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**Pepperdine University School of Law
Legal Summaries***

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UNITED STATES SUPREME COURT

Ali v. Federal Bureau of Prisons, 128 S. Ct. 831 (2008).

LAW: The Federal Tort Claims Act exception to waiver of immunity in Section 2680(c) covers all law enforcement officers.

FACTS: Petitioner was a federal prisoner who was transferred from a United States Penitentiary in Atlanta, Georgia to a United States Penitentiary in Inez, Kentucky. The Petitioner left two duffle bags containing personal property to be shipped to the new penitentiary. Upon arrival, Petitioner noticed that several items of personal property that were of religious and nostalgic significance were missing. Petitioner filed an administrative tort claim, which was denied. Petitioner then filed a complaint alleging violations of the Federal Tort Claims Act (FTCA) against the Bureau of Prisons (BOP). The BOP maintained that the Petitioner's claim was barred by the exception in section 2680(c) for property claims against law enforcement officers. The District Court agreed and dismissed the Petitioner's FTCA claim for lack of subject matter jurisdiction. Petitioner appealed and the Eleventh Circuit joined five other Courts of Appeals in construing the clause to encompass all law enforcement officers. This court granted certiorari because five other Courts of Appeals reached a contrary conclusion by interpreting the clause as limited to officers performing customs or excise functions.

ANALYSIS: Petitioner contended that the clause in section 2680(c) applied only to law enforcement officers enforcing customs or excise laws and therefore does not affect the waiver of sovereign immunity for his property claim against the BOP officers. The court was not persuaded by the Petitioner's attempt to create ambiguity where the statute's structure and text suggested none. The court reasoned that Congress' use of "any" to modify "other law enforcement officer" was most naturally read to mean law enforcement officers of whatever kind. The court stated that the text

indicated that Congress intended to preserve immunity for claims arising from the detention of property and that there was no indication of any intent that immunity for those claims turned on the type of law being enforced. The court also referenced a prior amendment to section 2680(c) to support its conclusion that Congress' view that section 2680(c) covered all law enforcement officers. Under subsection (1), an amendment restored the sovereign immunity waiver for officers enforcing any federal forfeiture law. Against the textural and structural evidence, the court concluded that Congress intended the exception to waiver of immunity applied to all law enforcement officers.

HOLDING: The Court of Appeals for the Eleventh Circuit's judgment that section 2680(c) covers all law enforcement officers was affirmed.

IMPACT: This clarification of "any other law enforcement officer" confirms the broad scope and application to the exception to waiver of immunity under the Federal Tort Claims Act. All law enforcement officers are exempt from waiver of immunity.

**UNITED STATES COURT OF APPEALS – DISTRICT OF COLUMBIA
CIRCUIT**

Nat'l Mining Assoc. v. Kempthorne, 512 F.3d 702 (D.C. Cir. 2008).

LAW: *Chevron* deference applies to the Secretary of the Interior's interpretation of the Surface Mining Control and Reclamation Act, 30 U.S.C. §1201 et seq.

FACTS: In 1977, Congress passed the Surface Mining Control and Reclamation Act ("SMCRA") in order to protect society and the environment from adverse effects of surface mining operations. SMCRA authorized the Secretary of the Interior to prohibit surface coal mining if it was a federal land and it was determined that the land was unsuitable for that purpose. Section 522 (e) bans surface mining in statutorily

designated areas after August 3, 1977 and subject to valid existing rights (“VER”). For decades, the Secretary and the courts have struggled to understand VER and what it protects. In 1999, the Secretary promulgated a rule through notice-and-comment procedures offering another interpretation of VER. The rule set forth two requirements for a miner claiming VER protection. First, he must produce a legally binding document that vested the right to mine the land. Second, he must prove that the owner of the land had obtained all of the necessary mining permits before the August 3, 1977 deadline or else prove all of the coal adjacent to an existing surface mining operation was needed to ensure the economic viability of the operation as a whole.

The National Mining Association (“NMA”) challenged the rule arguing that the Secretary’s interpretation was too narrow and shielded more land from mining than Congress intended. On cross-motions for summary judgment, the district court found the Secretary’s interpretation as reasonable and entered judgment for the Secretary. The NMA appealed.

ANALYSIS: The court rejected NMA’s argument that because the history of the Act’s interpretation struggles means that the agency’s current policy is entitled to less deference because it has changed over time. The court reasoned that the exact opposite is true. Since Congress had presented such a wide range of plausible interpretations to an agency with rulemaking authority, it showed delegation of the power to make reasonable adjustments to the nation’s surface mining policy.

The court agreed that the SMCRA language makes VER an ambiguous phrase. NMA argued that the word “right” could be taken to mean a property right, but the court stated that it could also encompass a narrower protection, as in the 1999 rule. Since the court was convinced that VER was ambiguous, they had to defer to the Secretary’s interpretation so long as it was based on a permissible construction of the statute and was a reasonable interpretation. The court found that the 1999 Rule was true to the authority delegated to protect against the

harmful effects of surface mining and therefore it was not surprising that the rule cut against the interests of some miners.

Next, NMA argued that the 1999 Rule runs afoul of both the Due Process and Takings Clauses of the Fifth Amendment and therefore invoked the canon of constitutional avoidance. The court stated that the judiciary must presume that Congress acts consistent with its duty to uphold the Constitution and must make every effort to construe statutes as to find their constitutional foundations. The canon of constitutional avoidance will trump *Chevron* deference if an interpretation presents serious constitutional difficulties and not because of the mere mention of a constitutional problem. In regards to due process argument, the court reasoned that because Congress created no process to abide in denial based on prohibition of surface mining in sensitive areas for all but those who had valid existing rights, there was no process for NMA to argue it was denied. In regards to the takings argument, the court stated that a taking is unconstitutional only when the government fails to pay just compensation. Here, the miners can pursue their takings claims in Federal Claims Court for protection. Therefore, NMA's takings challenge raises no serious question about the 1999 Rule that would preclude *Chevron* deference.

HOLDING: The district court's judgment giving *Chevron* deference to the Secretary's interpretive rule was affirmed.

IMPACT: In order for a miner to obtain VER protection that will allow for surface mining in prohibited areas, he must meet the two requirements set forth by the Secretary of the Interior's 1999 interpretive rule. This rule narrows the application of VER protection.

New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008)

LAW: The plain text of section 112 of 42 USCS § 7412 requires the Administrator to have specific findings based on studies before delisting any source of hazardous air pollutant ("HAP").

FACTS: In 1970, Congress added section 112 to the Clean Air Act (“CAA”), which required the Environmental Protection Agency (“EPA”) to list hazardous air pollutants (“HAPs”) that should be regulated because they cause or contribute to an increase in serious irreversible illnesses or cause mortality. Over the next eighteen years, the EPA only listed eight HAPs and established standards for seven. In 1990, Congress became concerned about the slow pace of the EPA’s regulations and altered section 112 to eliminate much of the EPA’s discretion in the process. First, Congress required the EPA to regulate more than one hundred specific HAPs and imposed strict pollution control requirements on both new and existing sources of HAPs. Second, Congress restricted the opportunities for the EPA and others to intervene in the regulation of HAP sources. Specifically, the EPA could delete any source category from the HAP list added by Congress only after determining that emissions from no source in the category or subcategory exceeded a level adequate to protect public health. Parties could not challenge the Administrator’s decision to add pollutants to the list until the Administrator issued emission standards for such pollutant. Third, Congress also required the Administrator to evaluate regulatory options with care and to meet certain conditions before listing electric utility steam generating units (“EGUs”) as a HAP source. This required the Administrator to perform studies and to regulate as appropriate and necessary after evaluation of the results of the studies.

In December 2000, the EPA concluded that it was “appropriate and necessary” to regulate mercury emissions from coal- and oil-fired power plants under section 112 and listed these EGUs as sources of HAPs regulated under that section. In 2005, after reconsidering its previous determination, the EPA purported to remove these EGUs from the section 112 list. Thereafter it promulgated Clean Air Mercury Rule (“CAMR”).

In early 2004, the EPA proposed two regulatory alternatives to control emissions from coal and oil fired EGUs. The first rule removes coal and oil fired EGUs from the list of sources

whose emissions are regulated under section 112 of the CAA. The second rule sets performance standards for new coal-fired EDUs and establishes total mercury emissions limits for States along with a cap-and-trade system. Although the EPA was attempting to delist EGUs without making the findings required, the EPA explained it had the authority because their regulation as neither appropriate nor necessary because the emission reductions could be achieved under CAMR promulgated by the EPA.

New Jersey and fourteen additional states, the Michigan Department of Environmental Quality, the Pennsylvania Department of Environmental Protection, the City of Baltimore, and various environmental organizations (“Environmental Petitioners”) challenged the validity of the two rules promulgated by the EPA.

ANALYSIS: The Environmental Petitioners contended that the EPA violated section 112’s plain text and structure when it did not comply with the requirements in delisting the EGUs. The court agreed by stating that the only way the EPA could delist an EGU was by satisfying the section’s study requirements and the EPA concedes that it never made the findings. Therefore, the EPA had violated the plain text and must be rejected. The court rejected EPA’s argument that deference should be given for evading the requirements because of ambiguity. The court found no persuasive evidence that the plain text was ambiguous to allow deference.

The EPA also argued that it had the inherent authority to reverse an earlier administrative determination or ruling where an agency has a principled basis for doing so and prior to the EPA’s listing of EGUs under section 112, nothing in the CAA would have prevented it from reversing its determination. The court rejected this argument because Congress can limit an agency’s discretion to reverse itself. Congress had done just that by unambiguously limiting the EPA’s discretion to remove sources, including EGUs, from the list once they had been added.

The court also rejected the EPA's argument that it had previously removed sources from the list without satisfying the requirements, because previous statutory violations could not excuse the one before the court now.

Also, the Environmental Petitioners contended that CAMR is inconsistent with the provisions of section 112 of the CAA. The court agreed because the EPA promulgated the CAMR regulations on the basis that there would be no section 112 regulation of EGU emissions and that the new source performance standards would be accompanied by a national emissions cap and a voluntary cap-and-trade program. Given that these assumptions were incorrect, the court must vacate the CAMR's new source performance standards and remand them to the EPA for reconsideration. The court emphasized that severance and affirmance of a portion of a regulation is improper if there is substantial doubt that the agency would have adopted the severed portion on its own.

HOLDING: The court held that the EPA had no authority to delist coal and oil fired utility units without following the CAA delisting provisions. Petitions were granted and rules vacated.

IMPACT: Deference is not given to an agency when the plain text of a regulation is not ambiguous. When challenged regulations fail to comply with the plain meaning, the court will invalidate the rule and all subsequent rules that were based on the vacated rule will also be vacated in whole, unless there is no substantial doubt that the agency would have adopted the severed portion alone.

UNITED STATES COURT OF APPEALS - NINTH CIRUIT

Gonzales v. Dep't of Homeland Sec., 508 F.3d 1227 (9th Cir. 2007).

LAW: An agency's reasonable interpretation of a statute binds courts that have previously ruled inconsistent to it.

FACTS: In 1994, Congress amended the Immigration and Nationality Act (“INA”) to provide for a special adjustment of status for certain aliens from certain admissibility requirements for adjustment of status. It allowed the Attorney General to adjust the status of an alien who entered the United States without inspection to that of a legal permanent resident if: 1) the alien was admissible to the United States and the beneficiary of an immediately available immigrant visa; and 2) paid an application fee five times the usual fee. In 1996, Congress enhanced the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”). In addition to the adjustment provision, there were two IIRIRA provisions pertaining to aliens who reenter the United States after being previously removed or deported – the reinstatement provision and the inadmissibility provision. The reinstatement provision provides for automatic reinstatement of an alien’s prior removal or deportation order when the alien has entered the United States illegally and may not apply for relief. The inadmissible provision permanently deems inadmissible a previously removed alien who enters illegally, unless he has been absent from the United States for more than ten years, and he has the consent of the Secretary of Homeland Security to the application for readmission. Application is done with and I-212 form which, if accepted, provides a waiver to the inadmissibility factor.

In August 2004, the Ninth Circuit held in *Perez-Gonzalez v. Ascroft* that a previously removed alien unlawfully present in the United States was eligible to adjust his status under the adjustment provision so long as he filed an I-212 waiver application prior to the initiation of the reinstatement proceedings. This was notwithstanding the bar to relief from the inadmissibility and reinstatement provisions of the IIRIRA.

Plaintiffs are seven Mexicans who were previously deported from the United States and have reentered without permission. Each applied for I-212 waivers, which were denied. Plaintiffs’ claim that they have been denied the opportunity to apply for lawful permanent resident status because of the Defendant’s

refusal to comply with the precedent decision by the Ninth Circuit. The district court issued an order granting the motions for injunctive relief to the class of aliens, which enjoined the Department of Homeland Security (“DHS”) from denying certain applications for permission to reapply for admission into the United States or from acting on any denied applications. DHS appealed.

ANALYSIS: The court first addressed DHS’s contention that the district court lacked subject matter jurisdiction to enter the injunction. The court agreed with the Plaintiffs and found that the district court did not err by concluding that the injunction’s effect on reinstatement proceedings is one step removed from the relief sought by Plaintiffs and therefore does not bring the action with the INA bar. The court also rejected DHS’s contention that the Plaintiffs had failed to exhaust their administrative remedies. It stated the exhaustion was not required because no statute or rule mandates administrative review of the denial of adjustment of status, therefore statutory exhaustion was not required in this case. Additionally, the court stated that the case presents a question of law that would not be aided by further development of the record.

The court rejected DHS’s argument that the district court erred in not concluding that the *Fernandez-Vargas* case holding undermines the *Perez-Gonzalez v. Ascroft* case because the cases raised different issues and issues not raised or discussed are unstated assumptions and not precedential holdings. The court agreed with DHS that the district court erred by failing to defer to Board of Immigration Appeals’ (“BIA”) opinion in the case *In re Torres-Garcia*, which undermines the *Perez-Gonzalez* holding pertaining to an illegal reentrant’s admissibility. Since the court’s holding in *Perez-Gonzalez* was based on a finding of statutory ambiguity, the court is bound by the agency’s interpretation of applicable statutes, even though they are inconsistent with the court’s holding in *Perez-Gonzalez*. Accordingly, the Plaintiffs had no likelihood of success on the merits of their suit and the preliminary injunction was vacated.

HOLDING: The Ninth Circuit vacated the district court's order and remanded for proceedings consistent with the opinion.

IMPACT: Courts are bound by an agency's reasonable interpretation of statutes, even when they have previously held inconsistently to it. Rather than adhere to a court's prior precedent, an agency's subsequent interpretation rules.

Northern Cheyenne Tribe v. Norton, 503 F.3d 836 (9th Cir. 2007).

LAW: It is not an abuse of discretion when a district court issues a partial injunction because it provides an equitable solution if it does not cause further irreparable harm.

FACTS: Although farmers and ranchers generally had surface rights, the federal government owned most of the subsurface mineral rights in the Powder River Basin. The Bureau of Land Management ("BLM") administers the mineral resources owned by the federal government. For more than twenty years, BLM has had resource management plans for the area. In 2002, BLM together with the Montana Board of Oil and Gas Conservation and the Montana Department of Environmental Quality issued a draft environmental impact statement analyzing development of coal bed methane resources and made it available for public review and comment. The draft environmental impact statement analyzed five alternatives. This statement was challenged by the Plaintiffs, who include: the federal Environmental Protection Agency, the Montana Department of Fish and Wildlife and Parks, an advocacy group called the Northern Plains Resource Council, and the Northern Cheyenne Tribe of Indians. The Plaintiff's suggested that BLM should study another alternative, which they called "phased development."

The final environmental impact statement approved existing oil and gas leases pursuant to an earlier resource management plan from 1994. This plan included the rights to explore and

develop coal bed methane. The statement also stated that the time for challenging the 1994 decision had passed.

The district court concluded that the final environmental impact statement was generally sufficient under the National Environmental Policy Act (“NEPA”), but improperly failed to consider the “phased development” alternative proposed by the Plaintiffs. Accordingly, it partially enjoined coal bed methane development. The injunction prohibited development on 93% of the resource area until BLM completed a revised environmental impact statement, but permitted development on 7% of the resource area subject to site-specific review. Both sides appealed.

ANALYSIS: The court rejected the Plaintiff’s argument that the district court should have enjoined all development because the final environmental impact statement mistakenly failed to consider the phased development alternative. The court stated that it was bound by precedent to hold that a NEPA violation is subject to traditional standards in equity for injunctive relief and does not require an automatic blanket injunction. Rather the court must review the scope of the injunction for abuse of discretion.

The court went on to discuss how a district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong and that the district court would have violated established precedent if it had issued the blanket injunction. The court discussed how courts must apply the usual equitable factors in determining the scope of an injunction pending NEPA compliance.

The court then addressed the tribal claims that the Plaintiff’s argued were dismissed by the district court in error. In a *de novo* review, the court did not need to reach the merits of the claim that the resource management plan will adversely affect Indian cultural resources, because neither the plan nor the partial injunction could affect them since no actual development is possible without additional environmental assessment. BLM

conceded that the Tribe is free to bring an action challenging any site-specific leasing decision at a later time.

HOLDING: The district court's judgment issuing a partial injunction was not an abuse of discretion and was affirmed.

IMPACT: District courts have broad latitude in fashioning equitable relief. Since irreparable harm is not presumed, partial injunctions provide remedy while awaiting additional assessments.

Yetiv v. U.S. Dep't of Hous. & Urban Dev., 503 F.3d 1087 (9th Cir. 2007).

LAW: An agency generally does not lose jurisdiction over a claim for money penalties because of the post-violation actions of the violator.

FACTS: The United States Department of Housing and Urban Development ("HUD") imposed penalties on Yetiv for failure to provide HUD with audited annual financial statements relating to the operation of a multifamily housing project, which were required because it was purchased with a HUD-insured loan. Yetiv was additionally subject to the Civil Money Penalty statute 12 U.S.C. §1735f-15, which authorizes HUD to impose civil penalties against multi-family mortgagors who "knowingly and materially" commit certain violations. Failing to provide the annual audited financial statements was such a violation. Yetiv appealed to the Secretary of HUD, who adopted the administrative law judge's ("ALJ") decision without change. Yetiv sought review of the administrative decision.

ANALYSIS: In *de novo* review, the court had to determine whether HUD's decision to impose civil penalties was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The court rejected Yetiv's argument that HUD lacked jurisdiction to impose civil penalties because he pre-paid the HUD-insured loan prior to final adjudication.

The court reasoned that the general rule is that liability for civil penalties attaches at the time of the violation. If the court accepted Yetiv's argument, the practical effect would be to encourage mortgagors to forgo the expense of compliance and pay the loan off before adjudication to escape liability. Paying the loan early did not deprive HUD of jurisdiction to maintain the enforcement action and impose penalties.

The court also rejected Yetiv's characterization of himself as a victim in a vendetta. The court reasoned that collection of penalties serves a deterrent purpose and discourages other mortgagors from failing to file audited financial statements.

The court was also not persuaded by Yetiv's argument that the imposition of penalties was arbitrary and capricious because the ALJ used an illogical standard for determining whether the violations were "material." Although the court agreed that some of the factors used in the "totality of the circumstances" test had no logical relationship to the significance of the underlying violation, the ALJ carefully based his decision on two factors that do logically relate to materiality: the injury to public, and the fact that Yetiv benefited economically from his violations. Therefore, the ALJ's decision was not arbitrary or capricious. Finally, the court was also not persuaded by Yetiv's challenges to the sufficiency of evidence because the ALJ relied on Yetiv's own admissions to base his decision. Those admissions constituted substantial evidence.

HOLDING: The administrative decision imposing civil penalties was affirmed.

IMPACT: Even when a totality of circumstances test includes factors that are not necessarily logically related to a violation, the decision is not considered arbitrary and capricious so long as the administrative law judge carefully analyses factors that do logically relate to base the decision.

Lingenfelter v. Astrue, 504 F.3d 1028 (9th Cir. 2007).

LAW: An ALJ must provide clear and convincing reasons for finding a lack of credibility in claimant testimony.

FACTS: After Plaintiff's application for disability insurance benefits and supplemental security income was denied initially and upon consideration, he requested a hearing before and Administrative Law Judge ("ALJ"). At the hearing, the Plaintiff was represented by counsel and testified on his own behalf. There were multiple medical reports from many doctors presented, but there was no consensus on Plaintiff's level of disability. The ALJ also denied benefits. In denying the benefits, the ALJ applied a five-step disability evaluation process, which the Plaintiff passed except for where the residual functional capacity ("RFC") assessment in step four and five. The ALJ found that the Plaintiff retained the capacity to lift twenty pounds occasionally and ten pounds frequently and could stand and/or walk for at least two hours. The Plaintiff testified to additional limitations that would establish a lower RFC, the ALJ rejected the testimony as not totally credible. The ALJ provided two reasons for the adverse credibility finding. Based on the RFC assessment and a vocational expert testimony, the ALJ found that the Plaintiff was not able to perform past relevant work, but retained the capacity to perform other work that existed in the economy.

The Appeals Council adopted the ALJ's decision as the final decision of the Commissioner. Plaintiff filed complaint in district court, which issued an order and judgment adopting the report and recommendation of a magistrate judge and affirming the ALJ's decision. Plaintiff appealed.

ANALYSIS: The court reviewed *de novo* and acknowledged that they may set aside the denial of benefits when the denial is not supported by substantial evidence or is based on legal error. The Plaintiff argued that substantial evidence does not support the decision because the ALJ improperly rejected his testimony as to the severity of his pain and symptoms. The

court agreed with the Plaintiff and reasoned that the ALJ failed to provide clear and convincing reasons for not finding credibility in Plaintiff's testimony and should have included the testified limitations in the RFC assessment. The court stated that the ALJ must engage in a two-step analysis to determine credibility of Plaintiff's testimony regarding subjective pain or symptoms. First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment that could reasonably be expected to produce the pain or symptoms alleged. It is not necessary that the claimant show evidence to support the severity of the pain or symptom. If the claimant meets the first step, the ALJ can reject the claimant's testimony about the severity of the symptoms only by offering clear and convincing reasons for doing so. The ALJ reasoned that there was a consensus of medical opinion that Plaintiff retained the capacity for sedentary work and that a brief nine-week stint of work was inconsistent with the alleged severity of his symptoms. The court did not accept the two reasons provided by the ALJ because there was not consensus of the medical opinion and the nine-week work attempt was not a sufficient basis in and of itself for an adverse credibility finding.

The court also rejected the ALJ's finding that there were sufficient jobs based on the vocational expert testimony because these jobs do not exist for a person with the limitations testified to by the Plaintiff.

HOLDING: The district court's judgment was reversed with instructions to remand to the ALJ for the calculation and award of appropriate benefits.

IMPACT: In benefit denial cases, the reviewing court will look for clear and convincing reasons for a finding that the claimant lacks credibility.

UNITED STATES COURT OF APPEALS - FIFTH CIRUIT

Dawson Farms, LLC v. Farm Serv. Agency, 504 F.3d 592 (5th Cir. 2007).

LAW: 7 U.S.C. Section 6912(e) is not a jurisdictional rule but the codification of a judicially developed principle under which exhaustion of administrative remedies is favored, but may be excused by a federal court under a limited number of exceptions.

FACTS: Dawson Farms, LLC (“Dawson”), a farm operator brought suit in district court against the Farm Service Agency (“FSA”), other agencies in the Department of Agriculture (“USDA”), and the Corps of Engineers. Dawson sought declaratory and injunctive relief and damages. Dawson alleged that the FSA erroneously determined that Dawson must return USDA program benefits and intended to withhold future benefits because of Dawson’s wetlands violations of the “swampbuster” provisions of the Food Security Act.

The District Court dismissed for lack of subject matter jurisdiction because Dawson had not exhausted its administrative remedies. Dawson appealed.

ANALYSIS: Defendant-appellees argue that §6912(e) jurisdictionally bars any action or appeal in a federal court against the Secretary or his delegate by a person who has not exhausted all administrative appeal procedures. Dawson argues that even if it failed to exhaust administrative remedies, the district court had subject matter jurisdiction and should have excused it from exhaustion under the circumstances in this case. The court stated that it is possible for a party to bring an action without exhaustion and invoke federal jurisdiction in exceptional and extenuating circumstances, but that Dawson had failed to establish that it should be excused from the exhaustion requirement and the court rejected their “futile” argument.

The court reviewed the jurisdictional splits among the circuits as to whether §6912(e) was a jurisdictional or jurisprudential requirement for the exhaustion of remedies. Ultimately the court sided with the Eighth and Ninth Circuits because one important factor in deciding whether exhaustion is “textually required” or “statutorily mandated” is when the statute explicitly mentions and deprives federal courts of jurisdiction if administrative remedies are not exhausted. Section 6912(e) does not have this language and therefore it is the codification of jurisprudential doctrine and not jurisdictional. Because Dawson failed to exhaust all of its administrative remedies and no excuse or exception has been shown, summary judgment in favor of the defendants was appropriate. The court also noted that failure to exhaust administrative remedies usually results in a dismissal without prejudice, when exhaustion is no longer possible, dismissal may be with prejudice. The exhaustion of administrative remedies is too late for the claims in this case.

HOLDING: The District Court’s judgment dismissing the case for failure to exhaust administrative remedies was affirmed, with prejudice.

IMPACT: Under §6912(e) a federal court will have jurisdiction over a claim that has not been administratively exhausted if the claimant has a valid excuse or exception.

UNITED STATES DISTRICT COURTS – DISTRICT OF COLUMBIA

Spirit of the Sage Council v. Kempthorne, 511 F. Supp. 2d 31 (D.C. 2007).

LAW: Under the Permit Revocation Rule of the Endangered Species Act, an Incidental Take Permit will be revoked when continuation of the permit puts the list species in jeopardy of extinction.

FACTS: Plaintiffs brought an action challenging the validity of two federal rules, the No Surprises Rule and the Permit

Revocation Rule (“PRR”, collectively, “the Rules”), under the Endangered Species Act (“ESA”). The PRR amended regulations specifically applicable to Incidental Take Permits (“ITP”), which were available to landowners, and developers who agree to mitigate the impacts to listed endangered species through a Habitat Conservation Plan (“HCP”). In effect, the PRR specifies that an ITP will not be revoked unless continuation of the permit puts a listed species in jeopardy of extinction. This significantly narrowed the circumstances under which an ITP would be revoked. Additionally, permits would be granted even if doing so threatened the recovery of an endangered species.

The court ruled that PRR had been promulgated without adequate opportunity for public comment required by the Administrative Procedure Act (“APA”) and remanded the Rules to the Wildlife Service and the National Marine Fisheries Service (collectively, “the Services”) to complete the proceedings within one year and enjoined use of the Rules in the interim. The Services complied with the required procedures and re-promulgated PRR. Pending before the court were cross-Motions for Summary Judgment disputing the court’s jurisdiction and the Plaintiff’s claims under the APA.

ANALYSIS: The court rejected the Defendants argument that the Plaintiffs lacked standing because they must challenge a specific ITP and that their harm was purely speculative. It reasoned that Plaintiffs assertion of harm arising from the substantial and unprecedented increase in ITPs sought and issued was sufficient to establish injury-in-fact and therefore Plaintiffs had standing. The court also found the Plaintiff’s claims ripe for review because they are facial challenges to regulations that have a direct and immediate effect on the Services and regulated third parties.

Plaintiffs argued that the PRR is contrary to the ESA and is not in accordance with the law under the APA. The court applied the framework established by *Chevron* to determine whether the action was in accordance with the law within the meaning of that provision. The Plaintiff’s argue that section 10 requires

measures that insure the survival and recovery of listed species. The section requires parties seeking an ITP to submit a HCP and because “conservation” is a broader concept than mere survival, the holders of the ITP must necessarily be required to “conserve” species and ITPs should be revoked when the recovery of a species is imperiled. The court rejected this argument because more specific provisions of section 10 fatally undermine it by speaking to minimizing impact on species, but do not address the recovery of species. Additionally, section 10 contains a specific provision regarding the revocation of permits and doesn’t require revocation due to the threat to a species’ recovery. The court also rejected the Plaintiff’s argument that a recovery-based standard must be applied to ITPs due to a recent Ninth Circuit decision because it was distinguishable.

In analyzing whether the rules were based on a permissible construction of the statute, the court referenced Congressional intent to allow the Services to grant ITPs even if they do not protect the recovery of listed species. Moreover, the PRR adopts a facially reasonable policy for revocation. Therefore, the court concluded that the PRR is a permissible and reasonable construction of the ESA. The court also rejected Plaintiff’s argument that the No Surprises Rule is contrary to the ESA because it makes more permanent conditions in an ITP that may not promote or maintain the recovery of listed species. It reasoned that the ESA does not require ITPs to promote or maintain the recovery of species.

Plaintiffs also argue that the Rules are arbitrary and capricious because the Services failed to articulate a reasoned basis for the rules. The court rejected this argument because it concluded that the Services have clearly explained that they believe that matching the ITP revocation criteria to the statutory ITP issuance criteria more accurately reflected Congressional intent. The court also rejected the Plaintiff’s argument that the Services have failed to explain why the PRR’s standard for revocation of ITPs was drafted in discretionary rather than mandatory terms. The court found it rational for the PRR to be phrased in discretionary terms

because decisions are fact-intensive and require the agency to exercise discretion. The court also rejected Plaintiff's argument that the No Surprises Rule's justification of creating incentives for landowners to engage in conservation was inconsistent with the ESA because it was rational for the Services to follow Congressional intent and create incentives for private landowners to apply and utilize ITPs. Lastly, the court rejected the Plaintiff's argument that an ITP holder should be required to address foreseeable changes in circumstances if those circumstances were not addressed at the time of the ITP issuance. The court acknowledged that these types of circumstances are addressed in the HCP and if applicants fail to address foreseeable circumstances, the Services can deny the ITP application. Therefore, the Services can handle the Plaintiff's concern under the Rules. The court concluded that the Rules are not arbitrary and capricious under the APA.

HOLDING: Plaintiff's Motion for Summary Judgment was denied and the Defendant's Motion for Summary Judgment was granted.

IMPACT: The reasons for revocation of Incidental Take Permits are narrow. This means that once a permit is issued, it will not be revoked based on threats to the listed species, rather the listed species must be in jeopardy of extinction. There are no requirements to actively conserve, rather to minimize impact on the listed species.

CALIFORNIA STATE COURT

Valenzuela v. Cal. State Pers. Bd., 63 Cal. Rptr. 3d 529 (Ct. App. 2007)

LAW: Without adequate notice, dismissal as a penalty for failing a drug test is an abuse of discretion of the State Personnel Board.

FACTS: Petitioner was a corrections officer for the Department of Corrections and Rehabilitation (Department).

Petitioner received a prescription for weight loss from a Mexican doctor. Because he was subject to drug testing as an employee of the Department, Petitioner confirmed with the doctor that the diet pills would not cause him any trouble. Two days after taking the medication, the Petitioner was randomly selected to participate in drug testing and the results came back positive for Amphetamine. The medical review officer who reviewed the drug tests was told by the Petitioner that he was taking Mexican diet pills and sent him a copy of a letter from the Mexican doctor stating that the medication was a legitimate weight loss treatment. After a hearing, the warden of the prison where Petitioner worked decided that dismissal was the proper penalty.

Petitioner appealed to the State Personnel Board (Board), who upheld the penalty. Petitioner then filed for writ of administrative mandate requesting the superior court to vacate the Board's order. The trial court found that the Board had abused its discretion because there was no evidence to support a conclusion that the Petitioner was on legally adequate notice that his foreign prescription could result in him being tested positive for amphetamines. The trial court ordered the Petitioner to be reinstated with back pay. The Department appealed.

ANALYSIS: The Appellant contended that the Petitioner did have adequate legal notice because of employees were told in the 2000-2001 timeframe that Mexican medicines could be metabolized into amphetamines and caused drug testing concerns. Another memo was sent out in 2000 regarding Mexican diet pills and repeated information from the previous memo. The copies of the memos in the record did not have any letterhead or other information indicating their distribution or source. This was problematic for the court because both the content and the format of the notice were proven only to a speculative degree and there was no established policy of notifying employees of the exact nature of the prohibited conduct. For these reasons, the court did not find that the Department had proven with substantial evidence that employees or Petitioner in particular, had been placed on

constructive or actual notice. The dismissal could not be upheld on those grounds.

HOLDING: The trial court's judgment reinstating Petitioner with back pay was affirmed.

IMPACT: Terminations based on an employee receiving legally adequate notice of prohibited conduct, must be proven with substantial evidence. An example of this is an established policy on disseminating information to employees which provides notice of prohibited conduct. If substantial evidence of legally adequate notice is not presented, the Board cannot uphold this termination or it will be vacated as an abuse of discretion.

Park v. Valverde, 61 Cal. Rptr. 3d 895 (Ct. App. 2007)

LAW: The exclusionary rule does not apply in DMV Administrative license suspension proceedings.

FACTS: A police officer observed Park operating a motor vehicle. When the officer ran a license plate check on the vehicle, the information obtained in the check was based on outdated police records and indicated that the vehicle could be stolen. During the stop, the erroneous record check was corrected, but the officer noticed that Park appeared intoxicated. Park failed a field sobriety test and admitted he had been drinking. The subsequent breathalyzer test showed a blood-alcohol level of 0.12 percent. The officer issued Park an administrative *per se* suspension/revocation order and temporary driver's license.

In the subsequent criminal proceedings, Park moved to suppress all evidence obtained or seized in connection with the traffic stop, because the stop was based on outdated police information. The court dismissed the action against Park. In the subsequent DMV administrative review of Park's driving privileges, Park again asserted that the exclusionary rule should apply. The DMV did consider the evidence and suspended Park's driver's license for one year. Park then filed

a petition for a writ of mandate and the court denied the writ petition. Park appealed.

ANALYSIS: In considering whether the exclusionary rule should be applied in DMV administrative hearings, the court reviewed the purpose of the rule which is to deter police misconduct. The court noted that the exclusionary rule has long been a part of constitutional procedural due process in criminal cases but that it is rarely applied in civil cases in the absence of statutory authorization.

The court discussed the need for the *per se* statutes authorizing suspension because the legal process leading to the imposition of a suspension sometimes took years from the time of the arrest. The *per se* statutes expedite the driver's license suspension system to make the suspension process swift. The criminal and administrative proceedings are intended to operate independently of each other and to provide for different dispositions.

The court also referenced cases where there were both criminal and subsequent administrative proceedings. Both in a parole adult authority proceeding and a state bar proceeding, the courts found the societal interests greater than the interest in police misconduct deterrence and therefore the exclusionary rule did not apply in the administrative proceedings. Lastly, the court applied a balancing test between the competing interests. The responsibility of the DMV to get drunk drivers off the road for protection of society at large outweighed the interest in deterring law enforcement officials from maintaining inaccurate stolen vehicle information.

HOLDING: The trial court's judgment that the exclusionary rule does not apply in DMV administrative license suspension proceedings was affirmed.

IMPACT: This holding confirms that administrative proceedings allow evidence that would otherwise be excluded because of the exclusionary rule. Evidence that may have been excluded in a criminal proceeding most likely will not be

excluded in a subsequent administrative proceeding. Specifically, in DMV license suspension proceedings, the interest in public safety is greater than the interest in police misconduct deterrence and therefore the exclusionary rule does not apply.

TEXAS STATE COURT

In re Southwestern Bell Telephone Co., 235 S.W.3d 619 (Tex. 2007).

LAW: Mandamus is an appropriate remedy to correct a trial court's denial of a plea to jurisdiction when there is exclusive jurisdiction in an agency.

FACTS: In 1995, amendments to the Public Utility Regulatory Act ("PURA") and the federal Telecommunications Act on 1996 opened local exchange service to competition. The amendments also provided for incentive regulation which permitted local telephone carriers to opt out of the traditional regulatory framework if they agreed to cap, or freeze, rates for basic services, including switched access rates. In response to these amendments, the Public Utilities Commission ("PUC") promulgated a rule allowing providers to recover their portion of the Texas Universal Service Fund ("TUSF") from retail customers via a Texas Universal Service Surcharge, which was a percentage of the customer's bill.

Customers challenged Southwestern Bell Telephone's ("SWBT") TUSF charge for the basic services in light of the rate freeze agreement. A class action was filed in County District Court and SWBT filed a plea to the jurisdiction, arguing that PUC has exclusive jurisdiction over the core claims, and the trial court denied it. The court of appeals denied mandamus relief. SWBT then sought a writ of mandamus from the Supreme Court of Texas.

ANALYSIS: The court recognized that mandamus relief is an extraordinary remedy to be used only when a court has clearly

abused its discretion, but that the trial court had abused its discretion by denying the plea to the jurisdiction. The court noted that the judicial appropriation of state agency authority would be a clear disruption of the orderly processes of government.

The court rejected the Plaintiff's argument that the PUC does not have jurisdiction because it cannot grant the relief they request as it discussed how the Legislature specifically granted the PUC exclusive original jurisdiction over the business and property of a telecommunications utility. When an agency has exclusive jurisdiction, a party must first exhaust administrative remedies before a trial court has subject matter jurisdiction.

The court also discussed how SWBT's jurisdictional plea was limited to the core claims and not to any new claims asserted after the jurisdictional plea.

HOLDING: The Supreme Court held that PUC has exclusive jurisdiction over the core claims and the trial court abused its discretion in denying SWBT's jurisdictional plea. The writ of mandamus was conditionally granted as to those claims and the trial court was directed to: vacated its January 6, 2004 order denying SWBT's motion to dismiss, to dismiss the core claims for lack of subject matter jurisdiction, and to conduct proceedings consistent with the opinion.

IMPACT: The Texas Supreme Court establishes that denial of a plea of jurisdiction in regards to an agency with exclusive jurisdiction is an abuse of discretion. This abuse therefore makes mandamus an appropriate remedy.

