No. 13-15227

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY and KEVIN LUNNY,
Plaintiff-Appellants,

v.

SALLY JEWELL, in her official capacity as Secretary, U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; U.S. NATIONAL PARK SERVICE; and JONATHAN JARVIS, in his official capacity as Director, U.S. National Park Service,

Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of California
(Hon. Yvonne Gonzales Rogers, Presiding)
District Court Case No. 12-cv-06134-YGR

MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC

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Attorneys for Plaintiff-Appellants

Petitioners Drakes Bay Oyster Company and Kevin Lunny ("Petitioners") respectfully move for leave to file the reply brief attached as Exhibit 1 in support of its Petition for Rehearing En Banc ("Petition").

This motion is made in accordance with Federal Rules of Appellate Procedure ("FRAP") Rule 27. The purpose of the motion, and of the reply brief, is to correct a misstatement made in the "Department of the Interior's Response to DBOC's Petition for Rearing En Banc" filed by Defendant-Appellees ("Defendants"). Petitioners have asked Defendants to correct the misstatement, but Defendants have refused. (Declaration of Peter S. Prows in Support of Reply Brief, Exs. A and B.)

A court order or decision should not be based on a misstatement. (*See United States v. Vanderwerfhorst* (576 F.3d 929, 935-936 (9th Cir. 2009) (criminal sentence based on "false or unreliable" information is a violation of due process).) Defendants have asked this Court to deny the Petition for En Banc Rehearing based on a misstatement. Petitioners should have an opportunity to correct that statement, so that it does not infect this Court's decision on the Petition for En Banc Rehearing.

The motion for leave to file the reply brief should be granted.

DATED: December 30, 2013

Respectfully submitted,
BRISCOE IVESTER & BAZEL LLP

Lawrence S. Bazel

EXHIBIT 1

No. 13-15227

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Attorneys for Plaintiff-Appellants

Courts must have jurisdiction to ensure the integrity of decisions made by federal agencies. On paper, the federal government supports the virtues of integrity, especially scientific integrity. President Obama has promised that "the days of science taking a back seat to ideology are over", and the Departments of Interior and Justice have followed the President's direction by establishing scientific-integrity policies.[1] In this case, however, Defendant-Appellees ("Defendants") have insisted that an agency's false statements are not subject to judicial review. The panel majority accepted Defendants' argument that courts "lack jurisdiction" to review ordinary agency decisions for abuses of discretion, including false statements of fact. (Op. 15.)

Defendants rely on a misstatement of fact in their brief opposing en banc rehearing (their "En Banc Response").[2] This misstatement was first made by Defendants at oral argument. It next appeared in the panel's opinion as part of the foundation for the majority's conclusion on the National Environmental Policy Act ("NEPA") issue. The following two sections explain why the statement was false, and why it is important to en banc rehearing.

[1] http://elips.doi.gov/elips/0/doc/3045/Page1.aspx; http://www.justice.gov/open/doj-scientific-integrity-policy.pdf.

[2] Department of the Interior's Response to DBOC's Petition for Rearing En Banc, ECF Dkt. 93

The Statement

The decision at issue in this case, which was made in November 2012, was "informed" by a "helpful" environmental impact statement ("EIS"), which found that Petitioners' oyster-farm operations were harming harbor seals. (ER 122; SER 58 ("moderate long-term adverse impacts").)[3] In this suit, Petitioners argue that the EIS was invalid because it made false statements about harm to harbor seals. As Petitioners learned in mid-December 2012—two weeks *after* the Secretary made the decision at issue—that Defendants' harbor-seal expert had actually found no evidence that that the oyster farm was disturbing harbor seals (much less that it was causing serious harm to them). (ER 290, ¶ 13.)

In their En Banc Response, Defendants insisted that the Secretary

> was fully aware of scientific disputes surrounding the EIS and therefore did not rely on "the data that was asserted to be flawed." [Op.] at 14.

(En Banc Response at 3.) But at the time he made his decision in November 2012, the Secretary could not have been "fully aware" of the key dispute—whether the EIS falsely asserted that the oyster farm harms harbor seals—because that dispute did not arise until two weeks *after* the Secretary made his decision.

Defendants argue that their statement is not false. (*See* Declaration of Peter Prows, Exs. A and B (correspondence about statement).) Defendants insist that they were simply repeating what the panel's majority had found. (*Id.*, Ex. B at 1,

[3] The use of the area by harbor seals is the *only* natural feature called out in the decision. (ER 118.)

citing Op. 33-34 (Secretary was "well aware of the controversies on the specific topics that Drakes Bay criticizes").) But if the majority found that the Secretary "was fully aware of scientific disputes surrounding the EIS" (En Banc Response at 3), it may have been because Defendants had made this misstatement at oral argument, and then refused to correct it. (*See* ECF Dkt. 64-2 (refusal to correct).) Defendants, in short, made an incorrect statement of fact to the panel, refused to correct it, and then cited the panel decision as evidence of the statement's truth.[4]

Why The Statement Is Important To En Banc Rehearing

During the permitting proceedings at issue in this case, Defendants were criticized by the National Academy of Sciences and their own Solicitor's Office for allowing zealousness to overcome their responsibility to speak the truth. (Petition for Rehearing En Banc, 1-2.) On appeal, Defendants continue this pattern, while insisting that this Court has no jurisdiction over the matter. (Response at 5.) The majority agreed that courts "lack jurisdiction" to consider Defendants' discretionary decisions for abuse of discretion. (Op. 15.) But a federal agency should not be allowed to make false statements, or to use those false statements to boot out the oyster farm, its resident workers, and the families who have lived there for decades. (*See e.g. United States v. Vanderwerfhorst*

[4] Defendants have never offered anything to rebut the opinion of Dr. Goodman that the EIS misrepresented the findings of Defendants' own expert. (ER 199 ¶ 14.) Nor can Defendants deny that the Secretary, in making his decision, was "informed" by the "helpful" but false statements about harbor seals in the EIS. (ER 122.) Because the Secretary's decision is based at least in part on false statements, it should be overturned.

(576 F.3d 929, 935-936 (9th Cir. 2009) (criminal sentence based on "false or unreliable" information is a violation of due process); *United States v. Aurora Lopez-Avila*, 678 F.3d 955, 964-965 (9th Cir. 2012) ("[w]hen a prosecutor steps over the boundaries of proper conduct and into unethical territory, the government has a duty to own up to it and to give assurances that it will not happen again"); *United States v. Olsen*, 2013 U.S. App. LEXIS 24500 at *8 (9th Cir. 2013) (Kozinski, C.J., dissenting from order denying rehearing en banc) (criticizing a prosecutor who misled a court—"nearly everything the district judge understood to be true was false"—and did not correct the court's mistaken understanding).)

The Department of Justice's Scientific and Research Integrity Policy specifies that the department is "entrusted with awesome responsibilities and…must pursue, rely upon and present evidence that is well-founded in fact and veracity." (Policy at 1.) "When science…forms the basis for the Department's litigation position in a civil matter, it is vital that the information relied upon be credible." (*Id*.) This policy confirms what should be beyond dispute: representatives of the United States of America should tell the truth, whether they are making permit decisions or representations to this Court.

This Court must have jurisdiction to ensure that agencies tell the truth.

The Petition for Rehearing En Banc should be granted.

DATED: December 30, 2013

Respectfully submitted,
BRISCOE IVESTER & BAZEL LLP

Lawrence S. Bazel

BRISCOE IVESTER & BAZEL LLP

Peter S. Prows

STOEL RIVES LLP

Ryan R. Waterman

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DECLARATION OF PETER PROWS IN SUPPORT OF MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC

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Attorneys for Plaintiff-Appellants

I, Peter Prows, declare:

1. I am a partner with the law firm Briscoe Ivester & Bazel LLP, which represents Petitioners in this action. I am making this declaration in support of Petitioners' Motion For Leave To File Reply Brief In Support Of Petition For Rehearing En Banc. I have personal knowledge of the following facts and if called as a witness could and would competently testify to them under oath.

2. Attached as **Exhibit A** is an accurate copy of a letter I sent counsel for Defendants on December 5, 2013.

3. Attached as **Exhibit B** is an accurate copy of a response letter I received from counsel for Defendants on December 9, 2013.

I declare under penalty of perjury under the laws of the United States that the statements in this declaration are true, and that this declaration was executed on December 30, 2013.

/s/ Peter Prows
PETER PROWS

EXHIBIT A

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5 December 2013

By Email

Mr. David Gunter
U.S. Department of Justice
Environment and Natural Resources Division
Appellate Section
P.O. Box 7415
Washington, DC 20044

Subject: Drakes Bay Oyster Company et al. v. Sally Jewell et al.

Dear Mr. Gunter:

You continue to make false statements about harbor seals to the Ninth Circuit Court of Appeals. In the response brief to Drakes Bay's petition for rehearing en banc, you wrote that the Secretary was "fully aware of scientific disputes surrounding the EIS" when he made his decision. (Dkt. #93 at 3.) But the Secretary could not have been fully aware of those disputes for the simple reason that Drakes Bay did not discover that the EIS's conclusions about harbor seal disturbances were flawed until shortly *after* the Secretary made his decision.

The EIS was released on 20 November 2012. It concluded that granting Drakes Bay the permit would cause "long-term moderate adverse impacts" to harbor seals. The Secretary decided to deny the permit on 29 November 2012, and in so doing he cited the EIS for his conclusion that removing the oyster farm "would result in long-term beneficial impacts to the estero's natural environment." (ER 122.) In December 2012, however, Dr. Goodman learned that the EIS misrepresented the findings of the Park Service's harbor-seal expert, who had actually found "no evidence" of harm to harbor seals caused by the oyster farm. (ER 290 ¶ 13.) Dr. Goodman's conclusion has gone completely unrebutted in this litigation. (ER 199 ¶ 14; *see also* Dkt. #64-1 at 4-5 (noting scientific misconduct complaint, which remains pending to this day).)

At oral argument before the Ninth Circuit panel, you similarly asserted that Defendants did not violate the law because "the Secretary responded" to Drakes Bay's criticisms of the EIS's conclusions about harbor seals. As we wrote you at the time, the Secretary could not have responded to those criticisms because Drakes Bay first made them only *after* the Secretary made his decision. (Dkt. #64-1 at 1-4.) In response, you acknowledged that you had misspoken. (*See* Dkt. #64-2 at 2 ("the Court will understand that, by referring to the final EIS, I intended to answer [Drakes Bay's counsel's] claim that the Park Service failed to respond to comments on the draft EIS").) But now your brief resuscitates the false statement made at oral argument.

False statements to the Ninth Circuit should be corrected promptly. Please let me know whether you consent to our filing a reply to your response brief to correct your misstatements, or whether you will require us to file a motion for leave to file that reply. I would appreciate your response by Monday 9 December.

Thank you for your cooperation. Please call me with any questions.

Sincerely,

BRISCOE IVESTER & BAZEL LLP

/s/ Peter Prows

Peter S. Prows

EXHIBIT B

U.S. Department of Justice

Environment and Natural Resources Division

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December 9, 2013

Mr. Peter Prows
Briscoe, Ivester & Bazel LLP
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San Francisco, CA 94104

Re: Drakes Bay Oyster Co. v. Jewell, No. 13-15227 (9th Cir.)

Dear Peter:

I have received your letter of December 5, in which you once again accuse me of professional misconduct before the Ninth Circuit. For two reasons, I do not consent to your proposal to file a reply brief raising this issue.

First, the Department's opposition to DBOC's rehearing petition does not contain any false statement. In the paragraph you cite, the Department's opposition describes the Secretary's own statements in the Decision document. Opposition at 3. It also cited to the portion of the panel opinion in which the panel described that same Decision document. *Id.* (citing Op. at 14). At that time, the Secretary was "fully aware of scientific disputes surrounding the EIS and therefore did not rely on 'the data that was asserted to be flawed.'" Opposition at 3. Indeed, the panel majority later stated that "the Secretary was well aware of the controversies on the specific topics that Drakes Bay criticizes and his statement was unambiguous that they did not carry weight in his decision." Op. at 34. These descriptions of what the Secretary said at the time of his Decision do not become false just because DBOC *later* raised new complaints of scientific misconduct.

Second, you claim that you need to file a reply brief in order to explain that the Secretary was not aware of disputed harbor seal data at the time he made his Decision. But you have repeatedly made this point already:

- DBOC's reply brief before the panel cited harbor seal data to rebut the Secretary's statement that he had not relied on the "data that was asserted to be flawed." DBOC Reply at 20-21.
- At oral argument, DBOC's former counsel raised this point at the very beginning of her rebuttal. *See* video at 44:42.
- You clarified the record on May 28, when you filed a letter to the court enclosing our correspondence about this issue.
- DBOC's petition for rehearing argued that the panel erred when it described the Secretary's decision in nearly identical terms as the Department did in its opposition. *See* Petition at 17 n.11 (citing Op. at 34).
- You personally signed and filed the 18-page *amicus* brief of Dr. Corey Goodman, which focused on the Secretary's use of scientific data and raised this specific issue in detail. *See* Goodman Br. at 10-14.

Even if you sincerely believe the government's opposition contained a false statement, you have had five different opportunities – three before the panel, and two before the *en banc* court – to make DBOC's views about this issue clear.

In short, there is no reason for you to file yet another brief. Instead, the full Ninth Circuit should be allowed to reach a decision based on the extensive arguments that DBOC and its allies have already made.

Sincerely,

/s/ David Gunter

9th Circuit Case Number(s) 13-15227

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) _____.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) _____

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Dec 30, 2013 .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Catherine Rucker

Signature (use "s/" format) s/ Peter Prows