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ENVIRONMENTAL LAW

Facing the Behemoth: Gorsuch's Implications for Environmental Law

BY JAMES M. MCCLAMMER
Special to the Legal

An avid fly-fisher born in Colorado to the first female administrator of the U.S. Environmental Protection Agency, Supreme Court nominee Judge Neil Gorsuch has clear connections to the world of environmental law. Indeed, in the opening line of *Scherer v. United States Forest Service*, 653 F.3d 1241 (10th Cir. 2011), which affirmed the right of the U.S. Forest Service to charge visitors the right to access Mt. Evans in Colorado, Gorsuch declared that "everyone enjoys a trip to the mountains in the summertime." While Gorsuch's confirmation is far from certain given the current political climate, he has been widely praised by both conservatives and liberals as an independent thinker with clearly written opinions that draw in readers with their narrative style and wit.

Many similarities have already been drawn between Gorsuch and the late Justice Antonin Scalia, whom Gorsuch would replace on the bench after Scalia's death over a year ago. Gorsuch has described Scalia as a "lion of the law" and is similarly viewed as a conservative jurist focused on principles of originalism and textualism. Like Scalia, if Gorsuch is confirmed, he will likely employ these principles with potential to create far-reaching effects in the areas of environmental and administrative law. Two U.S. Court of Appeals for the Tenth Circuit opinions authored by Gorsuch, discussed below, illustrate the influence we may see in these areas if Gorsuch is confirmed as the next Supreme Court justice.

JAMES M. MCCLAMMER *is an attorney with the environmental, energy and land use law and litigation firm of Manko, Gold, Katcher & Fox, located just outside of Philadelphia. He can be reached at 484-430-2334 or jmcclammer@mankogold.com.*

GORSUCH'S ATTACK ON 'CHEVRON' DEFERENCE

In response to the bipartisan questionnaire prepared by the Senate Judiciary Committee for the confirmation hearing, Gorsuch listed *Gutierrez-Brizuela v. Lynch,* 834 F.3d 1142 (10th Cir. 2016), as one of the 10 most significant cases he has presided over. The case addressed a wrinkle in a line of Tenth Circuit cases addressing *Chevron* deference—the principle of administrative law requiring courts to defer to interpretations of statutes made by the government agencies charged with enforcing them, unless such interpretations are unreasonable.

Gutierrez-Brizuela, and some prior, related cases addressed a conflict between two provisions of federal immigration law. The first provision granted the attorney general discretion to accord lawful resident status to noncitizens who illegally entered the United States. The second provision required noncitizens who illegally re-entered the United States to wait 10 years before obtaining lawful residency. Earlier, in 2005, the Tenth Circuit held that the attorney general retained discretion to award legal status notwithstanding the 10-year waiting period. In 2007, however, the Board of Immigration Appeals (BIA)—the executive agency charged with enforcing the statute—determined that the provision requiring the 10-year waiting period trumped the attorney general's discretion. Addressing this conflict in 2011, the Tenth Circuit applied *Chevron* deference (as extended by another Supreme Court case

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known as *Brand X*) to overrule its 2005 decision and adopt the BIA's interpretation, cementing the 10-year waiting period.

The "twist" in the 2016 Gutierrez-Brizuela decision arose when a petitioner applied to the attorney general for discretionary relief sometime between 2007 and 2011 (after the BIA's interpretation but before the Tenth Circuit had overruled its 2005 opinion). The Tenth Circuit held the petitioner could seek the attorney general's discretion to receive legal status in accordance with its 2005 ruling because that decision controlled over the BIA's interpretation until the court overruled itself in 2011.

The opinion, authored by Gorsuch, noted that due process and equal protection concerns underlie a presumption of prospectivity for legislative actions. Gorsuch reasoned that to allow the BIA to apply its interpretation to the petitioner's case while the Tenth Circuit's earlier, contrary opinion was still controlling law might invite individuals to disregard on-point judicial precedent because of its "potential susceptibility" to revision by an executive agency. Most significant, however, is Gorsuch's separate concurrence to his own opinion in which he skewers the entire concept of the *Chevron* deference: "There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth."

Gorsuch argued that *Chevron* and *Brand X* allow the "trampling of constitutional design" by allowing executive agencies to overrule a judicial declaration without the legislative process prescribed by the Constitution. This, he argues, is a problem for people whose liberties may now be impaired not by an independent decision-maker but by an "avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day."

With such a critical view of *Chevron*, Gorsuch, much like Scalia, would likely be more skeptical of agency statutory interpretation and rulemaking and offer much less deference to agencies like the Environmental Protection Agency (EPA). Gorsuch's views could play a key role in the challenges to the EPA's Clean Water Rule and Clean Power Plan, which will be decided by the court if they are not first repealed by the Trump administration. The regulated environmental community, which spends much time and money attempting to keep abreast of and in compliance with changing environmental regulations and policies, can also view Gorsuch as a champion of consistent and predictable law given his concern over executive agencies pursuing "whatever policy whim may rule the day."

STRICTER STANDING REQUIREMENTS FOR ENVIRONMENTAL GROUPS

In *New Mexico Off-Highway Vehicle Alliance v. United States Forest Service*, 540 F. App'x 877 (10th Cir. 2013), Gorsuch penned a lone dissent arguing that three environmental organizations should not have been allowed to intervene in a challenge to the U.S. Forest Service's plan to significantly reduce the number of roads and trails in the Santa Fe National Forest available for motorized vehicle use. The question of whether the organizations should be allowed to intervene turned on whether the Forest Service would adequately represent the interest of the environmental groups. The majority noted that the environmental organizations met their "minimal burden" to show that their interests would not be adequately represented because the Forest Service must consider a broad spectrum of views in litigating on behalf of the public. The majority also distinguished a prior Tenth Circuit decision, *San Juan County v. United States*, relied on by Gorsuch in his dissent, noting that the prior case contained a more narrow litigation objective in which the government didn't have to balance a spectrum of views to further public interest. In addition, none of the parties in the prior decision opposed intervention. Still, Gorsuch argued that the prior case controlled and that only if an "actual, nonspeculative" difference in interests emerged between the would-be intervenors and the government would intervention be appropriate.

While Gorsuch's position against intervention of the environmental groups could be fairly read as adherence to case precedent, it's notable that he did not address the case distinctions drawn by the majority and ultimately opposed intervention of the organizations. Thus, it's very possible that Gorsuch, much like Scalia, could bring a narrowed view of standing to the Supreme Court. With environmental organizations flush with donations after the presidential election and a more limited role for the EPA with Scott Pruitt at the helm, we are likely to see more federal citizen suits seeking to enforce compliance with environmental permits and regulations. The Supreme Court's view on standing will play an important role in the access that these organizations have to the courts.

These two cases do not serve as forecasts within a crystal ball, but they do provide insight into the role Gorsuch would play on the Supreme Court. Gorsuch's skepticism of *Chevron* deference and a potentially restricted view on standing would restore to the court some of the conservative jurisprudence lost by Scalia's death. •

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