in performing this de *novo* review if it is appropriate (*see* section II, below), it cannot be argued that legal questions should be reviewed for "substantial evidence" (Sec. Supp. Brf. at 7) or some other lesser standard than *de novo*.

The Secretary does not dispute that the primary question before the Court in this appeal is whether she properly requires a "causal nexus" test to be met in *all* cases under the "entitlement" prong of 43 C.F.R. § 4.1294(b), even where, as here, there were multiple administrative appeals consolidated by the Administrative Law Judge ("ALJ") *sua sponte* for "hearing and decision" and, based on the relief granted by the ALJ (including the relief requested by BMWC), BMWC's

merits briefs were not considered because they were rendered moot. The dispute is whether this is a legal question subject to *de novo* review, or a factual question subject to a more deferential standard of review. The answer is that it is a legal question subject to *de novo* review.

The Secretary casts BMWC's argument as that "the Court should review the Secretary's determination under the 'entitlement' prong of 43 C.F.R. § 1294(b) *de novo.*" Sec. Supp. Brf. at 5-6. But BMWC was clear in arguing that the overall standard for this question is for "an abuse of discretion." BMWC Brf. at 1-2. BMWC's position is that legal questions within this larger issue, like all legal questions, are reviewed *de novo*. *Id*.

It may be that "[t]he regulation expressly calls for a 'finding,' and the question is *primarily* factual and not legal." Sec. Supp. Brf. at 7 (emphasis added), citing *West Virginia Highlands Conservancy v. Norton*, 343 F.3d 239, 248 (4th Cir. 2003). But unlike the usual situation where entitlement hinges on a factual question, here the question turns on the Secretary's methodology for determining entitlement and a strict application of a "causal nexus" *legal* test that the Secretary argues must be met in all cases. Whether BMWC was

required as a matter of law to "cause" the ALJ's decision in order to be entitled to fees, a test that is not expressly part of or required by the regulation, is certainly a legal question. *Compare id.* (in single-party appeals where application of the "causal nexus" test is not contested, whether that test is met is a factual question); BMWC Reply Brf. at 10 n.4, cited in BMWC Supp. Brf. at 5 (acknowledging same).

The Secretary attempts to avoid the principle that legal issues here must be reviewed *de novo* by arguing in a footnote that the cases cited by BMWC "do not establish 'settled law' that the *de novo* standard applies to the entitlement prong." Sec. Supp. Brf. at 11 n.2. But as already discussed in its opening brief and above, BMWC does not argue that the overall standard applicable to the entitlement prong is *de novo*, but simply makes the unremarkable point that legal questions of any kind, including those in attorney fee disputes with more deferential standards of review applicable to the overall entitlement question, are reviewed *de novo*. BMWC Supp. Op. Brf. at 2-3.

Tellingly, the Secretary never tries to explicitly argue that legal questions should not be reviewed *de novo.* Instead, she argues that BMWC "attempt[s] to turn the Secretary's factual determinations into

legal issues." Sec. Supp. Brf. at 10. However, clearly the opposite is true. It is the Secretary that is attempting to turn the legal question of whether a "causal nexus" test must be applied in all cases into a factual question for which the ALJ is should receive greater deference.[1]

This Court's decision in *Harris* mandates that this argument cannot be accepted. There, even though the overall standard of review applicable to the attorney fee question was "abuse of discretion," because the issue was "the methodology that the district court used to determine the amount of fees attributable to those claims for which fees were appropriate," that was a legal question reviewed *de novo*. 631 F.3d at 970. Judge Bybee in his concurrence/dissent 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

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[1] The Secretary elsewhere essentially concedes that BMWC's challenge to the ALJ's entitlement determination is legal in nature, arguing that: "To the extent BMWC challenges the Secretary's interpretation of 43 C.F.R. § 4.1294(b) regarding how the agency is to go about making the factual determination required under the entitlement prong, this Court must defer to the Secretary's interpretation of the agency's own regulation." Sec. Brf. at 8. As discussed that is exactly the primary issue in this appeal. The Secretary's argument that the entitlement issue is a matter of "interpretation" of a regulation shows that it is simply not a factual question.

983, citing *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir.1991). The question here presents a clearer case for application of the *de novo* standard than in *Harris* because it cannot be denied that the issue, whether as a matter of law the causal nexus test must be applied in all circumstances, relates to "some element of legal analysis."

II. The Court Owes Little Deference to the Secretary's Position.

Once it becomes clear that the Court is presented with a legal question to be reviewed *de novo*, the question then becomes whether some deference to the Secretary's legal position should be granted in performing this review. The answer is that very little, if any, deference should be accorded the Secretary's position, which is based on an interpretation of case law rather than a considered analysis of the language of the statute or regulation itself.

As an initial point, even if any deference were warranted, the Court should still reject the Secretary's interpretation that a causal nexus test should be applied in all cases, because even where full deference under *Chevron v. NRDC*, 467 U.S. 837 (1984) is warranted, deference does not automatically result in finding the government's

interpretations correct, as even employing deference courts must not "rubber stamp … decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *BATF v. FLRA*, 464 U.S. 89, 97 (1983). As Congress expressly found, the subsection now codified as 30 U.S.C. §1275(e),

> does *not require that the proceedings result in the finding of a violation nor does the fact that the Government was a party in an adjudicatory proceeding, or had caused the proceeding to be initiated prevent an award under the terms of the subsection*. It is the committee's intention that this subsection *not* be interpreted or applied in a manner that would discourage good faith actions on the part of interested citizens.

H.R. Rep. No. 218, 95th Cong. 1st Sess. 131 (1977) (emphases added). Similarly, "if those who violate this bill's requirements are not to proceed with impunity, then citizens must have the opportunity to recover the attorneys' fees necessary to vindicate their rights." S. Rep. No. 128, 95th Cong. 1st Sess. 59 (1977).

But to the extent it makes a difference, little to no deference is warranted here. As the Supreme Court has stated, "this general rule [of deference to regulatory interpretations] does not apply in all cases." *Christopher v. SmithKline Beecham Corp.,* 132 S.Ct. 2156, 2166 (2012). And as explained in BMWC's opening supplemental brief, it should not

apply here since the Secretary's explanation is based on interpreting case law rather than her own considered interpretation of SMCRA or 43 C.F.R. § 4.1294(b) itself. BMWC Supp. Brf. at 8-9, citing *Blackburn v. Reich*, 79 F.3d 1375 (4th Cir. 1996) and *Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292-93 (10th Cir. 1978).

The Secretary counters that "a Court should defer to an agency's interpretation of its own regulations even if those regulations incorporate legal standards first developed by other authorities—such as when an agency's regulations incorporate state law." Sec. Supp. Brf. at 10, citing *Arkansas v. Oklahoma*, 503 U.S. 91, 112 (1992). But incorporating state water quality standards (the "state law" at issue there) is not the same as interpreting federal case law. In the former a federal court must grant deference to a state's water quality standards because the state was entrusted by Congress to develop them. In contrast, federal agencies have no expertise in interpreting federal case law, whereas that is the Court's exact role. *Blackburn v. Reich*, 79 F.3d at 1377 n.3 ("Because the Secretary based his decision in the instant case on judicial precedent rather than his own interpretation of the

statute, we owe 'no more deference than we would any lower court's analysis of the law.'") (citation omitted).

Likewise, the Secretary's quotation of *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) for the proposition that "[t]he reviewing court is not *generally* empowered to conduct a *de novo* inquiry" of agency actions (Sec. Supp. Brf. at 10, emphasis added) is inapposite because of course a court reviews agency actions under the familiar "arbitrary and capricious" standard of the APA. But that has no bearing on the fact that when a court considers a legal issue while conducting its review, its review is *de novo*, subject to whatever *legal interpretation* deference standard may apply as addressed in the preceding paragraphs.

Accordingly, that the APA provides the *cause of action* for the present action says little about the relevant standard of review here. *See* Sec. Supp. Brf. at 3-6. BMWC has explained that regardless of the overarching standard of review, the question at issue in this appeal is reviewed *de novo* because of its legal nature. But to the extent the Court wishes to announce the general standard for the entitlement prong of SMCRA fee awards, there really is no great disagreement here

because despite BMWC's citations holding that the standard is "abuse of discretion," and the Secretary's is "clear error," the two are not at odds and either way legal issues are reviewed *de novo*. As stated by the Court in *Fischel v. Equitable Life Assurance Society of the United States* (cited by the Secretary at 8):

> We review an attorney's fee award for an abuse of discretion. "A district court abuses its discretion if its decision is based on an erroneous conclusion of law or if the record contains no evidence on which it rationally could have based its decision." We review the underlying factual determinations for clear error and review *de novo* any legal analysis relevant to the fee determination.

307 F.3d 997, 1005 (9th Cir. 2002) (citations omitted).

III. Where, as Here, the Record is Clear, the Court Can Resolve This Matter Without Further Protracted Litigation.

The Secretary does not dispute the fact that, in the absence of a causality test, there is simply no argument that BMWC did not make "a substantial contribution to a full and fair determination of the issues," as application of a causality test was the *sole* basis for the Interior Board of Land Appeals and ALJ's denial of fees. *See* BMWC Supp. Opening Brief at 6-7. *Id.* Even though the normal course is for the tribunals below to make this determination in the first instance (Sec. Supp. Brf. at 12-13), the Secretary cannot contest this Court's power to

concurrently determine that BMWC is entitled to fee and cost recovery when announcing the correct test of entitlement. BMWC Supp. Opening Brief at 6 (citing *Beck v. City of Upland*, 527 F.3d 853, 866-67 (9th Cir. 2008)).

For these reasons, and in an effort to avoid further protracted litigation of an already lengthy effort to recover fees and costs in this administrative matter, this Court should concurrently determine that BMWC is entitled to fee and cost recovery in addition to announcing the correct test for entitlement.

RESPECTFULLY SUBMITTED December 29, 2014.

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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 29, 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
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