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Hayes v. Whitman, 264 F.3d 1017 (10th Cir. 2001)

Kirstin E. McMillan

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Hayes v. Whitman, 264 F.3d 1017 (10th Cir. 2001) (holding the district court correctly granted the Environmental Protection Agency's motion for summary judgment because the constructive submission theory did not apply, citizens lacked viable claims under the Administrative Procedure Act, citizens' motion to amend was untimely, and citizens' denied affidavit covered waived issues).

Individuals who used Oklahoma's waters and groups that advocated protecting water quality in Oklahoma ("Citizens") sued the Environmental Protection Agency ("EPA"). Citizens alleged Oklahoma failed to develop total maximum daily loads ("TMDLs") for the state's impaired waters, which constituted a constructive submittal of no TMDLs and triggered EPA's mandatory duty under the Clean Water Act to develop these TMDLs. The United States District Court for the Northern District of Oklahoma granted the EPA's motion for summary judgment, and denied the Citizens' motion to amend. Citizens appealed to the United States Court of Appeals for the Tenth Circuit, which affirmed the district court's decision.

Citizens raised four issues on review. First, Citizens claimed the district court erred when they granted summary judgment on their constructive submission claim. The court reviewed constructive submission and explained the theory turned on whether the state determined not to submit a required TMDL to the EPA. The state's decision did not trigger EPA's non-discretionary duty to develop TMDLs itself unless the state's inaction clearly and unambiguously demonstrated their decision not to submit required TMDLs. If a state submitted a TMDL or planned to submit a TMDL in the future, then constructive submission analysis was factually inapplicable. The court explained summary judgment was appropriate because Oklahoma submitted TMDLs to the EPA, thus rendering the constructive submission theory inapplicable and destroying Citizens' suit based on EPA's non-discretionary duty.

Second, Citizens asserted the district court erroneously dismissed three Administrative Procedure Act ("APA") claims. The court disagreed and affirmed summary judgment on all claims. Citizens had premised their first APA claim on the constructive submission theory and EPA's non-discretionary duty. Because Citizens' constructive submission theory failed, the court affirmed summary judgment on this issue. Further, Citizens asserted the district court should have allowed Citizens to challenge the adequacy of Oklahoma's TMDLs under the APA. The court affirmed summary judgment on this issue because citizens failed to assert this claim before they submitted their response to the EPA's motion to dismiss. The court said they sometimes consider additional facts or legal theories asserted in a response brief to a motion to dismiss, yet they do not consider allegations and theories inconsistent with those pleaded in the complaint. Thus, because Citizens' pleaded that Oklahoma failed to submit TMDLs, they could not also challenge, in their response to the

motion to dismiss, EPA's approval of Oklahoma's TMDLs. Furthermore, the court disagreed with the assertion that Citizens lacked the knowledge necessary to fully plead this APA claim. In so holding, it noted that because EPA's actions regarding Oklahoma's TMDLs were a matter of public record and part of EPA's motion to dismiss.

Third, Citizens challenged the district court's denial of a motion to amend their complaint. The court said the district court did not abuse its discretion in so doing. The court explained, saying untimeliness alone was a sufficient reason to deny leave to amend. Citizen's request to amend was untimely because they knew EPA approved some of Oklahoma TMDLs in April 1998, and did not file their application for leave to amend until February 2000.

Finally, Citizens asserted the district court erred when they struck Citizens' affidavit from a TMDL expert. The court affirmed the district court's decision because the expert's opinion regarded the substantive inadequacy of Oklahoma's TMDLs. Thus, the affidavit exceeded the scope of legal issues and was consequently waived, unless the ends of justice dictated otherwise. The court held justice supported the waiver because Citizens were informed of the waiver and chose to proceed. Thus, the court affirmed the district court's grant of summary judgment on all issues.

Kirstin E. McMillan

FEDERAL CLAIMS COURT

Brace v. United States, 51 Fed. Cl. 649 (2002) (Denying summary judgment because genuine issues of material facts existed as to: (1) whether or not a sufficient nexus existed between plaintiffs land and interstate water; and (2) the size of the "parcel as a whole" for purposes of the *Penn Central* test).

Plaintiff, Robert Brace, brought suit against the federal government ("United States") in the United States Court of Federal Claims, alleging that the United States took his land without just compensation when he was ordered to cease operation of a drainage system located on his property, and to restore parts of his land to its prior condition, which resembled wetlands. Brace argued that because the Clean Water Act ("CWA") did not apply until 1977, the United State's action interfered with the reasonable, investment-backed expectations he had when he bought the property in 1975.

This case concerned the United States' second motion for summary judgment. The court denied the first motion because the court did not have the information it needed to determine the economic impact, if any, on Brace. In its denial of the United States' first motion for summary judgment, the court ruled that Brace failed to meet factors (1) and (3) of the three factors used to determine