Case No. 18-35488

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAY HYMAS, d/b/a Dosmen Farms,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF INTERIOR; DAVID BERNHARDT, Secretary of the United States Department of the Interior; and JAMES W. KURTH, Acting Director of the United States Fish and Wildlife Service; DOES, 1-10,
Defendants-Appellees.

On Appeal from an Order Granting Defendants' Motion To Dismiss
U.S. District Court for Eastern District of Washington
D.C. No. 4:16-cv-05091-SMJ
District Judge Salvador Mendoza, Jr.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

The Service's voluntary cessation of its wrongful conduct cannot moot Hymas's claim under the Administrative Procedure Act ("APA") for injunctive and declaratory relief unless the Service overcomes the "formidable burden" of demonstrating that it is "absolutely clear" its wrongdoing could not reasonably be expected to recur. Unable to meet that burden, Appellees attempt to recast the burden, arguing that there is "no foundation" for Hymas's "speculation" that the Service could continue its decades-long practice of favoring incumbent or prior farmers in awarding cooperative farming agreements on the McNary and Umatilla National Wildlife Refuges. Appellees offer no persuasive response to Hymas's arguments that his claims remain justiciable – (i) the Service remains practically and legally free to alter the 2017 Policy that it adopted without a rulemaking process; (ii) the Service has a history of relying on *ad hoc* policy pronouncements and disregarding its own policies and manuals; and (iii) the 2017 Policy, adopted a mere two weeks prior to the filing of Appellees' motion, had not been in place for sufficient time when the District Court dismissed Hymas's claims as moot.

Moreover, the District Court had jurisdiction over Hymas's claim for bid preparation costs under the Little Tucker Act that was separate and independent of its jurisdiction over his APA claim. Unlike the cases cited by Appellees, the Service's corrective action did not "completely and irrevocably" eradicate the

effects of the challenged awards. The Service's solicitation of bids for the 2015 farming season could not rectify Hymas's lost opportunities to be considered fairly and honestly for the farming seasons that had already passed by the time of solicitation. Those lost opportunities are gone; his claims to recover the wasted costs he incurred to prepare his 2013 and 2014 bids that were never fairly considered are not moot. The District Court erred in dismissing Hymas's claims, and this Court should reverse.

ARGUMENT

I. APPELLEES FAILED TO MEET THEIR "FORMIDABLE BURDEN" TO SHOW THAT HYMAS'S APA CLAIM IS MOOT

A. Appellees Bear the Burden To Establish Mootness Based on Voluntary Cessation

As an initial matter, it is well established that Appellees bear a "formidable burden" in claiming that their voluntary cessation of the alleged wrongdoing moots Hymas's claim under the APA. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Unable to meet this "formidable burden," Appellees attempt to recast the burden of proof by claiming there is "no foundation" for Hymas's "speculation" that the Service might not follow the 2017 Policy. As Appellees point out (at 21), a plaintiff indeed "bears the burden of establishing that jurisdiction exists at all stages." However, where the defendant invokes an exception to the presumption "that a defendant's voluntary cessation of

a challenged practice does not deprive a federal court of its power to determine the legality of the practice," *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), as Appellees did in this case, they bear the burden to show "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth*, 528 U.S. at 190. Appellees have not and cannot meet that high burden.

B. Replacing One Set of Pre-Existing Policies Encouraging Competition with Another Does Not Make It "Absolutely Clear" That Appellees' Decades-Long Practice of Favoring Incumbent Farmers Could Not Reasonably Be Expected To Recur

Appellees argue (at 22) that the 2017 Policy "made it 'absolutely clear' that CFA awards pursuant to the now-superseded policies will not recur" and question (at 24) how they "could violate the old superseded policies in the future when those policies are obsolete." That is not the correct inquiry.

Appellees must show that it is absolutely clear that "the allegedly wrongful behavior" – the Service's decades-long practice of favoring incumbent or prior farmers – could not reasonably be expected to recur. *See Friends of the Earth*, 528 U.S. at 190. Hymas alleged that the Service's "award of [cooperative farming agreements] from 2012 through 2015 was arbitrary, capricious, an abuse of discretion, and contrary to law." D. Ct. Dkt. 96, at 18 (ER 31). The pre-existing agency regulations and policies called for a competitive process and merit-based awards of cooperative farming agreements. *See* 505 DM 2.13 (ER 678) (U.S.

Department of Interior Manual "strongly encourage[s]" competition and requires the Service to "make awards based on the merits"); Appellant's Br. 9-13. Similarly, the 2017 Policy promises an "open, competitive process" based on "objective criteria" in awarding all future cooperative farming agreements. 620 FW 2 (ER 122-29); *see* Appellant's Br. 17-19. Replacing old policies encouraging competition with a new policy calling for the same does not make "absolutely clear" that the Service will put an end to its long-standing practice of favoring incumbent or prior farmers.

Furthermore, Appellees argue (at 20, 22) that Hymas's APA claim is moot because it seeks to enjoin "CFA awards pursuant to the now-superseded policies." Appellees mischaracterizes the relief Hymas seeks. Hymas seeks, *inter alia*, (i) a declaratory judgment that the Service's practice of favoring incumbent and prior farmers in awarding cooperative agreements is unlawful, Compl. at 25, Prayer for Relief ¶ 14 (ER 634); (ii) an injunction against the Service's selection of cooperative farmers with "arbitrary and capricious restrictions on competition," *id.* at 26, Prayer for Relief ¶ 21 (ER 635); and (iii) bid preparation costs, *id.* at 25, Prayer for Relief ¶ 18 (ER 634). The District Court may grant the foregoing relief regardless of the Service's adoption of the 2017 Policy. Hymas's APA claim remains justiciable.

C. Appellees' Other Arguments Are Unpersuasive

Appellees dismiss (at 25) as "a cascade of merits arguments" the reasons put forth by Hymas regarding why the 2017 Policy does not make it "absolutely clear" that the Service will cease its long-standing practice of favoring incumbent cooperators – namely, (i) the Service remains practically and legally free to alter the 2017 Policy that it adopted without a formal rulemaking process, after the commencement of Hymas's lawsuit, *see* Appellant's Br. 25-28; (ii) the Service has a history of relying on *ad hoc* policy pronouncements and disregarding its own policies and manuals, *see id.* at 28-30; and (iii) the 2017 Policy, adopted a mere two weeks before Appellees filed their motion for dismissal, had not been in place for sufficient time when the District Court considered mootness, *see id.* at 30-32. However, this Court's precedent makes clear that these considerations are dispositive in this case.

For example, this Court has held that a defendant's voluntary cessation of wrongful conduct moots a claim only where there are sufficient procedural safeguards in place to constrain the government from later reverting back to the offending behavior. *See*, *e.g.*, *Fikre v. FBI*, 904 F.3d 1033, 1039 (9th Cir. 2018). Appellees fail to address any of Hymas's arguments relating to the importance of procedural safeguards and even admit (at 24) that "[f]ederal agencies retain authority and discretion to revise their own agency policies." As this Court

emphasized in *Bell v. City of Boise*, 709 F.3d 890 (9th Cir. 2013), "[e]ven assuming Defendants have no intention to alter or abandon the [current policy], the ease with which [Defendants] could do so counsels against a finding of mootness." *Id.* at 900. The ease with which Appellees could continue the allegedly wrongful behavior is particularly pronounced here. Even though it promises an "open, competitive" process, the 2017 Policy exempts awards of all future cooperative farming agreements from the generally applicable regulations and policies that require competition,[1] and treats an applicant's "personal experience" on the subject refuge land as one of the merit-based qualifications, *see* § 2.12B(1) (ER 128). Appellees have argued throughout this litigation that favoring incumbent or prior farmers is the most appropriate method, *see* Appellant's Br. 31-32, and, on appeal, Appellees repeat (at 26) that they "do not admit any wrongful conduct."

Nor do Appellees meaningfully address this Court's holdings that a policy change that is not implemented by statute or regulation must be "unequivocal."

[1] *See* § 2.2E (ER 123) ("A [cooperative agricultural agreement] is not a financial assistance award and is not subject to the regulations at 2 CFR 200 or policy in parts 515 and 516 of the Fish and Wildlife Service Manual."). Among other things, Part 516 of the Service Manual requires the Service to "encourage competition" when awarding assistance awards. 516 FW 6.7A (ER 682). In the proceedings before the Federal Circuit, which vacated the Claims Court's judgment in favor of Hymas for lack of jurisdiction, Appellees relied on the fact that the cooperative farming agreements were assistance awards, *see Hymas v. United States*, 810 F.3d 1312, 1327-28 (Fed. Cir. 2016), which section 2.2E of the 2017 Policy repudiates. *See* Appellant's Br. 27-28.

White v. Lee, 227 F.3d 1214, 1243 (9th Cir. 2000); *see also Gluth v. Kangas*, 951 F.2d 1504, 1507 (9th Cir. 1991) ("Even assuming that the policy meets constitutional standards on its face, given the Department's history of allegedly denying access arbitrarily and the vagueness of the new policy, it cannot be said 'with assurance' that there is no 'reasonable expectation' that the alleged violations will recur.") (quoting *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 854 (9th Cir. 1985)). Appellees argue (at 23) that the Refuge Manual has been "unequivocally superseded," but this is not in dispute; the point is that there is nothing to prevent Appellees from continuing their decades-long practice that caused Hymas's harm.

Appellees correctly point out (at 23) that the farming contracts awarded on the McNary and Umatilla Refuges in 2015 were procurement contracts, not cooperative farming agreements. In response to an order of the Court of Federal Claims, the Service conducted a public bidding process to award five procurement contracts, not cooperative agreements. *See* Appellant's Br. 15. But this distinction has no bearing on whether the 2017 Policy mooted Hymas's APA claims. Since those contracts were in effect, the Service awarded no cooperative agreements for the McNary and Umatilla National Refuges pursuant to the 2017 Policy. And, even after the public bidding process, the Service selected the same incumbent farmers. *See id.* at 15-16.

Finally, Appellees argue (at 24) that the cases cited by Hymas are distinguishable because "they did not involve the United States as a party, did not involve APA claims, and did not involve alleged violations of superseded agency policies." But Appellees do not explain why those distinctions matter. Appellees cannot escape from the fact that there is no "positive evidence" that the Service would cease their long-standing practice of favoring incumbent or prior farmers. *See Natural Res. Def. Council v. County of Los Angeles*, 840 F.3d 1098, 1104 (9th Cir. 2016). And the 2017 Policy – promulgated a mere two weeks before Appellees filed their motion to dismiss – does not possess any of the required indicia to make it "absolutely clear" that the alleged wrongdoing could not reasonably be expected to recur. *See Friends of the Earth*, 528 U.S. at 190.[2]

[2] Appellees argue (at 26) that, if this Court reverses the dismissal of Hymas's APA claims, as it should, the appropriate remedy would be to remand for further proceedings on the merits of Appellees' motion for summary judgment based on the administrative record. In dismissing Hymas's APA claims as moot, the District Court denied "[a]ll pending motions," including Appellees' motion for summary judgment, as moot. ER 13. On remand, the parties should be allowed to file summary judgment motions based on the administrative record and, if no summary judgment is entered, to seek a scheduling order for discovery and trial, as the District Court has previously ordered. *See* D. Ct. Dkt. 116, at 2.

II. HYMAS'S CLAIM FOR BID PREPARATION COSTS REMAINS JUSTICIABLE

A. The District Court Erroneously Found That Hymas Submitted Bids for Cooperative Farming Agreements Only in 2014

In a footnote, the District Court summarily found "Hymas did not submit a bid for the 2013 [cooperative farming agreements]," narrowing the scope of Hymas's claim for bid preparation costs to those incurred in preparing bids for the 2014 farming season. ER 12. Appellees mistakenly argue (at 29) that the District Court's finding is subject to a clear-error standard of review.

The District Court erred by not assuming the truth of Hymas's allegations. *See* Appellant's Br. 33. Even if the clear-error standard applies, the District Court's "single, conclusory sentence" prevents this Court from undertaking a meaningful review because the District Court's rationale for its finding cannot be "determine[d] with any degree of certainty." *See Jerry's Famous Deli, Inc. v. Papanicolaou*, 383 F.3d 998, 1006 (9th Cir. 2004) (internal quotation marks omitted).

If this Court were to conduct a review for clear error, the record unequivocally establishes that Hymas submitted a bid for the 2013 farming season. *See* 4/3/2013 Email from Hymas to Glass (ER 244) ("As a follow-up to our meeting last week I am formally requesting to be included in any of the 8 contracts that will be given this year."). Appellees' argument that "the record does not

include any bid from [Hymas] for the 2013 CFAs" is simply untrue. *See* Appellees' Br. 29. To be sure, a bid is nothing more than a statement of interest. *See*, *e.g.*, ER 357 (2014 bid from Frederickson) ("I would like to continue to participate in the farming program as I have for the last 40 plus years."); ER 358 (2014 bid from Maddox) ("We very much would like to continue as the cooperator and would be interested in any more ground that would become vacant.").

Appellees also argue (at 29), despite repeatedly describing Hymas's bid preparation costs as reliance damages, that Hymas could not have submitted a bid because the Service later notified him that it had "decided not to solicit a bid from him." However, for a 10-month period starting in June 2012, the Service's employee Lamont Glass repeatedly represented to Hymas that the Service would solicit bids by posting a public notice imminently. *See* Appellant's Br. 5-7. Relying on that representation, Hymas incurred costs and ultimately submitted his bid for the 2013 farming season. The Service's later statement that it would not solicit bids was merely a rejection of Hymas's already-submitted bid. *See id.* at 6; ER 243 (Apr. 12, 2013 letter from Stenvall). This Court may determine on this record that the District Court made a clear error by finding that Hymas did not submit a bid for 2013 cooperative farming agreements.

B. Hymas Lost the Opportunity To Be Considered Fairly and Honestly for the 2013 and 2014 Farming Seasons, and His Claim for Bid Preparation Costs Remains Justiciable

At any rate, the District Court erred in holding that the Service's solicitation of bids for the 2015 farming season mooted Hymas's claim for bid preparation costs. While the Service terminated certain cooperative agreements at the end of the 2014 farming season and solicited bids for the 2015 farming season, that solicitation did not "completely and irrevocably" eradicate the effects of the Service's breach of its promise to consider Hymas's bids fairly and honestly for the 2013 and 2014 farming seasons. *See* Appellant's Br. 34-38

Appellees argue (at 33-34) that Hymas is seeking improper "expectation damages." Hymas is not seeking any lost profits or "expectation damages." Hymas is simply seeking to recover what he spent to prepare for his bids when the Service had no intention to consider his bids fairly and honestly – because no one other than a selected few incumbent or prior farmers had a shot at getting the award. Hymas is not seeking compensation for lost opportunities; he is seeking to recover his bid preparation costs. As Appellees discuss in detail, "costs or expenses wasted in preparing an offer which was not fairly considered" are properly recoverable. Appellees' Br. 27-28 (internal quotation marks omitted).

Appellees fault (at 30) Hymas for not having quantified his bid preparation costs and presume that they would be "negligible." The amount of the costs

Hymas incurred goes to the merits of his claim and is therefore irrelevant to the mootness analysis. Because the District Court erroneously dismissed Hymas's claims as moot, Hymas was never allowed the opportunity to prove the amount of the costs and expenses he incurred to inspect the subject refuge land and its irrigation systems and to prepare each of his bids.[3] And these costs were not "a cost of doing business," but a cost "wasted in preparing an offer which was not fairly considered." Appellees' Br. 27, 28 (internal quotation marks omitted).

Furthermore, none of the arguments offered by Appellees changes the bedrock principle that an agency's corrective action moots a protestor's claim for bid preparation costs only if the corrective action "completely and irrevocably" eradicates the effects of the challenged award. *Continental Serv. Grp., Inc. v. United States*, 132 Fed. Cl. 570, 575 (2017); *see id.* (emphasizing that a finding of mootness requires the corrective action to "completely and irrevocably eradicate[] the effects of the alleged violation") (internal quotation marks omitted).

Here, four cooperative agreements awarded in 2013, on which Hymas had bid unsuccessfully, expired after the 2013 farming season. *See* Appellant's Br. 36.

[3] Furthermore, Appellees are incorrect to state (at 30) that Hymas has "never quantified" his bid preparation costs. Following the Court of Federal Claims' memorandum opinion and final order, Hymas submitted a declaration demonstrating that his bid preparation costs related to investigating, preparing, and submitting bids for the 2013 and 2014 cooperative farming agreements were in excess of $5,000. *See* D. Ct. Dkt. 60-65.

Other cooperative agreements that the Service terminated for re-solicitation for the 2015 farming season had been performed for multiple farming seasons. *See id.* The Service's corrective action did not moot Hymas's claim for bid preparation costs because it could not rectify Hymas's lost opportunity to be considered for those farming seasons prior to the re-solicitation.

In all the cases cited by Appellees, the content of the solicitation remained the same before and after the corrective action so that a protestor's reliance could be "completely and irrevocably" cured. *See IAP Worldwide Servs., Inc. v. United States*, 141 Fed. Cl. 788, 793 (2019) (concerning contract awards for the repair of the electrical system in Puerto Rico after Hurricane Maria); *Tender Years Learning Corp. v. United States*, 134 Fed. Cl. 336, 340-41 (2017) (concerning a five-year funding grant to run a county program); *Caddell Constr. Co. v. United States*, 125 Fed. Cl. 30, 33 (2016) (concerning the construction of a New Embassy Compound in Maputo, Mozambique); *KWR Constr., Inc. v. United States*, 124 Fed. Cl. 345, 348 (2015) (concerning construction contracts for the United States Air Force); *Square One Armoring Serv., Inc. v. United States*, 123 Fed. Cl. 309, 314 (2015) (concerning the procurement of the same armored vehicles); *Technical Innovation, Inc. v. United States*, 93 Fed. Cl. 276, 278 (2010) ("The Air Force has since decided to issue a new solicitation to re-procure the services that were the subject of the award challenged in this case"); *AshBritt, Inc. v. United States*, 87 Fed. Cl.

344, 349 (2009) (concerning debris removal contractors for designated regions of the country in anticipation of a natural or man-made disaster).

Here, by contrast, the Service could not re-solicit bids for farming seasons that had already passed. Hymas's lost opportunities to be considered fairly and honestly for both the 2013 and 2014 farming seasons could not be retroactively rectified by the Service's solicitation of bids for the 2015 farming season. The District Court erred in dismissing Hymas's claim for bid preparation costs as moot.

C. Hymas's Claim for Bid Preparation Costs Does Not Depend on His APA Claim

Appellees also argue (at 30-31) that Hymas's claim for bid preparation costs should necessarily be moot if "the underlying challenge to defunct CFAs awarded based on obsolete policies is moot." Even if the Service's 2017 Policy mooted Hymas's claim for declaratory and injunctive relief under the APA – and it did not – the Little Tucker Act provides an *independent* jurisdictional basis for Hymas to bring a claim for bid preparation costs totaling less than $10,000. *See* 28 U.S.C. § 1346(a)(2).[4]

Appellees' reliance on *Glenn Defense Marine (Asia), PTE Ltd. v. United States*, 469 F. App'x 865 (Fed. Cir. 2012), is misplaced. In that case, the

[4] Appellees do not dispute that the District Court had subject-matter jurisdiction to hear Hymas's claim for injunctive and declaratory relief under the APA and his claim for bid preparation costs under the Little Tucker Act. *See*

government's subsequent award of all contracts at issue to the plaintiff mooted the appeal from the dismissal of the bid protest because the plaintiff's "claim ha[d] been satisfied." *Id.* at 867. Because the plaintiff's "princip[al] claim has been resolved," its claim for certain costs became merely "ancillary," insufficient to sustain the lawsuit. *Id.*; *see also Diamond v. Charles*, 476 U.S. 54, 56, 70-71 (1986) (cited in *Glenn Defense Marine*) (claim for attorney's fees did not survive mootness of underlying action). Even if the Service's voluntary cessation of the alleged wrongdoing moots Hymas's APA claim, there is nothing "ancillary" about his claim for bid preparation costs incurred in prior years.

CONCLUSION

The District Court's judgment should be reversed.

Appellees' Br. 26 n.5; *see also Gabriel v. General Servs. Admin.*, 547 F. App'x 829, 831 (9th Cir. 2013) (holding that the Little Tucker Act provides district courts "concurrent jurisdiction with the Court of Federal Claims for actions claiming less than $10,000").

Respectfully submitted,

/s/ Minsuk Han

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August 2, 2019

CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 32-1 FOR CASE NO. 18-35488

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this brief complies with the applicable type-volume limitation permitted by Ninth Circuit Rule 32-1. This brief was prepared in Times New Roman 14-font and complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), as well as the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 3,547 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Office Word 2013) used to prepare this brief.

/s/ *Minsuk Han*

Counsel for Jay Hymas, d/b/a Dosmen Farms

CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed electronically 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 August 2, 2019.

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.

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