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American Wildlands v. Browner, 260 F.3d 1192 (10th Cir. 2001)

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contracts involving mutual conduct, trade usage, or performance for ambiguous terms. The first individual PPR contract contained language expressly prohibiting an increased water delivery to the District. Although the individual contract constituted trade usage, the court reasoned the contract did not increase the District's water entitlement. The court also rejected the Board of Directors' meeting minutes, which suggested the PPRs delivery amount would add to the annual allotment. Thus, the minutes did not factor into a UCC ambiguity argument. In conclusion, the court affirmed summary judgment in favor of the Department.

Jon Hyman

TENTH CIRCUIT

American Wildlands v. Browner, 260 F.3d 1192 (10th Cir. 2001)

(holding: (1) the Environmental Protection Agency's approval of Montana's water quality standard, which exempted nonpoint source pollution from antidegradation review, was permissible because nothing in the Clean Water Act demanded that a state regulate nonpoint sources, or give the EPA the authority to regulate such sources; and (2) the EPA's approval of Montana's policies and procedures, which exempted areas within the mixing zone from antidegradation review, was permissible because the use of mixing zones was widespread and a practical necessity for meeting water quality criteria at a discharge pipe).

Pursuant to the Clean Water Act ("Act"), the State of Montana adopted water quality standards and submitted such standards to the Environmental Protection Agency ("EPA") for review. In 1998, American Wildlands filed suit in the United States District Court for the District of Colorado alleging that the EPA failed to take timely action to approve or disapprove of Montana's standards, and failed to promptly promulgate replacement standards for those failing to meet the Act's requirements. In October 1998, American Wildlands moved for summary judgment. The parties agreed to postpone that motion when the EPA stipulated that it would complete its review of Montana's standards by January 15, 1999. On January 26, 1999, the EPA completed its review of Montana's standards, disapproving some and approving others.

On March 31, 1999, American Wildlands amended its original complaint and challenged the EPA's approval of several of Montana's standards. The district court affirmed each of the EPA's actions. American Wildlands appealed the district court's ruling to the United States Court of Appeals for the Tenth Circuit. Specifically, American Wildlands disagreed with the district court's conclusions that: (1) the EPA properly approved Montana's water quality standards that

exempted nonpoint source pollution from antidegradation review; and (2) the EPA properly approved Montana's mixing zone policies and procedures, which exempted areas within the mixing zone from antidegradation review.

Dealing with the threshold issue of the appropriate standard of review, the appellate court disagreed with American Wildlands' assertions that the EPA's determinations involved purely legal questions and that the court should not defer to the EPA. According to the appellate court, Congress had clearly delegated authority to the EPA to make determinations as to when water quality standards were consistent with the Act. As such, the appellate court invoked the two-step approach to judicial review of agency interpretations of congressional acts announced in *Chevron v. Natural Resources Defense Council*. Under that approach, if the statute is clear and unambiguous, the plain language controls. However, if the statute is silent or ambiguous on the issue, the court must decide whether the agency's interpretation is based on a permissible construction of the statute. According to the appellate court, the Act was silent on the specific questions raised by the case. Thus, the appellate court deferred to the EPA's determinations, and asked only if such determinations were permissible constructions of the Act.

Turning to the EPA's approval of Montana's standard exempting nonpoint source pollution from antidegradation review, the appellate court agreed with the district court and concluded that nothing in the Act demanded a state adopt a regulatory system for nonpoint sources, or gave the EPA the authority to regulate such sources. Thus, the appellate court found that the EPA's approval of this standard was a permissible construction of the Act. Second, regarding the EPA's approval of Montana's policies and procedures exempting areas within the mixing zone from antidegradation review, the appellate court noted that the use of mixing zones was a practical necessity for meeting water quality criteria at a discharge pipe and was a widespread practice. The appellate court agreed with the EPA that the Act's antidegradation requirements applied to the waterbody as a whole, and not specifically to the mixing zone. Therefore, the appellate court found the EPA's approval of Montana's mixing zone policies and procedures a permissible construction of the Act.

Matthew J. Costinett

FEDERAL CLAIMS COURT

Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001) (holding that water restrictions imposed pursuant to the Endangered Species Act amounted to a physical taking under the Fifth Amendment and were compensable).