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Domestic Environmental Law

Judge Gorsuch's Environmental Record

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Despite sitting on the U.S. Court of Appeals for the Tenth Circuit for over 10 years, Judge Neil M. Gorsuch has authored relatively few environmental law decisions, though he has considered cases concerning federal lands and holds strong opinions on administrative law. Judge Gorsuch interprets statutes strictly, but does not evidence a discernible bias for or against "the environment," environmental regulation, or federal control over public lands.

Agency Deference

Most of the negative commentary from the environmental community about Judge Gorsuch is that he could sway the court to reverse Chevron U.S.A. v. Natural Resources Defense Council , 467 U.S. 837 (1984), which requires court deference to executive agency actions, such as EPA regulations. Under *Chevron*, courts take a two-step approach in reviewing challenges to agency actions. If the statute is clear, the court's inquiry ends. If the statute is silent or ambiguous, the court determines whether the agency's interpretation is reasonable. If so, the court must defer to the agency.

Gutierrez-Brizuela v. Lynch , 834 F.3d 1142 (10th Cir. 2016) involved an interpretation of two conflicting immigration law provisions. One provided the Attorney General (AG) with discretion to adjust the legal status of people who entered the country illegally, while a second prohibited anyone who entered the country illegally twice from lawful residency until completing a 10-year waiting period outside the United States. In a 2005 decision (*Padilla-Caldera I*), the Tenth Circuit upheld the AG's discretion to afford relief without requiring the 10-year period. In 2007, the Board of Immigration Appeals (BIA) issued a new decision that eliminated the AG's discretion, which the Tenth Circuit upheld under the *Chevron* standard (*Padilla-Caldera II*).

In *Gutierrez-Brizuela*, Judge Gorsuch, writing for the Tenth Circuit, reversed a BIA order to apply its 10-year period to Mr. Gutierrez-Brizuela who had sought relief *prior* to the 2007 *Padilla-Caldera II* decision. The court held that while the BIA could apply its new rules prospectively, due process and equal protection prohibited it from applying them retroactively: "If the agency were free to change the law retroactively based on shifting political winds, it could use that power to punish politically disfavored groups or individuals for conduct they can no longer alter."

In a lengthy, scholarly, and passionate concurrence to his opinion, Judge Gorsuch expressed his displeasure with *Chevron*, calling it the "elephant in the room," and lamented its harm to the separation of powers and the judiciary's duty to check the potential tyranny of a political executive agency. Judge Gorsuch questioned whether the federal courts should continue to be limited by *Chevron*'s deferential standard of judicial review. He expressed concern that, with *Chevron* deference, an agency can change its position and, as long as the underlying statute is ambiguous, courts must uphold that new position if it is a reasonable interpretation. He explained

that courts "are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them … . It is a problem for the people whose liberties may now be impaired not by an independent decisionmaker seeking to declare the law's meaning as fairly as possible … but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day."

In addition to his concern about executive flip-flops, he questioned whether *Chevron* and its successors have resulted in unlawful delegation of legislative power. He explained "[w]hen the political branches disagree with a judicial interpretation of existing law, the Constitution prescribes the appropriate remedial process. It's called legislation." Recognizing that, under the Administrative Procedure Act (APA), Congress vested courts with the power to interpret statutes, he further expressed concern that the public cannot rely on judicial precedent about an existing law if the executive agencies can overrule that precedent. His concurrence demonstrates a strong respect for due process, equal protection, and protection of the marginalized "politically disfavored groups" from political oppression.

It is too speculative to predict how Judge Gorsuch would rule on environmental cases on the Supreme Court if *Chevron* were reversed. Based on his analysis in Gutierrez-Brizuela , one hopes that he would follow legal precedent and not reverse such landmark decisions as Massachusetts v. EPA , 549 U.S. 497 (2007), which recognizes carbon dioxide and other greenhouse gases are pollutants that can be regulated under the Clean Air Act (CAA). However, new programs, like EPA's Clean Power Plan that is now undergoing judicial review in the D.C. Circuit after being stayed by the Supreme Court, could be vulnerable with a more conservative court if such programs are interpreted to be unlawful legislation by the EPA.

Judge Gorsuch cites to the Supreme Court's Michigan v. EPA , 135 S. Ct. 2699 (U.S. 2015) in Gutierrez-Brizuela , which may provide an understanding of how he might decide environmental cases. Michigan involved a 5-4 decision authored by Justice Antonin Scalia in which the court reversed EPA's regulation establishing emissions standards for mercury and other hazardous air pollutants from power plants because EPA had not first considered costs in determining whether it was "appropriate and necessary" to regulate power plant emissions. In her dissenting opinion, Justice Elena Kagan agreed that the CAA required costs to be considered; however, while EPA did not consider costs in first determining it was "appropriate and necessary," EPA later addressed costs in actually adopting the standards. As explained by Justice Kagan, it was not up to the Court to determine at what stage in the regulatory process the review of costs should occur. The 5-4 decision vacating EPA's emission standards based on the timing of when costs were considered, after EPA had spent about a decade of review involving considerable public process, is an overly strict reading of the CAA resulting in the vacatur of a rule intended to protect public health and the environment. Thus, Judge Gorsuch may continue the trend of a very strict reading of environmental statutes that could result in the invalidation of regulations for what seem, at most, trivial errors of interpretation in a complex, technical area.

Environmental Decisions

While Judge Gorsuch has questioned judicial deference of agency decisions, his few written opinions on environmental matters actually show a tendency to rule in favor of the federal agency. However, the outcomes of these cases have less to do with the environment than with Judge Gorsuch's judicial and constitutional philosophy.

In Energy and Environment Legal Institute v. EPEL , 793 F.3d 1169 (10th Cir. 2015), Judge Gorsuch upheld a Colorado law requiring that 20 percent of the electricity sold to Colorado consumers come from renewables. The court held that Colorado's law did not violate the "dormant" Commerce Clause, even it could affect electricity prices outside of Colorado. Judge Gorsuch specifically rejected plaintiffs' position that any state regulation that controls conduct out-of-state is unconstitutional because finding for such position would mean that the courts would have to "strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels."

Judge Gorsuch, in reversing a lower court decision in United States v. Magnesium Corporation of America , 616 F.3d 1129 (10th Cir. 2010), upheld EPA's interpretation of the meaning of a complicated industrial waste processing method that would have been subject to a less stringent disposal standard under the Resource Conservation and Recovery Act. While the EPA had determined the waste streams by Magnesium Corporation of America were tentatively subject to a less stringent standard in a report to Congress, EPA later changed its interpretation and found several of Magnesium's waste streams to be subject to more stringent disposal standards. Judge Gorsuch found that, because EPA considered its earlier interpretation to be tentative, its change in interpretation was not subject to the APA notice requirements. While Judge Gorsuch upheld EPA's interpretation given the narrow question before the court, he stated in dicta that Magnesium did not seek review as to whether EPA's interpretation was arbitrary and capricious or an abuse of discretion; nor did Magnesium bring a due process challenge on the grounds that it did not receive adequate notice prior to being subject to enforcement. Thus, while Judge Gorsuch ruled in favor of EPA, if Magnesium had brought different claims, the outcome might have been different.

Similarly, Judge Gorsuch upheld a U.S. Forest Service plan imposing a fee to visitors of Mount Evans. *Scherer v. U.S. Forest Service* , 653 F.3d 1241 (10th Cir. 2011). Plaintiffs argued that the plan imposed fees beyond the limits of the federal Recreation Enhancement Act because they also covered people not using the amenities. Judge Gorsuch explained that while plaintiffs might have grounds for an as-applied challenge, they only filed a facial challenge, a tougher burden they could not meet. Therefore, again, Judge Gorsuch's decision was based on the limited question before the court.

Judge Gorsuch has authored opinions in several other federal lands cases, often ruling in favor of federal regulation or a pro-environmental outcome. See, e.g., Wyoming v. Dep't of Interior , 587 F.3d 1245 (10th Cir. 2009) (upholding agency policy limiting snowmobile use in Yellowstone National Park); *Backcountry Hunters & Anglers v. U.S. Forest Service , 612 Fed.Appx. 934* (10th Cir. 2015) (decision resulting in fewer motorized uses allowed in the San Juan National Forest); *Entek GRB v. Stull Ranches , 612 Fed. Appx. 934* (10th Cir. 2015) (upholding right under federal law to access mineral claims that cross surface of neighboring private property); *George v. United States , 672 F.3d 942* (10th Cir. 2012) (prohibiting private landowner from blocking Forest Service road with gate in order to provide corral for her horse). While Judge Gorsuch apparently is an avid outdoorsman (as was Justice Scalia) and writes in reverential language about the American West (*George*: "the [Gila National] Forest is a place of soaring peaks and rugged canyons, covering over 3 million acres and embracing what may be the first formally designated wilderness area in the country.") or demonstrates a respect for legal systems that take into account natural systems (*Stull*: "Instead of worrying about a checkerboard of titles and leases for lawyers to play on and fight over, the law seeks to permit geologists and engineers to

arrange their assets on the surface efficiently in order to follow the underground boundary lines of mineral deposits that nature dictates."), his decisions are often procedural or based on strict adherence to precedent and legislative text, rather than pro-environment.

In Cook v. Rockwell International , 790 F.3d 1088 (10th Cir. 2015), Judge Gorsuch upheld a jury award for $177 million compensatory damages, $200 million punitive damages and $549 million in prejudgment interest to neighbors of a nuclear weapons production facility, finding that the federal Price-Anderson Act (PAA) did not preempt state law nuisance claims. The case involved the Rocky Flats plant in which workers had mishandled radioactive waste, resulting in property damage and diminution to the plaintiffs' property values. As an earlier Tenth Circuit decision had found that the district court's jury instructions on what qualifies as a "nuclear incident" and thus covered by the PAA had been too expansive, the plaintiffs just brought the state nuisance law claims when the case went back to the district court, which resulted in the jury award. On appeal, defendants argued that the PAA preempts the state nuisance claims. Judge Gorsuch, in reviewing the plain language of the PAA, the legislative history of the PAA, the purpose of the PAA, and other Supreme Court decisions on preemption, concluded that the PAA did not preempt state law claims. (We note that Judge Gorsuch is not a fan of legislative history, writing in *Gutierrez-Brizuela*: "But where exactly has Congress expressed this intent? Trying to infer the intentions of an institution composed of 535 members is a notoriously doubtful business under the best of circumstances.").

He explained that the court has a "duty to accept the reading that disfavors pre-emption[, a] duty that is only 'heightened' where (as here) the area of law in question is one of traditional state regulation like public health and safety. These presumptions seek to ensure 'that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts.'" (internal citations omitted). On the issue of whether the case should be remanded for a new jury trial, Judge Gorsuch found that there existed a properly instructed jury, legally sufficient evidence and a favorable verdict on the state law nuisance claim that was sufficient to guarantee a judgment in favor of the plaintiffs. He explained that as the first trial took 15 years, it would be unjust to require a second trial and its "needless financial expense," waste of judicial resources, "human costs associated with trying to piece together faded memories and long since filed away evidence."

Judge Gorsuch also concurred on a decision to uphold a U.S. Fish and Wildlife Service (FWS) rulemaking to reintroduce a nonessential experimental population of an endangered falcon into southern New Mexico in Forest Guardians v. U.S. Fish & Wildlife Service , 611 F.3d 692 (10th Cir. 2010). The court found that FWS's interpretation of a "population" as a potentially self-sustaining group in common spatial arrangement as opposed to being based on a few sightings of the falcon species as plaintiffs sought did not conflict with the plain language of the Endangered Species Act and was a reasonable interpretation of the statute entitled to deference. Further, the court found that there was no evidence that FWS had predetermined to approve its rulemaking prior to issuing its Environmental Assessment.

Overall, with an expectation that Trump and his newly-confirmed EPA Administrator Scott Pruitt will roll-back federal environmental regulations affecting air quality, water quality, hazardous materials and climate change, it is possible that Judge Gorsuch would rely on precedent to find such roll-backs as unlawful. However, for new environmental programs that are now before the courts, Judge Gorsuch would likely take a very strict reading of the

underlying statute and may draft decisions vacating EPA rules if he believes they are based on an unlawful delegation of legislative authority to the EPA.

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