C.A. No. 12-16980

D. Ct. No. CV-11-8122-PCT-GMS

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 A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLEE'S SUPPLEMENTAL BRIEF

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IV. SUMMARY OF ARGUMENT

As the Secretary explained in her Response Brief at 18-20, this Court reviews the decision of the Interior Board of Land Appeals ("IBLA") under the deferential standard set forth in the Administrative Procedure Act ("APA"). Plaintiffs-Appellants Black Mesa Water Coalition, *et al.* (collectively "BMWC") erroneously suggest that, because the Secretary's decision denied them attorney's fees, the Court reviews this case under an "abuse of discretion" standard with legal questions reviewed *de novo*. (Supp. Br. at 1.) Not so. As laid out below, the Supreme Court has repeatedly emphasized that, absent clear statutory guidance to the contrary, judicial review of *all* agency determinations is governed by the APA, with reference to general administrative law principles. Thus, this Court may only set aside the Secretary's decision if it is arbitrary and capricious—that is, if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

V. ARGUMENTS

A. This Court Reviews Interior's Decision Under the Standards Provided by the Administrative Procedure Act (APA).

This Court reviews the Secretary's decision not to award costs and expenses to BMWC pursuant to the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1275(e). SMCRA specifies that "costs and expenses" "*may* be assessed"—when, as here, the final order results from administrative proceedings—as "the Secretary . . . deems proper." *Id.* (emphasis added). Under SMCRA, Congress has left the judgment of whether fees and costs should be awarded in these circumstances to the Secretary.

SMCRA contains a provision setting forth the standards and requirements for judicial review of certain specified decisions and agency actions, but that provision does not apply to decisions regarding the award of costs and expenses. *See* 30 U.S.C. § 1276 (Judicial Review).[1] "[I]n the absence of a statutorily defined standard of review for [an agency's] action under [a federal statute], the APA supplies the applicable standard." *United States v. Bean,* 537 U.S. 71, 77 (2002). "[A] reviewing court must apply the deferential APA standard in the absence of a stated exception when reviewing federal agency decisions." *Ninilchik Traditional*

[1] Notably, when SMCRA's judicial review provision does apply, its standard is generally consistent with the APA's standard of review. *See* 30 U.S.C. § 1276(a)(1) ("Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law.").

Council v. United States, 227 F.3d 1186, 1193-94 (9th Cir. 2000); *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 699-700 (9th Cir. 2012); 5 U.S.C. § 559 (explaining that a "[s]ubsequent statute may not be held to supersede or modify [the APA] . . . except to the extent that it does so expressly."). "Under the APA, an administrative action may be set aside only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *San Luis*, 672 F.3d at 699-700 (quoting 5 U.S.C. § 706(2)(A)).

The agency's decision is reviewed under the APA even though it involves costs and expenses (including attorney's fees). BMWC does not (and cannot) point to any express statutory exception to APA review here, and none may be implied. The Supreme Court has "expressly 'recognized the importance of maintaining a uniform approach to judicial review of administrative action.'" *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011) (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)). "The APA was meant to bring uniformity to a field full of variation and diversity. It would frustrate that purpose to permit divergence on the basis of a requirement 'recognized' only as ambiguous." *Zurko*, 527 U.S. at 155. In *Zurko*, the Supreme Court held that decisions made by the Patent and Trademark Office must be reviewed under the APA's standards despite the Federal Circuit's numerous policy arguments in favor of a different standard and a history of applying a different standard. The Court

explained that any exception to APA review must be expressly stated with clarity. BMWC points to no statutory basis for applying a different standard of review. Instead, BMWC points to a few cases applying a different standard of review to agency assessments of attorney's fees, but as *Zurko* clearly establishes, precedent alone does not justify reviewing an agency decision under a different standard than provided by the APA.

Moreover, the APA's standard of review must apply because only the APA provides the Court with jurisdiction to review Interior's decision here. The APA provides the necessary waiver of sovereign immunity to allow this action to proceed, and thus the APA also "prescribes standards for judicial review and demarcates what relief a court may (or must) order." *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1172 (9th Cir. 2009); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004). Notably, in its Opening Brief, BMWC stated that the district court had jurisdiction under either SMCRA's judicial review provision, 30 U.S.C. § 1276, "or 28 U.S.C. § 1331, review of a final agency action, along with 5 U.S.C. §§ 702-703, judicial review provision of the [APA]." (Opening Br. at 1.) Neither SMCRA's judicial review provision nor the APA supports BMWC's contention that this Court should review the Secretary's determination under the "entitlement" prong of 43 C.F.R. § 1294(b) *de*

novo. BMWC cannot rely on the APA to provide the Court with jurisdiction and then refuse to accept the APA's standards for judicial review.

B. This Court Reviews Interior's Determinations Under the "Entitlement Prong" Under the "Arbitrary and Capricious" Standard With Reference to Administrative Law Principles.

Under the entitlement prong, an award may be available only "upon a finding that such person made a substantial contribution to a full and fair determination of the issues." 43 C.F.R. § 4.1294(b). Here, the Secretary interpreted 43 C.F.R. § 4.1294, applied it to the specific facts of BMWC's request and these proceedings, and reasonably found that BMWC had not substantially contributed to a determination of the issues. This Court reviews those determinations under the APA's arbitrary and capricious standard, informed by general principles of administrative law.

This Court "is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs.*, 463 U.S. at 43. This Court should uphold the Secretary's finding so long as the agency examined the relevant data and articulated a satisfactory explanation for its action. *Id.*

To the extent that BMWC challenges the Secretary's determination that BMWC did not make a substantial contribution to a full and fair determination of the issues, BMWC challenges a factual finding. 43 C.F.R. § 4.1294(b) states that Interior may award costs and expenses only "upon a *finding* that such person made

a substantial contribution to a full and fair determination of the issues." 43 C.F.R. § 4.1294(b) (emphasis added). The regulation expressly calls for a "finding," and the question is primarily factual and not legal. *West Virginia Highlands Conservancy v. Norton*, 343 F.3d 239, 248 (4th Cir. 2003) ("The regulation explicitly labels the substantial contribution determination as a 'finding,' indicating that it is a factual determination unlike the legal question of success on the merits." (Citation omitted.)) Moreover, whether a person made a "substantial contribution" to a determination of the issues is a question best answered by the agency which held the proceedings to which the fee applicant allegedly contributed.

Under the APA's arbitrary and capricious standard of review, "substantial evidence" is the standard applied to judicial review of agency factual decisions and is the most stringent standard that can apply to review of factual determinations. *See Zurko*, 527 U.S. at 164; *see also Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006); *Ass'n of Data Processing v. Bd. of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (Scalia, J., joined by R.B. Ginsburg, J.). That standard is more deferential even than the "clearly erroneous" standard for appellate review of trial court findings. *Zurko*, 527 U.S. at 162, 164. In this Court's words, "we must defer to the agency's finding on these matters unless the record shows that the agency's findings were not supported by substantial evidence—*i.e.*, unless the evidence in the record 'would *compel* a

reasonable finder of fact to reach a contrary result.'" *Ursack Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 958 (9th Cir. 2011) (quoting *Gebhart v. SEC*, 595 F.3d 1034, 1043 (9th Cir. 2010)).

In this matter, the appropriate standard is "substantial evidence" because this involves review a decision by the Secretary rather than a trial court. *See, e.g., Ohio River Valley Envtl. Coal., Inc. v. Green Valley Coal Co.*, 511 F.3d 407, 413 (4th Cir. 2007) ("Clear error" standard applied to factual underpinnings of district court's award of attorney fees under the Surface Mining Control and Reclamation Act at 30 U.S.C. § 1270(d).); *Fischel v. Equitable Life Assurance Society of the United States*, 307 F.3d 997, 1005 (9th Cir. 2002) (The underlying factual determinations of district court's award of attorney's fees reviewed for "clear error."). Although the "substantial evidence" standard is more deferential than "clear error," the distinction is not great. *Zurko*, 527 U.S. at 162-63. No matter which standard is applied, the result will be the same in this case. The Secretary's decision is supported by substantial evidence and must be upheld.

C. This Court Must Defer to the Secretary's Interpretation of 43 C.F.R. § 4.1294(b).

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. "When an agency

interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is 'plainly erroneous or inconsistent with the regulation." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013) (quoting *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 131 S. Ct. 871, 880 (2011)) (internal quotations omitted); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." *Decker*, 133 S. Ct. at 1337; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). As explained in the Secretary's Response Brief, "whether a party makes a substantial contribution" turns on whether there is "a 'causal nexus' between the petitioners' actions and the relief obtained, the determination of which depends upon the totality of the circumstances." (Resp. Br. at 19.) This interpretation is reasonable, not plainly erroneous, and is supported by precedential case law and administrative decisions. *See, e.g.*, *Kentucky Resources Council, Inc. v. Babbitt*, 997 F. Supp. 814, 820 (E.D. Ky. 1998); *West Virginia Highlands Conservancy v. Norton*, 343 F.3d 239, 247 (4th Cir. 2003); *West Virginia Highlands Conservancy*, 152 IBLA 66, 74 (2000); *Kentucky Resources Council v. OSM*, 137 IBLA 345, 352 (1997); s*ee also, e.g.*, OXFORD AMERICAN DICTIONARY 379 (3d ed. 2010) (defining "contribution" as "the part played by a person or thing in bringing about a result or helping something to advance.").

BMWC suggests (Supp. Br. at 8-10) that no deference applies to the Secretary's interpretation of this regulation because the Secretary considered various judicial opinions when adopting its regulation governing when an award is "proper" under SMCRA, 30 U.S.C. § 1275(e). However, as the Supreme Court has explained, 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. *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 112 (1992). An agency's consideration of legal precedent in developing a regulation does not mean that the agency's later interpretation of the regulation will be reviewed *de novo*. Agency determinations are almost never reviewed *de novo*. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.").

Furthermore, BMWC's arguments that the Secretary's findings under the entitlement prong are subject to *de novo* review (Supp. Br. at 3-5) and that the Secretary's interpretation of the agency's own statute is to be given no deference (Supp. Br. at 8-10) are nothing more than an attempt to turn the Secretary's factual determinations into legal issues, not to mention an attempt to sidestep the

application of the APA-required standard of review discussed *supra*.[2] This stands 43 C.F.R. § 4.1294(b) on its head. That regulation, by explicitly labeling the substantial contribution determination as a "finding," makes clear that a factual determination is required, in contrast to the legal question of success on the merits for the eligibility prong. *West Virginia Highlands Conservancy v. Norton*, 343 F.3d 239, 248 (4th Cir. 2003). There is no reason why this Court cannot conduct its proper review of the Secretary's factual findings to determine whether they are supported by substantial evidence.

However, even if this Court were to agree that it should review as a legal issue the Secretary's use of a causal nexus or causation standard in this matter, the review is not *de novo*. Rather, in accordance with the APA, the standard of review is whether the Secretary's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That review must also be coupled with the appropriate deference given to the Secretary's interpretation of the agency's regulations, discussed *supra*.

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[2] The cases cited by BMWC are inapposite. Neither *St. John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054 (9th Cir. 2009) nor *Harris v. Maricopa County Superior Court*, 631 F.3d 963 (9th Cir. 2011) interprets SMCRA or its regulations, and thus they do not establish "settled law" that the *de novo* standard applies to the entitlement prong. To the contrary, the entitlement prong requires a "factual determination unlike the legal question of success on the merits," *West Virginia Highlands Conservancy v. Norton*, 343 F.3d 239, 248 (4th Cir. 2003) (citation omitted), to which the "substantial evidence" standard applies. *Ursack Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 958 (9th Cir. 2011).

D. This Court May Not Substitute Its Judgment for That of the Secretary.

This Court cannot substitute its judgment for that of the Secretary, nor make factual determinations delegated to the IBLA, which is what BMWC quite clearly wants this Court to do. BMWC asserts that "there is no reasonable argument" that it did not make a substantial contribution to a full and fair determination of the issues (Supp. Br. at 6) and urges this Court to "determine that BMWC is entitled to fee and cost recovery." *Id.* This Court cannot make such a determination.

The "substantial contribution (or entitlement) determination, which is the second step in the determination of whether a fee award is proper, is committed by statute to the [IBLA's] discretion." *West Virginia Highlands Conservancy v. Norton*, 343 F.3d 239, 248 (4th Cir. 2003). 43 C.F.R. § 4.1294(b) "explicitly labels the substantial contribution determination as a 'finding[.]'" *Id.* The factual question of whether a substantial contribution was made "is therefore for the [IBLA] to make in the first instance." *Id.* It is a basic proposition that "a reviewing court may not decide matters that Congress has assigned to an agency." *Id.* (citation omitted). In *Norton*, the "district court therefore erred in deciding the factual question of whether [West Virginia Highlands Conservancy] made a substantial contribution toward achieving the remand order in the administrative appeal. That question was for the [IBLA] to decide, and the district court should

have remanded the matter to the [IBLA] for the appropriate factfinding." *Id.* at 248-49.

Congress has assigned to the Secretary (who has delegated this duty to the IBLA), *id.* at 248, the responsibility to make the factual finding of whether BMWC made a substantial contribution, and this Court may not make that determination. This Court is also "not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs.*, 463 U.S. at 43 (1983). This Court should therefore decline BMWC's invitation to make the entitlement determination itself.

VI. CONCLUSION

The entitlement prong of 43 C.F.R. § 1423(b) is a factual determination that is reviewed under a "substantial evidence" standard pursuant to the APA's "arbitrary and capricious" standard, not a legal determination susceptible to a *de novo* review. Congress has empowered the Secretary to make the factual determination, and this Court must give great deference to that determination under the "substantial evidence" standard.

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VII. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 12-16980

I certify that: (check appropriate option(s))

☐ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

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☒ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

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December 22, 2014
Date

s/ Paul A. Bullis
PAUL A. BULLIS
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VIII. CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2014, I electronically filed the Brief of Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Paul A. Bullis
PAUL A. BULLIS
Assistant U.S. Attorney