

1-1-2015

American Whitewater v. Tidwell, 770 F.3d 1108 (4th Cir. 2014)

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R. J. Colwell, Court Report, American Whitewater v. Tidwell, 770 F.3d 1108 (4th Cir. 2014), 18 U. Denv. Water L. Rev. 440 (2015).

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that other remedies should be considered in this case, including judicial review of the recommendation chosen by the Corps and District to solve the Asian carp problem and a claim for review of agency action, should the Corps or District halt their preventative measures unlawfully. Finally, the court held that the States were not precluded from bringing suit in the future, should the advancement of Asian carp be imminent and occur as a result of the Corps' or District's negligence in operating the waterways.

Accordingly, the court affirmed the judgment of the district court's dismissal of the State's suit against the Corps and District for failure to state a claim.

Cody Cassidy

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

American Whitewater v. Tidwell, 770 F.3d 1108 (4th Cir. 2014) (holding that (i) the US Forest Service's revised wild and scenic river management and oversight plan allowing restricted floating on the northernmost section of the Chattooga River was supported by the record and not arbitrary and capricious; (ii) floating is not an outstandingly remarkable value of the Chattooga requiring protection under the Wild and Scenic Rivers Act; and (iii) claims that the revised management plan may lead to additional trespassing and environmental impact were not reasonably foreseeable and did not require analysis under the National Environmental Protection Act).

In 1974, Congress designated fifty-seven miles of the Chattooga River ("Chattooga") for preservation under the Wild and Scenic Rivers Act ("WSRA"). The US Forest Service is responsible for managing the Chattooga under the WSRA. The WSRA requires the Forest Service to "protect and enhance" the "outstandingly remarkable values ["ORVs"] . . . that led Congress to designate the river" and to limit other uses that "substantially interfere with the public's use of these ORVs." Prior to 2012, Forest Service policy permitted non-motorized rafting on the lower portions of the Chattooga but prohibited the practice on the twenty-one-mile northernmost section of the Chattooga ("Headwaters"). In 2005, after American Whitewater and several other non-motorized watercraft associations (collectively, "American Whitewater") challenged the floating ban, the Forest Service began studying whether floating could be expanded beyond the lower portions of the Chattooga.

Over the course of seven years, the Forest Service "measure[d] the expected impact of allowing Headwaters floating on the Chattooga's ORVs." The Forest Service concluded that expanded floating made sense so long as it imposed certain limitations to ensure the upper Chattooga still offered opportunities for remoteness and solitude to all users, and to limit potential conflicts with other recreational users. These limitations included restricting floating on the Headwaters to the winter months when water flows were highest and prohibiting floating in areas that offered prime fishing but marginal floating potential. In 2012 the Forest Service revised its management plan for the

Chattooga to allow floating on most of the Headwaters between December 1 and April 30 or when flows exceeded 350 cubic feet per second. The Forest Service determined that the revised plan would have no significant effect on the environment and did not require preparation of an Environmental Impact Statement under the National Environmental Protection Act ("NEPA").

American Whitewater filed suit in the United States District Court for the District of South Carolina ("district court") challenging the Forest Service's revised plan. American Whitewater argued that the revised plan did not go far enough, and that the remaining limits on floating were both inconsistent with WSRA and arbitrary and capricious, in violation of the APA.

Two parties, Georgia ForestWatch ("ForestWatch"), a not-for-profit environmental group, and the Rust family, who own approximately 1.7 miles of the Headwaters' shoreline, moved to intervene. ForestWatch asserted that the Forest Service's decision to allow *any* floating on the Headwaters violated the Forest Service's mandate under the WSRA. The district court, however, limited the scope of ForestWatch's intervention to defending the remaining limits on Headwater floating. The Rust family sought a declaratory judgment from the district court that the Headwaters running through their property were non-navigable and outside Forest Service control. The Rust's also filed a cross-claim asserting that the Forest Service's analysis violated NEPA. All parties moved for judgment on the administrative record. The district court upheld the Forest Service's decision, rejected all of American Whitewater's claims and the Rust's NEPA claim, and dismissed the Rust's request for a declaratory judgment as premature. The parties appealed to the United States Court of Appeals for the Fourth Circuit ("Court").

According to the Court, "the crux of American Whitewater's claim [was] that the Forest Service struck the wrong balance when it opened the Headwaters to floating partially but not entirely [by] maintaining some restrictions on floating in order to avoid conflicts with other recreational users." American Whitewater argued that the Forest Service's concern about potential conflicts was unsupported by the record and therefore arbitrary and capricious, and that the remaining restrictions violated the WSRA.

The Court first addressed American Whitewater's argument that that no basis existed in the record for the Forest Service's concern about potential conflicts among recreational users. The Forest Service relied on a history of user conflicts on the Headwaters prior to the original floating ban as well as evidence from the lower Chattooga and other rivers where floating has always been permitted. In the Court's words, the Forest Service "assembled significant data pointing to the potential for future conflicts, counting cars to estimate usage, developing expected encounter estimates, and analyzing a wealth of public comments including many from current users who expressed a preference for solitude and an isolated experience." American Whitewater argued that the Forest Service was required to allow floating on the Headwaters as a part of the study to identify actual conflicts between recreational users. The Court disagreed, holding that "[w]here the agency's conclusion otherwise rests on a firm factual basis, nothing in the APA requires it to experiment with a practice before continuing preexisting policies."

The Court next addressed American Whitewater's argument that the remaining restrictions on the Chattooga violated section 1281 of the WSRA,

“which requires the Forest Service to ‘protect and enhance the values which caused’ the Chattooga to be designated for preservation ‘without . . . limiting other uses that do not substantially interfere with public use and enjoyment of these values.’” American Whitewater argued that floating on the Chattooga was one of the values that led Congress to designate the Chattooga for protection under the WSRA; therefore, the Forest Service had to “protect and enhance” that value by lifting all floating restrictions on the Chattooga. In the alternative, American Whitewater argued that the Forest Service could not limit floating on the Chattooga because the Forest Service did not show that floating substantially interfered with any protected recreational use of the Headwaters. The Court rejected each of these claims in turn.

First, the Court noted that neither the 1971 Forest Service report that led to the Chattooga’s protective designation nor the Senate and House Reports accompanying the designation specifically mentioned floating in contrast with all other forms of recreational activities on the Chattooga. Rather, because these reports all made mention of a wide variety of recreational activities on the Chattooga, the Court declined to find Congress had intended to give special status to floating, let alone any one recreational use, when it designated the Chattooga under the WSRA. Accordingly, the Court rejected American Whitewater’s argument that the Forest Service had no choice but to lift all restrictions on floating on the Chattooga.

Second, not only did the Court agree with the district court’s assessment that the record supported a finding of substantial interference with other protected recreational uses of the Chattooga, the Court took the analysis one step further and found American Whitewater’s argument to be “flawed in its premise.” Under section 1281(a) there are only two categories of “uses” of designated rivers: (i) public uses of ORVs; and (ii) other uses “to be limited when they interfere substantially with public use and enjoyment of an ORV.” The Court stated that floating is more akin to hiking and other recreational activities and thus more accurately characterized as “a ‘public use’ of the recreational value, not an ‘other use’ subject to the substantial interference standard.”

The Court next addressed the Rust family’s claims against the Forest Service. The Rust family had sought a declaratory judgment designating as non-navigable the 1.7-mile stretch of the Headwaters running through their land. The effect of such a designation would make this stretch of water private property, which in turn would prohibit the Forest Service from taking any action that would provide public access to this stretch of water. However, because the Forest Service’s 2012 decision neither authorized floating on the Rusts’ property nor covered any portion of the Headwaters that concerned the Rust family’s property, the Court found that the Forest Service had not taken any action to exercise regulatory authority over the Rust’s property. Accordingly, the Court dismissed the Rust family’s request for declaratory judgment because it failed to present a justiciable controversy in the absence of such action.

The Court then addressed the Rust family’s claim that “the Forest Service violated NEPA by failing to analyze the risk that opening portions of the Headwaters to floating could lead to trespass on the Rust’s property.” The Rust family argued that floaters will illegally cross the Rust’s property on their

way to the Chattooga. However, the Court noted that the Forest Service's 2012 decision only authorized floating on portions of the river that are downstream from the Rust family's property. Accordingly, the Court characterized this concern, and any associated environmental impact, as too speculative to require NEPA analysis.

Last, the Court quickly addressed whether the district court had erred in limiting the scope of ForestWatch's intervention. On appeal, ForestWatch attempted to depart from its assigned role of defending the Forest Service's remaining restrictions and instead challenge the Forest Service's decision to permit any floating at all under NEPA and the WSRA. The Court declined to address these new arguments on appeal, and found that the only issue ForestWatch could properly raise on appeal was the district court's decision to limit its scope of intervention. The parties disputed the proper standard of review, but the Court determined, and ForestWatch's counsel admitted at oral argument, that a review of the district court's decision to limit ForestWatch's intervention ultimately hinged on whether the decision was fundamentally unfair. Because the district court preserved ForestWatch's opportunity to raise its NEPA and WSRA claims in a pending lawsuit related to the matter, and carefully limited its decision to insulate ForestWatch's claims against the Forest Service, the Court found no evidence of fundamental unfairness.

Accordingly, the Court dismissed all challenges brought against the Forest Service by American Whitewater, the Rust family, and ForestWatch, and held that the Forest Service's WSR management and oversight plan for the Chattooga River was not arbitrary and capricious under the APA, that the Forest Service's WSR management and oversight plan complied with the WSRA, and that the Forest Service's analysis satisfied NEPA.

R.J. Colwell

STATE COURTS

IDAHO

Brown v. Greenheart, 335 P.3d 1 (Idaho 2014) (holding (i) the statute of limitations for a quiet title action does not begin to run until a party claims a right in property that is adverse to another; (ii) the statute of limitations for mutual mistake does not begin to run until the facts constituting the mistake are discovered, not when the mistake is discoverable; (iii) the plaintiffs adequately pleaded the issue of mutual mistake; and (iv) the property conveyance was ambiguous and, therefore, the trial court did not err in considering extrinsic evidence to resolve the ambiguity).

Jay Brown and Christine Hopson-Brown owned a 320-acre parcel of land in Elmore County, Idaho ("Brown Property"). In 2000, the Snake River Basin Adjudication Court decreed water rights associated with the parcel to the Browns. The rights authorized the Browns to irrigate a total of 287 acres. In