

1-1-2016

## Alaska Wilderness League v. Jewell, 788 F.3d 1212 (9th Cir. 2015)

W. James Tilton

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

---

### Custom Citation

W. James Tilton, Court Report, Alaska Wilderness League v. Jewell, 788 F.3d 1212 (9th Cir. 2015), 19 U. Denv. Water L. Rev. 278 (2016).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

the statute applied to this case. That paragraph stipulates that the EPA must determine there were no other reasonable alternatives other than on-site disposal of materials. However, the Court held that there was no evidence in the record, nor in the regulations, to support the claim that paragraph (c) applied to this proceeding.

Second, the AEWC argued the evidence did not support a finding that discharges other than non-contact cooling water will not cause an “unreasonable degradation of the marine environment.” The AEWC’s challenge of the EPA’s evidentiary analysis was based on two CWA criteria: (i) the potential impact the discharge will have on human health; and (ii) “[s]uch other factors relating to the effects of the discharge as may be appropriate.”

The Court disagreed with the AEWC, holding that the record was “replete with evidence” that the EPA fully considered the AEWC’s concerns and that it considered the CWA’s criteria in making its determination. Therefore, the Court held that the EPA was not arbitrary or capricious in issuing the Permit.

Third, the AEWC argued that the EPA did not provide a rational explanation of how the EPA’s monitoring program would prevent conflict with subsistence use and that the EPA acted arbitrary and irrational in relying on such monitoring programs. Again, the Court disagreed with the AEWC. It found that the detailed description of the monitoring program included requirements for monthly monitoring, post-drilling reports, and ongoing monitoring of marine mammal deflection during discharges. Based on these requirements, the Court held there was no basis for concluding that the EPA’s design and implementation of the monitoring program was arbitrary or capricious.

Finally, the AEWC contended that the EPA should adopt the same mitigation measures that the National Marine Fisheries Services (“NMFS”) adopted. These are the same measures the AEWC, Shell Gulf Oil of Mexico, and Shell Offshore, Inc. agreed to in a separate Conflict Avoidance Agreement. The Court held that the EPA was not required to adopt those terms because the AEWC identified no legal authority requiring such measures. The Court found no measures that would mandate the EPA to incorporate the NMFS mitigation measure or the Conflict Avoidance Agreement into the Permit.

Accordingly, the Court remanded to the EPA for a determination of whether the discharge of non-contact cooling water would cause an “unreasonable degradation of the marine environment,” and denied the petition in all other respects.

*Vann A. Ellerbruch*

**Alaska Wilderness League v. Jewell, 788 F.3d 1212 (9th Cir. 2015)** (affirming the district court’s ruling that: (i) the Bureau of Safety and Environmental Enforcement’s approval of the challenged oil spill response plans was not arbitrary and capricious; (ii) the Endangered Species Act did not require the Bureau of Safety and Environmental Enforcement to consult with any environmental agencies before approving oil spill response plans; (iii) the Bureau of Safety and Environmental Enforcement was entitled to *Chevron* deference for its interpretation of the Oil Pollution Act; and (iv) the National Environmental Policy Act did not require the Bureau of Safety and Environmental Enforcement to do an

environmental impact statement before approving an oil spill response plan).

The Outer Continental Shelf Lands Act (“OCSLA”) outlines the procedure for exploration and development of oil and gas resources offshore. This process has four stages. First, the Secretary of Interior creates a five-year leasing program under which operators may search and mine for oil and gas. Second, the Secretary must approve the leases under agreed upon terms and conditions. Third, the lessee must provide the Secretary with a plan of exploration and an Oil Spill Response Plan (“OSRP”) pursuant to the Clean Water Act (“CWA”). Fourth, after searching for oil and gas, and successfully finding either, the lessee has must submit a production and development plan to the Secretary for approval.

At the third stage, the Secretary of the Interior has delegated its power to the Bureau of Safety and Environmental Enforcement (“BSEE”) to approve OSRPs to prevent and respond to oil spills. The CWA requires these plans at four levels: national, regional, local, and individual. At the individual level, owners and operators must propose an OSRP for approval that outlines their response to a potential “worst case discharge” of oil or some other hazardous substance.

Shell Gulf of Mexico Inc. and Shell Offshore Inc. (collectively “Shell”) acquired three leases for offshore exploration and production—two leases in the Beaufort in 2005 and 2007, and one in the Chukchi Seas in 2008. Shell complied with all regulations at the time for intended exploration, but due to the Deepwater Horizon oil spill in 2010, the Secretary of the Interior placed a temporary moratorium on all offshore drilling. The United States Department of Interior required owners and operators to provide new information in all OSRPs after the moratorium ended. To comply with the new criteria, Shell updated its OSRPs for its three leases. BSEE approved the updated Beaufort and Chukchi Seas OSRPs.

Alaska Wilderness League, a coalition of environmental groups, sued Secretary of Interior, Sally Jewell, in her official capacity because of the approval of Shell’s three OSRPs. Shell intervened as a co-defendant. On cross-motions for summary judgment, the United States District Court for the District of Alaska (“district court”) ruled in favor of Jewell and Shell. Alaska Wilderness League appealed to the United States Court of Appeals, Ninth Circuit (“Court”). The Court reviewed the granting of summary judgment *de novo* and reviewed the record of the agency’s action under the arbitrary and capricious standard.

First, Alaska Wilderness League argued BSEE’s approval of the OSRPs was arbitrary and capricious because Shell assumed it would be able to recover ninety to ninety-five percent of any oil spilled in either of the seas via mechanical means. A figure that Alaska Wilderness League claimed was unrealistic and that Shell failed to support with any evidence. First, the Court found that Shell could store, not recover, ninety to ninety-five percent of any spilled oil. Further, the Court found that BSEE did not rely on this information in approving Shell’s OSRPs. Accordingly, the Court concluded BSEE’s approval of the OSRPs was not arbitrary and capricious.

The Court next addressed Alaska Wilderness League’s argument that

BSEE failed to consult with other agencies in order to comply with the Endangered Species Act ("ESA"). The Court disagreed, reasoning that ESA only triggers consultation when the agency's involvement is discretionary, and, in this case, BSEE's approval of the OSRPs was non-discretionary. Therefore, the Court held that ESA did not require BSEE to do a consultation.

The Court then applied the two-step *Chevron* deference analysis to assess BSEE's interpretation of the applicable sections of the CWA. At step one of its *Chevron* analysis, whether the statute in question is ambiguous, the Court found that the CWA was ambiguous in both its structure and its language. The Court found the CWA has ambiguous language because of three pertinent sections: (i) 33 U.S.C. § 1321(j)(5)(A)(i) requires an operator to "prepare and submit . . . a plan for responding, to the maximum extent practicable, to a worst case discharge;" (ii) § 1321(j)(5)(D) lists six requirements that the OSRP "shall" meet; and (iii) § 1321(j)(5)(E)(iii) states that if the OSRP meets all six requirements, then BSEE "shall" approve it.

Specifically, the Court found the text ambiguous as to whether BSEE has the discretion to consider any additional environmental factors in making its determination of an OSRP. The Court found that the "maximum extent practicable" language in § 1321(j)(5)(A)(i) suggested the agency had discretion in its approval of an OSRP. However, the Court also found §§ 1321(j)(5)(D) and 1321(j)(5)(E)(iii) to be a laundry list of requirements that an OSRP must meet. If an OSRP meets those requirements, then BSEE must approve the plan; removing any agency discretion. Additionally, the Court found the statute's structure ambiguous because of the discretionary language in one section, and the rigid language in the one following it. The Court found this difference created "a statute whose halves do not correspond to each other - giving rise to ambiguity that calls for *Chevron* deference." Under this finding of ambiguity, the Court found it must defer to BSEE's interpretation of the statute as long as its interpretation is reasonable.

The Court then underwent the second step of the *Chevron* analysis to determine whether BSEE's interpretation was reasonable. Courts must defer to an agency's interpretation of an ambiguous statute as long as that interpretation is reasonable. BSEE argued that § 1321(j)(5)(A)(i) mandated it to promulgate regulations that help operators follow the OSRP requirements listed in § 1321(j)(5)(D). Then, separately, § 1321(j)(5)(D)-(E) lists exactly what the OSRP *shall* include and the agency *shall* approve. The Court agreed with BSEE's interpretation that the statute mandated the agency to publish regulations to outline how operators can comply with the list. The Court also agreed with BSEE's interpretation that it could not consider anything more than the list when granting an OSRP. Having found BSEE's interpretation to be reasonable, the Court deferred to the agency's interpretation.

The Court also found that BSEE's interpretation was consistent with longstanding agency policy. The Court explained how BSEE has a history of regulating in conformity with the goals of the Oil Pollution Act that amended the CWA. The legislative history of the Oil Pollution Act suggests that Congress meant to create specific requirements of OSRPs, not guidelines open to interpretation by the courts or agencies.

Additionally, the Court addressed Alaska Wilderness League's four additional arguments. First, Alaska Wilderness League argued that the similarity in language between the requirements listed in § 1321(j)(5)(E) and the section of the statute governing federal response plans to spills subjected the approval of OSRPs to ESA consultation. However, the Court disagreed with this interpretation. Under the sections of the statute governing federal response plans, an ESA recommendation may prompt agency action, but the plan "shall include, but not be limited to" a number of factors. This federal response plan requirement, unlike that in § 1321(j)(5)(E), does not limit the factors to those listed.

Second, Alaska Wilderness League argued that the regulations contain no language to support approval of the OSRPs just because they address the clean-up plan to some degree. The Court quickly dismissed this argument. The Court found that the statute states that the purpose of the OSRP is to prepare a response plan for an accident at sea resulting in release of oil, and that Congress ordered these plans be in compliance with "the Oil Pollution Act's amendments to the Clean Water Act." The Court deferred to BSEE's interpretation that the OSRPs were sufficient and justly approved, despite any explicit language governing BSEE's decision.

Third, Alaska Wilderness League argued that BSEE had discretion over whether OSRPs met the criteria in § 1321(j)(5)(E), thus triggering ESA consultation. The Court found this argument to be at odds with previous Supreme Court's rulings. The Supreme Court previously held that "ESA cannot defeat an agency's nondiscretionary statutory directive." The Court held that BSEE's act of granting OSRPs was nondiscretionary, and so it did not trigger any inter-agency review under ESA.

Lastly, Alaska Wilderness League claimed that BSEE violated the National Environmental Policy Act ("NEPA") by failing to do an environmental impact statement ("EIS") before approving the OSRPs. Under NEPA, all federal agencies must conduct an EIS before conducting any "major Federal action" that significantly affects the environment. However, the Court noted that there is an exception to this requirement when the environmental impact is the result of a decision over which the agency had no discretion. The Court ruled that because BSEE had no discretion over the approval of the OSRPs under the statute, it also had no discretion over the environmental impacts, making BSEE exempt from performing an EIS.

Accordingly, the Court affirmed the district court's ruling.

D.W. Nelson, Senior Circuit Judge, dissenting.

Senior Circuit Judge Nelson agreed with the majority's ruling that BSEE acted appropriately when it approved the OSRPs in question, but dissented to all other aspects of the majority opinion. Specifically, the dissent agreed with Alaska Wilderness League's contention that BSEE's action was discretionary, triggering an ESA consultation.

The dissent also disagreed with the majority's finding that BSEE was exempt from performing a NEPA analysis. The dissent did not agree with the majority's interpretation of the NEPA exception. The dissent argued that as a

regulator of environmental consequences “the [BSEE] did in fact possess the kind of discretion that necessitated NEPA review.”

*W. James Tilton*

**ONRC Action v. U.S. Bureau of Reclamation, 798 F.3d 933 (9th Cir. 2015)** (holding that the district court properly granted summary judgment in favor of the Bureau of Reclamation because the two water sources at issue were not “meaningfully distinct” and did not require the governmental entity to obtain a permit under the Clean Water Act).

In 2012, ONRC Action, an Oregon-based environmental group, filed a complaint in the United States District Court for the District of Oregon contending that the Bureau of Reclamation (“Bureau”) discharged pollutants from the Klamath Straits Drain (“KSD”) into the Klamath River without a permit, in violation of the Clean Water Act (“CWA”). The Bureau filed a motion for summary judgment and ONRC Action filed a cross-motion for partial summary judgment. A magistrate judge issued a report and recommendation in favor of the Bureau because of the Water Transfers Rule, which the Environmental Protection Agency (“EPA”) adopted through regulation. The district court adopted the magistrate’s report and recommendation finding summary judgment in favor of the Bureau and denying ONRC Action’s motion for partial summary judgment. ONRC Action appealed to the Ninth Circuit Court of Appeals (“Court”).

In 1905, Congress authorized the Klamath Irrigation Project (“Project”) to provide irrigation to approximately 210,000 acres of land in Oregon and California through a system of dams, pumps, drains, tunnels, and canals. The Project draws water from the Klamath River and Upper Klamath Lake, and eventually conveys the water from Lower Klamath Lake back into the Klamath River through the KSD. In the early 20th Century a natural waterway called the Klamath Straits connected the Lower Klamath Lake and the Klamath River. A local railroad severed the Klamath Straits in 1917, but the Bureau restored flow in the 1940s when it created the KSD. The KSD includes two pumping stations that keep water flowing within a certain operating range; however, the pumps are not always active. The KSD generally follows the historic pathway of the Klamath Straits, with only a slight deviation passing through marshland that acted as a historical hydrological connection between the water bodies.

To resolve whether the district court correctly granted summary judgment in favor of the Bureau, the Court looked to recent Supreme Court precedent in determining whether Lower Klamath Lake and Klamath River were “meaningfully distinct” water sources. The Court cited *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (“*L.A. County*”), where the Supreme Court held that pumping water between different parts of a water body is not a discharge of pollutants under the CWA. The Supreme Court went on to add that a water transfer is a discharge of pollutants only if the bodies of water are “meaningfully distinct.” As a result of the Supreme Court’s holding in *L.A. County*, the Court did not rule on whether the Water Transfers Rule