

No. 13-1244

---

In the  
**Supreme Court of the United States**

—◆—  
DRAKES BAY OYSTER COMPANY  
and KEVIN LUNNY,

*Petitioners,*

v.

SALLY JEWELL, Secretary of the  
United States Department of the Interior, et al.,

*Respondents.*

—◆—  
**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit**

—◆—  
**BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION AND  
CALIFORNIA CATTLEMEN'S ASSOCIATION  
IN SUPPORT OF PETITIONERS**

—◆—  
DAMIEN M. SCHIFF

\*ANTHONY L. FRANÇOIS

*\*Counsel of Record*

Pacific Legal Foundation

930 G Street

Sacramento, California 95814

Telephone: (916) 419-7111

Facsimile: (916) 419-7747

E-mail: [dms@pacificlegal.org](mailto:dms@pacificlegal.org)

E-mail: [alf@pacificlegal.org](mailto:alf@pacificlegal.org)

*Counsel for Amici Curiae*

*Pacific Legal Foundation and*

*California Cattlemen's Association*

---

## QUESTIONS PRESENTED

1. Whether the federal courts lack jurisdiction under the Administrative Procedure Act to review an agency action that is arbitrary and capricious or an abuse of discretion when the statute authorizing the action does not impose specific requirements governing the exercise of discretion.

2. Whether federal agencies can evade review of their actions under the National Environmental Policy Act by designating their actions as “conservation efforts,” when the record shows that the action will cause significant adverse environmental effects.

3. Whether an agency commits prejudicial error when it makes materially false statements in an environmental impact statement, and then asserts that it would have made the same decision even if the false statements had been corrected.

**TABLE OF CONTENTS**

	<b>Page</b>
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
INTEREST OF AMICI CURIAE .....	1
INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION .....	3
REASONS FOR GRANTING THE PETITION ....	6
I. Bureau grazing permit decisions regulate a predominant use of over 150 million acres of the nation’s federal lands, almost all of which fall within the Ninth or Tenth Circuits. ....	6
II. The Court should grant the Petition because the Ninth and Tenth Circuits are split on two legal standards for grazing permit renewals. ....	9
A. The Ninth Circuit holds that a decision not to renew a natural resource permit is exempt from NEPA if the agency characterizes the decision as a conservation effort, while the Tenth Circuit rejects precisely such an exemption. ....	9

**TABLE OF CONTENTS—Continued**

	<b>Page</b>
B. The Bureau cannot arbitrarily or capriciously refuse to renew a grazing permit without answering to the federal courts under the Administrative Procedure Act in the Tenth Circuit, but it can refuse renewals with impunity in the Ninth. . .	14
CONCLUSION .....	17

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>Cases</b>	
<i>Baca v. King</i> , 92 F.3d 1031 (10th Cir. 1996) . . .	15-16
<i>Cape Hatteras Access Pres. Alliance v. Dep't of Interior</i> , 344 F. Supp. 2d 108 (D.D.C. 2004) . . .	12
<i>Catron County Bd. of Comm'rs, New Mexico v. U.S. Fish &amp; Wildlife Serv.</i> , 75 F.3d 1429 (10th Cir. 1996) . . . . .	5, 11-13
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971) . . . . .	14-15
<i>Diamond Ring Ranch, Inc. v. Morton</i> , 531 F.2d 1397 (10th Cir. 1976) . . . . .	4, 15-16
<i>Douglas County v. Babbitt</i> , 48 F.3d 1495 (9th Cir. 1995) . . . . .	5, 10-13
<i>Drakes Bay Oyster Co v. Jewell</i> , No. 13-15227, 2014 WL 114699 (9th Cir. Jan. 14, 2014) . . . . .	3-5, 10-11, 14, 16
<i>In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation</i> , 818 F. Supp. 2d 214 (D.D.C. 2011) . . . . .	12
<i>Merrell v. Thomas</i> , 807 F.2d 776 (9th Cir. 1986) . . .	10
<i>Middle Rio Grande Conservancy Dist. v. Norton</i> , 294 F.3d 1220 (10th Cir. 2002) . . . . .	12
<i>Mollohan v. Gray</i> , 413 F.2d 349 (9th Cir. 1969) . . . . .	4, 14-15
<i>Ness Inv. Corp v. USDA., Forest Serv.</i> , 512 F.2d 706 (9th Cir. 1975) . . . . .	4, 14

**TABLE OF AUTHORITIES—Continued**

	<b>Page</b>
<i>Ness Inv. Corp v. USDA, Forest Service</i> , 360 F. Supp. 127 (D. Ariz. 1973) . . . . .	15-16
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006) . . . . .	1
<i>Sabin v. Butz</i> , 515 F.2d 1061 (10th Cir. 1975) . . . . .	15-16
<i>Sackett v. E.P.A.</i> , 132 S. Ct. 1367 (2012) . . . . .	1
<i>San Luis &amp; Delta-Mendota Water Authority v.</i> <i>Jewell</i> , No. 11-15871, 2014 WL 975130 (9th Cir. Mar. 13, 2014) . . . . .	10
<i>Solid Waste Agency of Northern Cook County v.</i> <i>U.S. Army Corps of Engineers</i> , 531 U.S. 159 (2001) . . . . .	1
<i>Strickland v. Morton</i> , 519 F.2d 467 (9th Cir. 1975) . . . . .	14
<i>Utah Shared Access Alliance v. Carpenter</i> , 463 F.3d 1125 (10th Cir. 2006) . . . . .	12
<i>Utahns for Better Transp. v. United States Dep't</i> <i>of Transp.</i> , 305 F.3d 1152 (10th Cir. 2002) . . . . .	13

**Rules**

Sup. Ct. R. 37.2(a) . . . . .	1
Sup. Ct. R. 37.6 . . . . .	1

**Statutes**

5 U.S.C. § 701(a)(2) . . . . .	14
43 U.S.C. § 315b . . . . .	4, 15
Pub. L. No. 111-88, 123 Stat. 2904 (2009) . . . . .	3, 15

**TABLE OF AUTHORITIES—Continued**  
**Page**

**Miscellaneous**

- Buccino, Sharon, *NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*,  
12 N.Y.U. Env'tl. L.J. 50 (2003) . . . . . 13
- Bureau website, *available at*  
<http://www.blm.gov/wo/st/en/prog/grazing.html>  
(last visited May 12, 2014) . . . . . 6
- Public Lands Council, *Public Lands Grazing, An Integral Segment of the U.S. Livestock Industry*,  
*available at* [http://publiclandscouncil.org/  
CMDocs/PublicLandsCouncil/New%20Website/  
Public%20Lands%20Ranching%20Overview.pdf](http://publiclandscouncil.org/CMDocs/PublicLandsCouncil/New%20Website/Public%20Lands%20Ranching%20Overview.pdf)  
(last visited May 12, 2014) . . . . . 9
- U.S. Dep't of Interior, Bureau of Land Mgmt.,  
*Fiscal Year 2012 Rangeland Inventory, Monitoring, and Evaluation Report*, *available at*  
[http://www.blm.gov/pgdata/etc/  
medialib/blm/wo/Planning\\_and\\_Renewable\\_Res  
ources/rangeland.Par.30896.File.dat/Rangeland  
2012.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/rangeland.Par.30896.File.dat/Rangeland2012.pdf) (last visited May 12, 2014) . . . . . 7
- U.S. General Services Administration, *Federal Real Property Profile as of September 30, 2004*,  
Table 16, at 18-19, *available at* [http://www.gsa.  
gov/graphics/ogp/Annual\\_Report\\_\\_FY2004\\_Fina  
l\\_R2M-n11\\_OZ5RDZ-i34K-pR.pdf](http://www.gsa.gov/graphics/ogp/Annual_Report__FY2004_Final_R2M-n11_OZ5RDZ-i34K-pR.pdf)  
(last visited May 12, 2014) . . . . . 7-8

## INTEREST OF AMICI CURIAE

Pursuant to Rule 37.2(a), Pacific Legal Foundation (PLF) and California Cattlemen's Association (CCA) respectfully submit this brief amicus curiae in support of the Petitioners.<sup>1</sup>

PLF is the most experienced public interest legal organization advancing and defending constitutional rights and limitations on government in the area of environmental law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving access to federal courts and judicial oversight of agency action. *See, e.g., Sackett v. E.P.A.*, 132 S. Ct. 1367 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

CCA is a mutual benefit corporation organized under California law in 1923 as an "agricultural and horticultural, nonprofit, cooperative association" to promote the interests of the industry. Membership in the CCA is open to any person or entity engaged in breeding, producing, maturing, or feeding cattle, or who leases land for cattle production. The CCA is the

---

<sup>1</sup> Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.



predominant organization of cattle grazers in California and, acting in conjunction with its affiliated local organizations, it endeavors to promote and defend the interests of the livestock industry. CCA has several members who ranch within the boundaries of the Point Reyes National Seashore under reservations of use and occupancy and/or special use permits from the National Park Service, and these members have a strong interest in ensuring that the National Park Service complies with applicable laws when acting on future renewals of their permits. CCA also has many members who hold federally issued grazing permits in many areas of California, and the decision below impacts how the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA) apply to agency actions on those permits.

CCA members and other federal grazing permit holders in the Ninth Circuit currently lack access to the federal courts equal to that enjoyed by identically situated federal grazing permit holders in the Tenth Circuit. And, under the decision below, federal agencies are exempt from NEPA when they refuse to renew CCA members' grazing permits in the Ninth Circuit, while in the Tenth Circuit the same agencies are subject to NEPA.

**INTRODUCTION AND  
SUMMARY OF REASONS  
FOR GRANTING THE PETITION**

The Petition presents the question whether federal courts lack jurisdiction under the APA to review an agency action for abuse of discretion when the authorizing statute for the action lacks specific limitations on the scope of the agency's discretion. Petition at 1. The Petition identifies a broad split among various federal circuit courts on this question, including several specific examples of cases in which different circuits have given conflicting answers to this question in the context of the same class of agency decisions. *Id.* at 14-18.

One of the circuit splits listed as a basis for granting the Petition is between the Ninth and Tenth Circuits on the issue of APA review of federal grazing permit decisions. *Id.* at 19. This brief provides additional detail on this issue's importance to thousands of ranching families across the nation, and why the Court should grant the Petition to resolve this circuit split affecting tens of millions of acres of federal grazing lands.

The decision below involves the Interior Secretary's refusal to renew a permit for an existing oyster farm in a national seashore under section 124 of Public Law 111-88, 123 Stat. 2904, 2932 (2009) (Section 124), and the scope of judicial review under that statute. *Drakes Bay Oyster Co v. Jewell*, No. 13-15227, 2014 WL 114699, at \*1 (9th Cir. Jan. 14, 2014). The questions presented in the Petition are important far beyond this one permit or statute. Thousands of ranchers graze livestock on tens of millions of acres of federal land under renewable federal grazing permits

in the states comprising the Ninth and Tenth Circuits. The Bureau of Land Management (Bureau) renews these permits under the Taylor Grazing Act, 43 U.S.C. § 315b, which affords the Bureau the same broad discretion that Section 124 affords the Interior Secretary (Secretary).

*Drakes Bay* entrenches prior Ninth Circuit case law holding that Bureau grazing permit decisions are not subject to APA review. *Drakes Bay* relies on *Ness Inv. Corp v. USDA, Forest Serv.*, 512 F.2d 706 (9th Cir. 1975), in holding that the Secretary’s refusal to renew the oyster farm’s permit is not subject to APA review. *Drakes Bay*, 2014 WL 114699, at \*1, 6. *Ness* in turn relies on the Ninth Circuit’s decision in *Mollohan v. Gray*, 413 F.2d 349, 352 (9th Cir. 1969), which holds that decisions on grazing permits under the Taylor Grazing Act are not subject to judicial review under the APA. *See Ness*, 512 F.2d at 716 (“we share the view of the panel[] which decided *Mollohan*”). The Ninth Circuit conflicts with the Tenth Circuit on judicial review of grazing permit decisions under the APA. *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1406 (10th Cir. 1976) (“The Taylor Grazing Act does not fall within the limited class of non-reviewability.”). Since almost all federal lands managed under grazing permits are in the Ninth or Tenth Circuits, this split divides virtually the entire relevant part of the country for purposes of federal grazing management. Granting the Petition will provide this Court the ability to resolve much more than whether the Secretary’s refusal to renew the oyster farm’s permit is subject to APA review; it will also resolve the split between the Ninth and Tenth Circuits on whether renewal decisions on more than

18,000 grazing permits, regulating 155-million acres of federal land, are subject to APA review.

The decision below also holds that the Secretary's refusal to renew a permit for a pre-existing activity is not subject to NEPA if the refusal is characterized as a "conservation effort," relying on the Ninth Circuit's holding in *Douglas County v. Babbitt*, 48 F.3d 1495, 1505-06 (9th Cir. 1995) (critical habitat designation under the Endangered Species Act not subject to NEPA because "ESA furthers the goals of NEPA"). *Drakes Bay*, 2014 WL 114699, at \*12. The Ninth Circuit also conflicts with the Tenth Circuit on the application of NEPA to agency actions that purport to benefit the environment. *Catron County Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996) (environmental conservation purpose does not exempt federal action from NEPA). Because *Drakes Bay* extends *Douglas County* to permit nonrenewals, it is precedent that NEPA does not apply to refusals to renew federal grazing permits in the Ninth Circuit. As such, *Drakes Bay* also conflicts with the Tenth Circuit's decision in *Catron County*.

The Court should grant the Petition to resolve the splits between the Ninth and Tenth Circuits on whether a permit renewal decision is subject to APA review, and whether NEPA applies to a refusal to renew a permit if the agency characterizes the refusal as environmentally beneficial.

**REASONS FOR  
GRANTING THE PETITION**

**I**

**Bureau grazing permit decisions  
regulate a predominant use of over  
150 million acres of the nation's  
federal lands, almost all of which fall  
within the Ninth or Tenth Circuits.**

Livestock grazing under Bureau permits is one of the major uses of federal land in eleven western states comprising much of the Ninth and Tenth Circuits. The Bureau manages roughly 245-million acres of federal land. Of those acres, 155 million—or approximately 63%—are used for livestock grazing under more than 18,000 Bureau permits covering 21,000 separate grazing allotments.<sup>2</sup>

As the table below shows, almost all of these allotments are in either the Ninth or Tenth Circuits. While the Ninth Circuit has appellate jurisdiction over about two-thirds of the federal grazing acreage, the number of grazing permits is fairly evenly divided between the two circuits.

---

<sup>2</sup> Bureau website, *available at* <http://www.blm.gov/wo/st/en/prog/grazing.html> (last visited May 12, 2014).

<b>Circuit/ State</b>	<b>Bureau Allot- ments<sup>3</sup></b>	<b>Allot- ment Acres (millions)</b>	<b>% federally owned land<sup>4</sup></b>
<b>Ninth Circuit</b>			
California	681	7.2	45.30%
Oregon/ Washington	2,028	13.6	53.11%/ 30.33%
Arizona	820	11.4	48.06%
Nevada	798	43.4	84.48%
Idaho	2,175	11.5	50.19%

---

<sup>3</sup> The number of allotments and allotment acreage from the Bureau's 2012 Rangeland Inventory, Monitoring, and Evaluation Report, Table 6, *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning\\_and\\_Renewable\\_Resources/rangeland.Par.30896.File.dat/Rangeland2012.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/rangeland.Par.30896.File.dat/Rangeland2012.pdf) (last visited May 12, 2014).

<sup>4</sup> Percentage of each state which is federally owned, from U.S. General Services Administration, *Federal Real Property Profile as of September 30, 2004*, Table 16, at 18-19, *available at* [http://www.gsa.gov/graphics/ogp/Annual\\_Report\\_FY2004\\_Final\\_R2M-n11\\_0Z5RDZ-i34K-pR.pdf](http://www.gsa.gov/graphics/ogp/Annual_Report_FY2004_Final_R2M-n11_0Z5RDZ-i34K-pR.pdf) (last visited May 12, 2014).

Montana/ Dakotas <sup>5</sup>	5,222	8.2	29.92%/ 4.49%
Total Ninth Circuit	11,724	95.3	48.58%
<b>Tenth Circuit</b>			
New Mexico	2,282	12.8	41.77%
Utah	1,393	21.6	57.45%
Wyoming	3,531	17.6	42.33%
Colorado	2,416	7.9	36.63%
Total Tenth Circuit	9,622	59.9	43.77%

This data shows that about half of the land in the western United States is federally owned. According to the U.S. General Services Administration, grazing is the second most predominant specific use of federal lands,<sup>6</sup> and the five states with the largest federal land holdings are all in the Ninth Circuit. According to the Public Lands Council, an organization of state and national cattle, sheep, and grassland associations,

---

<sup>5</sup> Montana, in the Ninth Circuit, and the Dakotas, in the Eighth Circuit, are managed by one Bureau state office, and data on allotments and acres exclusively for Montana are not readily available. The low percentage of federal land in the Dakotas suggests that most of the allotments and grazing acres shown are in Montana. The totals for the Ninth Circuit states include the combined allotment and allotment acres figures for Montana and the Dakotas, but do not include the Dakotas in the total percentage of federal land owned in the Ninth Circuit states.

<sup>6</sup> *Federal Real Property Profile 2004, supra*, Table 14, at 16.

approximately 40% of the beef cows in the western United States, and half of the nation's sheep herds, spend some time in grazing allotments on public lands. A very large number of rural communities are dependent on federally permitted grazing for employment, commerce, and tax revenue to support public services.<sup>7</sup>

With the Ninth and Tenth Circuits each governing about half of all federal grazing permits, these two circuits must be aligned on fundamental questions of law relating to renewal of grazing permits, including the application of NEPA, and judicial review under the APA.

## II

### **The Court should grant the Petition because the Ninth and Tenth Circuits are split on two legal standards for grazing permit renewals.**

- A. The Ninth Circuit holds that a decision not to renew a natural resource permit is exempt from NEPA if the agency characterizes the decision as a conservation effort, while the Tenth Circuit rejects precisely such an exemption.**

By characterizing the refusal to renew a federal grazing permit as a conservation action, the Bureau need not comply with NEPA for permits throughout

---

<sup>7</sup> Public Lands Council, *Public Lands Grazing, An Integral Segment of the U.S. Livestock Industry*, available at <http://publiclandscouncil.org/CMDocs/PublicLandsCouncil/New%20Website/Public%20Lands%20Ranching%20Overview.pdf> (last visited May 12, 2014).



the Ninth Circuit, including just inside the eastern borders of Arizona, Nevada, and Idaho. But, the agency must comply with NEPA for identical decisions in the neighboring Tenth Circuit states of New Mexico, Utah, and Wyoming.

The decision below holds that a federal agency's refusal to renew an existing permit is not subject to NEPA if the refusal purports to be a "conservation effort," even where the record shows that failure to renew has adverse impacts. *Drakes Bay*, 2014 WL 114699, at \*12.<sup>8</sup> *Drakes Bay* echoes the Ninth Circuit's decision in *Douglas County*, 48 F.3d at 1506 (designation of critical habitat under the Endangered Species Act exempt from NEPA because habitat designation furthers NEPA's purpose). *Drakes Bay* and *Douglas County* both rest on the rationale that actions intended to benefit the environment should not be subjected to the "obstructionist tactic" of complying with NEPA. *Drakes Bay*, 2014 WL 114699, at \*13 (citing *Douglas County*, 48 F.3d at 1508).

*Douglas County* addressed the application of NEPA to critical habitat designations as an issue of first impression in 1995. 48 F.3d at 1501. *Douglas County* first held that designation of critical habitat is exempt from NEPA by analogizing to *Merrell v. Thomas*, 807 F.2d 776, 778-80 (9th Cir. 1986), which

---

<sup>8</sup> The Ninth Circuit recently stated in *San Luis & Delta-Mendota Water Authority v. Jewell*, No. 11-15871, 2014 WL 975130, at \*54 (9th Cir. Mar. 13, 2014), that *Drakes Bay* does not "stand for the proposition that efforts to preserve the natural environment are per se exempt from NEPA." But, this is precisely what *Drakes Bay* does say. *Drakes Bay*, 2014 WL 114699, at \*12 ("The Secretary's decision is essentially an environmental conservation effort, which has not triggered NEPA in the past.").

held that procedures that duplicate or prevent compliance with NEPA indicate congressional intent to exempt the process from NEPA.<sup>9</sup> *Douglas County*, 48 F.3d at 1502-04. *Douglas County* also held that NEPA does not apply to critical habitat designation “because the ESA furthers the goals of NEPA without demanding an EIS.” *Id.* at 1506. This holding in *Douglas County* relies on the proposition that NEPA does not apply to federal actions that do nothing to alter the natural physical environment. *Id.* at 1505-06 (“[W]hen a federal agency takes an action that prevents human interference with the environment, it need not prepare an EIS.”).

The Tenth Circuit comprehensively reviewed *Douglas County* in *Catron County Bd. of Comm’rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d at 1435-38, and rejected it entirely, including the “conservation effort” holding. The Tenth Circuit directly rejected the proposition that projects intended to benefit the environment should not be subject to review under NEPA, because this begs the question that NEPA is specifically enacted to answer. *Id.* at 1437. A more recent decision of the Tenth Circuit follows *Catron County* in holding that NEPA applies to critical habitat

---

<sup>9</sup> *Douglas County* also offers the putative assurance that excusing a federal agency from NEPA in critical habitat designations would not yield “unchecked discretion in making critical habitat designations,” since “the procedural requirements of the ESA, combined with review of decisions possible under the Administrative Procedure Act, are adequate safeguards.” 48 F.3d at 1505. Yet while the decision below relies on the “conservation effort” holding of *Douglas County* to exempt a refusal to renew a permit from NEPA, the same decision also holds that there is no jurisdiction to review the refusal under the APA. *Drakes Bay*, 2014 WL 114699, at \*1.

designations. *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1230 (10th Cir. 2002) (Fish and Wildlife Service required to prepare EIS to designate critical habitat for silvery minnow.).<sup>10</sup>

The United States District Court for the District of Columbia also followed *Catron County* in rejecting the government’s assertion that NEPA does not apply to critical habitat designations. *Cape Hatteras Access Pres. Alliance v. Dep’t of Interior*, 344 F. Supp. 2d 108, 136 (D.D.C. 2004) (because critical habitat designation significantly affects the human environment, government must “determine the extent of the impact in compliance with NEPA”). In another case, the same court rejected the Secretary’s arguments, based on *Douglas County*, that NEPA does not apply to Special Rules under Section 4(d) of the ESA, and held that NEPA requires at least the preparation of an Environmental Assessment. *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 236-38 (D.D.C. 2011) (citing and applying reasoning of *Catron County* to ESA Section 4(d) Special Rules).

The circuit split between the Ninth and Tenth Circuits on NEPA creates regional legal variations for renewal of grazing permits, in which permits in the Ninth Circuit are exposed to greater risk of

---

<sup>10</sup> In *Utah Shared Access Alliance v. Carpenter*, the Tenth Circuit ruled that closure of certain public lands to off-road vehicles was not subject to NEPA, and commented in a footnote that if the parties had argued that the closure were a major federal action, the rationale of *Douglas County* might apply. 463 F.3d 1125, 1136 n.4 (10th Cir. 2006). This discussion is tangential at best to the NEPA holding in *Utah Shared Access*, and the case does not examine *Douglas County* in any depth.

nonrenewal. Amicus CCA members hold many of the 572 federal grazing permits issued by the Bureau in California. Because the Ninth Circuit excuses agencies such as the Bureau from complying with NEPA where the agency purports to act to improve the environment, the Bureau has an incentive to avoid NEPA responsibilities by the simple expedient of recasting every refusal to renew a permit as environmentally beneficial. The lack of a NEPA analysis in such circumstances hamstring permit holders and members of the public in their effort to learn more about the decision, provide input, and test the assertion that the decision is beneficial. Sharon Buccino, *NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. Env'tl. L.J. 50, 53 (2003) ("Courts have consistently recognized NEPA's dual goals of 'informed decisionmaking and informed public comment.'") (citing *Utahns for Better Transp. v. United States Dep't of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002)). Excusing agencies that permit the use of natural resources on public lands from complying with NEPA if they refuse to renew (while requiring compliance with NEPA for renewing the same permits) improperly tips the balance toward nonrenewal.

Meanwhile, federal grazing permit holders in the states comprising the Tenth Circuit are free of this chicanery, because *Catron County* rejects *Douglas County's* "conservation effort" holding. The Court should grant the Petition to establish a uniform national rule for the application of NEPA to agency refusals to renew permits, when the agency contends the refusals are "conservation efforts."

**B. The Bureau cannot arbitrarily or capriciously refuse to renew a grazing permit without answering to the federal courts under the Administrative Procedure Act in the Tenth Circuit, but it can refuse renewals with impunity in the Ninth.**

The Ninth Circuit has disclaimed jurisdiction under the Administrative Procedure Act to review an arbitrary or capricious refusal to renew an existing grazing permit. *See Mollohan v. Gray*, 413 F.2d at 352 (decisions or refusals to issue or renew a grazing permit under the Taylor Grazing Act are not subject to review under the APA). Following this Court's subsequent decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), that 5 U.S.C. § 701(a)(2) deprives federal courts of APA jurisdiction only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply,'" (citation omitted), the Ninth Circuit re-examined and affirmed the principles in *Mollohan*, holding that federal courts lacked jurisdiction to hear a challenge to the denial of a homestead application under the Classification and Multiple Use Act of 1964. *Strickland v. Morton*, 519 F.2d 467, 468-70 (9th Cir. 1975). *See also Ness*, 512 F.2d at 716 ("we share the view of the panel[] which decided *Mollohan*"). In turn, *Drakes Bay* relies on *Ness* in holding that the Secretary's refusal to renew Petitioner's permit is not reviewable under the APA. *Drakes Bay*, 2014 WL 114699, at \*6.<sup>11</sup>

---

<sup>11</sup> Even without its reliance on *Ness* and *Mollohan*, *Drakes Bay* is precedent that a refusal to renew a grazing permit is not  
(continued...)

When the Bureau arbitrarily or capriciously refuses to renew a grazing permit in the Tenth Circuit, the federal courts have jurisdiction to review the action under the Administrative Procedure Act. *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d at 1406, states squarely that “[t]he Taylor Grazing Act does not fall within the limited class of non-reviewability, *see Sabin v. Butz*, 515 F.2d 1061, 1064-65 (10th Cir. 1975).” *Sabin* declines to follow *Mollohan*. 515 F.2d at 1065 (federal courts have jurisdiction under the APA to review Forest Service refusal to issue a permit for ski instruction). In *Sabin*, the Tenth Circuit construed *Citizens to Preserve Overton Park* narrowly, but noted the broader interpretation of the federal district court in *Ness Inv. Corp v. USDA, Forest Service*, 360 F. Supp. 127 (D. Ariz. 1973).<sup>12</sup>

---

<sup>11</sup> (...continued)

reviewable under the APA. Both of the federal statutes, for renewal of Petitioner’s special use permit in the Point Reyes National Seashore, and for renewal of grazing permits on federal land, extend very broad discretion to the relevant agency to grant or deny permits. *Compare* Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009) (“Section 124” in the decision below) (“[T]he Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization[.]”), *with* 43 U.S.C. § 315b (“Such [grazing] permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior . . .”).

<sup>12</sup> *Baca v. King*, 92 F.3d 1031, 1037 (10th Cir. 1996), cites *Mollohan* for the inability of the courts to order Bureau to renew a grazing permit. The plaintiff in *Baca* was challenging a land exchange under the Federal Land Policy and Management Act, *id.* at 1032, that led to the cancellation of his grazing permit, *id.* at 1033. The Tenth Circuit ruled that the plaintiff lacked standing because his injuries were not redressable based on the relief he  
(continued...)

*Drakes Bay* relies on *Ness* (no APA review of denial of Forest Service permit), which relies in turn on *Mollohan* (no APA review of cancellation of grazing permit). These Ninth Circuit decisions conflict with the Tenth Circuit's decisions in *Sabin* (APA review of denial of Forest Service permit) and *Diamond Ring Ranch* (APA review of grazing permit decision). So, granting the Petition will not just resolve whether the Secretary's refusal to renew Petitioners' permit is subject to APA review. Granting the Petition will resolve the circuit splits on APA review of grazing permits (*Mollohan/Diamond Ring Ranch*) and Forest Service discretionary permits (*Ness/Sabin*).

The circuit split on APA review of grazing permit decisions results in a type of second-class citizenship for grazing permit holders in the Ninth Circuit. They hold a permit which the Bureau can arbitrarily or capriciously refuse to renew, for any reason or no reason, without being accountable to the federal courts under the APA. Grazing permit holders in the Tenth Circuit, however, are able to bring identical refusals before the federal courts under the APA. As a result, grazing permit holders in the Tenth Circuit have a more useful and valuable First Amendment right to petition their government, because they can petition both the Executive and Judicial Branches. Those in the Ninth, meanwhile, may only petition the same Executive Branch agency that refuses to renew their permits, secure in the knowledge it is unaccountable to the federal courts.

---

<sup>12</sup> (...continued)

sought. *Id.* at 1037. The plaintiff had not directly challenged the cancellation of his permit under the APA, only the land swap.

The Court should grant the Petition to eliminate this regionally based second-class citizenship for grazing permit holders and establish a uniform rule of jurisdiction under the APA.

**CONCLUSION**

The Court should grant the Petition.

DATED: May, 2014.

Respectfully submitted,

DAMIEN M. SCHIFF  
ANTHONY L. FRANÇOIS  
*Counsel of Record*  
Pacific Legal Foundation  
930 G Street  
Sacramento, California 95814  
Telephone: (916) 419-7111  
Facsimile: (916) 419-7747  
E-mail: dms@pacificlegal.org  
E-mail: alf@pacificlegal.org

*Counsel for Amici Curiae*  
*Pacific Legal Foundation and*  
*California Cattlemen's*  
*Association*