No. 13-15227

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,

Plaintiffs-Appellants,

v.

SALLY JEWELL, ET AL.,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Northern District of California,
No. 4:12-CV-6134-YGR (Hon. Yvonne Gonzalez Rogers)

DEPARTMENT OF THE INTERIOR'S OPPOSITION TO DBOC'S MOTION TO STAY THE MANDATE

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This Court previously granted an injunction pending appeal, allowing Drakes Bay Oyster Company ("DBOC") to continue operating its commercial oyster business within the designated wilderness of Drakes Estero while the Court considered the merits of DBOC's claims. Those claims, challenging the district court's denial of a preliminary injunction, have now been decisively rejected by this Court: The merits panel held that DBOC was not entitled to a preliminary injunction, and DBOC's petition for rehearing *en banc* failed to persuade even a single judge to call for a vote of the full court. DBOC now seeks to stay the Court's decision so that it may continue running its business on public property within a National Park, without a permit, while it petitions the Supreme Court to grant certiorari. DBOC's request depends largely upon the same misreading of the panel opinion that it presented in its petition for rehearing *en banc*. The Court should deny DBOC's motion – and should allow its mandate to issue – because it is highly unlikely that the Supreme Court will grant certiorari or reverse this Court's decision.

I. STANDARD OF REVIEW

Rule 41 requires a party moving for a stay of the mandate pending a petition for certiorari to demonstrate that "the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). This relief is not granted "routinely" or "as a matter of course." Circuit Rule 41-1; Advisory Committee Note. Instead, as DBOC admits, there must be a "reasonable probability that four Members of the [Supreme] Court would consider the underlying

issue sufficiently meritorious for a grant of certiorari" *and* that there is "a significant possibility of reversal." *See Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983); DBOC Mot. at 2. Thus, while a motion for a stay of the mandate will be denied if it is "frivolous or filed merely for delay," *see* Circuit Rule 41-1, it may also be denied because it depends upon a petition for certiorari that is not likely to succeed. That is the case here.

II. DBOC'S PETITION FOR CERTIORARI IS NOT LIKELY TO SUCCEED.

DBOC's petition for certiorari is not likely to succeed because the panel's opinion does not conflict with the precedent of other Courts of Appeals or of the Supreme Court. The jurisdictional question in this case was a narrow one, confined to the interpretation of one statute that by its own terms has no precedential value for any other agency decision, *see* Pub. L. No. 111-88, s. 124, 123 Stat. 2904, 2932 (2009) ("Section 124") – and this Court decided that question in DBOC's favor. On the merits, the Court did not decide the case based upon any broad holding about NEPA or the APA, but rather conducted a record-bound review of the Secretary of the Interior's decision with respect to a single special use permit. For these reasons, the Court has already denied *en banc* review, implicitly finding that the case does not warrant further review based on conflict with Supreme Court precedent or based on any question of exceptional importance. *See* Fed. R. App. P. 35(b)(1).

The Court's decision in this case included a dissent from Judge Watford, who disagreed with the panel majority over the scope and effect of the "notwithstanding"

clause in Section 124. Perhaps recognizing that the Supreme Court is not likely to grant certiorari to consider the interpretation of a statute that has no application beyond this specific situation, DBOC does not attempt to argue that this difference of opinion shows that there is a question here worthy of certiorari.

Instead, DBOC attempts to identify three areas in which it alleges the Court's opinion conflicts with the precedent of another Court of Appeals or the Supreme Court. However, no such conflicts exist, and none of these issues is likely to draw four votes for certiorari from the Supreme Court.

A. The panel opinion does not create any jurisdictional issue that is worthy of certiorari.

DBOC first claims that the Court applied an unlawfully narrow scope of APA jurisdiction. *See* DBOC Mot. at 3-4. The Supreme Court will not grant certiorari on this issue because there is no circuit split, and more importantly, this Court resolved the jurisdictional question in DBOC's favor.

The APA does not grant jurisdiction to review final agency action that is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Supreme Court and this Court have long held that this exception to APA jurisdiction precludes review of an agency action if there is "no law to apply." *See Heckler v. Chaney*, 470 U.S. 821, 830-31 (1985) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)); *CPATH v. Office of U.S. Trade Rep.*, 540 F.3d 940, 944-45 (9th Cir. 2008).

In *Ness Investment Corp. v. U.S. Dep't of Agriculture*, 512 F.2d 706, 715 (9th Cir.

1975), this Court held that there was "no law to apply" to the Forest Service's refusal to issue a special use permit. The Secretary urged this Court to adopt that view here, arguing that Section 124 removed any constraints that may otherwise have been "law to apply" to the Secretary's decision regarding a special use permit for DBOC. *See* Amended Op. at 16. But the Court rejected that interpretation of Section 124, holding that it *does* have jurisdiction to review the Secretary's decision for any violation of "constitutional, statutory, regulatory, or other legal mandates or restrictions." *Id.* (quoting *Ness*, 512 F.2d at 715).[1] The Court then reviewed the Secretary's decision for consistency with Section 124 and the 1976 Point Reyes statute, *id.* at 22-27; with other statutes concerning wilderness and Point Reyes, *id.* at 27-29; and with NEPA and other "applicable procedural constraints," *id.* at 16, 29-34.

It is true that this Court reached a different conclusion in *Ness* than the Tenth Circuit reached in *Sabin v. Butz*, 515 F.2d 1061, 1065 (10th Cir. 1975). The Ninth Circuit in *Ness* held that there was (at that time) "no law to apply" to the decision to deny a special use permit, and the Tenth Circuit in *Sabin* held that there was. There is no longer any circuit split on this point, as the Ninth Circuit has since recognized that Forest Service regulations, promulgated after *Ness*, constitute "law to apply." *See KOLA, Inc. v. United States*, 882 F.2d 361, 363-64 (9th Cir. 1989).

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[1] For this reason, the Court's opinion also does not conflict with the rule that APA jurisdiction is precluded only by clear and convincing evidence of Congressional intent. *See* DBOC Mot. at 4 (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S 667, 671 (1986)).

More importantly, in the present case, the Court simply did not apply that particular holding of *Ness*. Instead, the Court held (to use the phrase from *Sabin*) that "there is law to apply and substantial issues raised as to whether the agency action was arbitrary or unlawful." *Sabin*, 515 F.2d at 1065; *see* Amended Op. at 18. This court went on to consider those issues, as DBOC requested, and resolved them. Even if the Supreme Court were interested in considering any conflict between *Ness* and *Sabin*, this case would not offer that opportunity.

DBOC also strains to identify a conflict with Supreme Court precedent in the Court's jurisdictional holding. *See* DBOC Mot. at 4. The Court's opinion correctly applied, and did not create any conflict with, Supreme Court cases describing the scope of judicial review under the APA. For example, the Court applied the "narrow" standard of review that the Supreme Court described in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009), and recognized that it must not "substitute its judgment" for the Secretary's judgment. *See* Amended Op. at 25, 30 n.10. Once the Court disposed of the Secretary's jurisdictional objection, it engaged in a straightforward application of APA review that is unlikely to draw the attention of the Supreme Court.

B. The panel opinion does not conflict with any other Court of Appeals on the applicability of NEPA.

DBOC's second proposed point seeks review of an issue that the Court did not decide at all: whether NEPA applies to actions that "prevent human interference with the environment." *See* DBOC Mot. at 4; Amended Op. at 31-32.

DBOC claims that the panel here "relied on and extended" the Ninth Circuit case of *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995), in which this Court held that "NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment." *See* Amended Op. at 31. It is true that, before the panel, the Secretary argued that the Secretary's decision here was exempt from NEPA. Citing *Douglas County*, the panel majority noted that not all "environmental conservation efforts" trigger NEPA review, *id.* at 31-32; and that the short-term harms associated with returning Drakes Estero to its natural state do not by themselves "significantly affect" the environment within the meaning of NEPA, *id.* at 32. Based on that review, the panel said it was "skeptical" that NEPA applied to the Secretary's decision. *Id.* at 31.

However, the panel *did not resolve* that question, nor did it apply or extend *Douglas County* to avoid NEPA review. Instead, as DBOC requested, the panel reviewed the Secretary's decision for compliance with NEPA. *Id.* at 33-34. Based upon that review, the panel held that "the Secretary conducted an adequate NEPA review process." *Id.* at 32. DBOC was not entitled to a preliminary injunction

because it was "not likely to succeed in showing that the final EIS was inadequate, even assuming NEPA compliance was required." *Id.* at 34.

DBOC argues that in *Humane Society v. Locke*, 626 F.3d 1040, 1056 n.9 (9th Cir. 2010), this Court acknowledged a circuit split among *other* Courts of Appeals on the question whether NEPA applies to actions that have only beneficial effects, without itself deciding the question. *See* DBOC Mot. at 5. According to *Humane Society*, the Sixth Circuit is the outlier that differs from authority in other courts. *See* 626 F.3d at 1056 & n.9. Even if the Supreme Court sought to resolve this conflict, it is exceptionally unlikely that it would choose to do so in a case in which the Ninth Circuit had directly stated that it "need not resolve" this issue and instead decided the case on other grounds.

C. The panel opinion does not conflict with any other Court of Appeals on the rule of prejudicial error.

Finally, the Court in this case applied the rule of prejudicial error, holding that "any claimed deficiencies" in the NEPA process were "without consequence." Amended Op. at 33. The Court's authority to excuse error that does not cause prejudice comes from the APA itself and is recognized by the Supreme Court. *See* 5 U.S.C. s. 706; *see Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (cited at Amended Op. at 33). DBOC claims that the Court incorrectly applied that rule here. *See* DBOC Mot. at 5.

The alleged error that is the focus of DBOC's argument is its claim that "the final EIS was based on flawed science" and that the comment period was too short for it to "fully air its critique." The panel held that any error with respect to scientific conclusions was not prejudicial because the Secretary did not rely on those conclusions. Amended Op. at 34-35. At the time of his Decision Memorandum, the Secretary stated that he had considered DBOC's critique of the Environmental Impact Statement and that he had not relied "on the data that was asserted to be flawed." *Id.* at 34. Instead, the Secretary stated that his decision was based primarily on policy considerations, *id.* at 25, and that "the specific topics that Drakes Bay criticized . . . did not carry weight in his decision." *Id.* at 35.

This does not conflict with the D.C. Circuit's decision in *Gerber v. Norton*, 294 F.3d 173, 182-84 (D.C. Cir. 2002) (*see* DBOC Mot. at 5-6). In that case, the D.C. Circuit found that the Fish and Wildlife Service had committed an error in authorizing the take of an endangered squirrel, and considered whether that error was prejudicial. The Service argued that "its procedural error was harmless because, after [plaintiffs] filed their complaint and elaborated on their concerns, the agency nonetheless concluded that it would not have changed its decision had it known of those concerns." *Id.* at 183. The D.C. Circuit called this a "post hoc rationalization," and held that it could only properly consider "the regulatory rationale actually offered by the agency" at the time of its decision. *Id.* at 184.

This holding is fully consistent with the Court's decision in the present case. The Secretary's statement that he did not consider disputed scientific data is not a post hoc rationalization offered after litigation had begun, but rather a statement *in the Decision itself* about what factors he considered important and unimportant to that decision. This contemporaneous statement of the Secretary's rationale would be acceptable under the D.C. Circuit's rule in *Gerber*, as it was acceptable to the Court here. This issue therefore does not present any legal question that the Supreme Court is likely to consider worthy of review.

III. SOME EQUITABLE FACTORS WEIGH AGAINST GRANTING A STAY OF THE MANDATE.

The Secretary does not contest that allowing the mandate to issue would adversely affect DBOC and its employees. However, the workers and their families that live on the site will not be "kicked out." *See* DBOC Mot. at 1, 7. The Secretary has informed the employees who live on site that they can apply for relocation assistance, including rental assistance, and continue to reside there while the Park Service works to find comparable local housing. DBOC and its supporting *amici* have also argued in this case that DBOC is exceptionally important to California's food industry, *see, e.g.*, DBOC Mot. at 7 & n.5, undermining its claim that it would not be able to regain its customers in the unlikely event that the Supreme Court granted certiorari and reversed.

Other equitable factors weigh against granting a stay. The record does not state that ending DBOC's commercial operations would have "significant adverse effects on water quality, eelgrass, fish, birds, harbor seals, and special status species." DBOC Mot. at 4 n.2. Instead, the cited portions of the EIS indicate that the activity associated with removing DBOC's equipment from Drakes Estero would have "short-term minor adverse impacts on eelgrass," EIS at liv (SER 53); an "undetectable . . . and therefore negligible" impact on the benthic wildlife community, *id.* at lv-lvi (SER 54-55), "short-term minor adverse impacts on fish species," *id.* at lviii (SER 57); "short-term minor adverse impacts" to harbor seals, *id.* at lix (SER 58); "short term and minor" adverse impacts on bird species, *id.* at lxi (SER 60); "short-term minor adverse impacts" to special-status fish species, *id.* at lxiii (SER 62); and "a short-term minor adverse impact on water quality," *id.* at lxvii (SER 66). Moreover, in the same discussions, the Park Service repeatedly identified "long-term beneficial impacts" to the decision not to issue DBOC a new special use permit. Those long-term beneficial impacts cannot begin until the mandate issues, ending this Court's present injunction.

In addition, the Park Service closes Drakes Estero each year from March 1 to June 30 to protect harbor seals during pupping season, a closure that extends even to canoes and kayaks. A stay of the mandate here would allow DBOC to continue operating in the Estero using motorboats and other equipment for at least half of that four-month season. Although DBOC has disputed the effect of its operations on

harbor seals, the Park Service's interest in protecting harbor seals in Drakes Estero during pupping season is an equitable factor that the Court should consider.

Finally, equity compels the Court to recognize that DBOC is currently running its business in the public lands of a National Park, using the designated wilderness of Drakes Estero, without any permit from the Park Service. DBOC has been doing so since November 30, 2012, when its Reservation of Use and Occupancy and its previous special use permit expired according to the terms that DBOC had accepted. While DBOC's operations continue, Point Reyes National Seashore cannot provide its millions of visitors with the wilderness experience in Drakes Estero that the Secretary envisioned.

Even if an injunction pending appeal was appropriate to maintain the status quo when the Ninth Circuit had yet to consider the potential merits of DBOC's arguments, it has now fully heard and rejected those arguments. DBOC may not rely on the remote possibility of Supreme Court review as a justification to keep doing business in Point Reyes National Seashore until the last possible minute.

CONCLUSION

For the foregoing reasons, the Court should deny DBOC's motion to stay the mandate pending a petition for certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 27, 2014, I filed the foregoing Opposition using the Court's CM/ECF system. All participants in this case are registered to receive service with that system and will receive a copy of this Opposition upon its filing.

/s/ *David Gunter*
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