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A BATTLE OVER OYSTERS: *DRAKES BAY OYSTER CO. V. JEWELL* AND ITS AFTERMATH

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*“Wilderness is a relative condition. As a form of land use it cannot be a rigid entity of unchanging content, exclusive of all other forms.”*²

— Aldo Leopold

I. INTRODUCTION

This comment summarizes the saga of Drakes Bay Oyster Company (DBOC), located in Point Reyes National Seashore (Seashore) in Marin County, California, just north of San Francisco. Owned and operated by the Lunny family, DBOC battled the National Park Service (NPS) in an attempt to compel the NPS to renew its special use permit (SUP). The SUP allowed DBOC to operate within Point Reyes National Seashore. This conflict pitted environmentalists against each other. Supporters of local, sustainable agriculture were on one side of the environmental debate. Traditional environmentalists, representing the other side, advocated for returning uninhabited areas to an untouched state.

The dispute over the oyster farm’s presence resulted in litigation and an appeal to the Ninth Circuit to resolve the legal questions presented by the issue of renewal, specifically, whether the NPS could be compelled to renew DBOC’s SUP. The result was the Ninth Circuit’s decision, *Drakes Bay Oyster Co. v. Jewell*, which set forth unfortunate precedent for the future of agriculture in Point Reyes National Seashore

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² ALDO LEOPOLD, WILDERNESS AS A FORM OF LAND USE (1925), in *THE RIVER OF THE MOTHER OF GOD, AND OTHER ESSAYS BY ALDO LEOPOLD* 135-36 (Susan L. Flader & J. Baird Callicott eds., 1992).

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by not allowing the oyster farm operations to continue within the Seashore.³ Arguing that the case involved important issues of administrative law with broad national implications, the Lunnys filed a petition for certiorari with the United States Supreme Court. However, this petition was denied by the Court in 2014.⁴

DBOC's operation was "supported by modern environmentalists who believe[d] that people can, through sustainable agriculture, develop a close and symbiotic relationship with the environment."⁵ When it was in existence, the oyster farm helped control nutrient levels and played a key role in the ranching cultural landscape.⁶ Converting the land on which DBOC resided into full wilderness designation was an effort to "erase human past" in the Seashore.⁷ This comment presents the opinion that the Ninth Circuit should have allowed the review of the Secretary's decision to not renew DBOC's permit to operate within the Seashore. The support for this argument rests on three legal positions, as discussed in the dissenting opinion of *Drakes Bay Oyster Co. v. Jewell*.⁸

First, the majority in *Drakes Bay Oyster Co.* relied on a misinterpretation of the Point Reyes Wilderness Act. Second, many recognized the oyster farm as a pre-existing use in the Seashore. And third, the public policy underlying the issue strongly favored keeping DBOC in operation.

Based on the majority's decision in *Drakes Bay Oyster Co. v. Jewell*, the Ninth Circuit created dangerous legal precedent for the future of agriculture in the Seashore. The Ninth Circuit decided that it did not have the authority to review the Secretary of Interior's (Secretary) decision to deny renewal of the oyster farm's permit.⁹ The precedent established by this decision is detrimental for ranchers who live and operate within the Seashore, as these ranchers are also part of the working landscape of the park. Given the result of the *Drakes Bay Oyster Co.*, the future of ranching in the park stands on dangerous grounds.

³ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073 (9th Cir. 2013).

⁴ *Drakes Bay Oyster Co. v. Jewell*, 134 S. Ct. 2877 (2014), *cert. denied*.

⁵ Petition for Writ of Certiorari at 2, *Drakes Bay Oyster Co. v. Jewell*, 134 S. Ct. 2877 (2014) (No. 13-1244).

⁶ LAURA WATT, *THE PARADOX OF PRESERVATION* 196 (2017).

⁷ Telephone Interview with Dr. Laura Watt, Professor, Sonoma State University (Oct. 17, 2016).

⁸ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1093-99.

⁹ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1082.

II. POINT REYES NATIONAL SEASHORE

A. A BRIEF HISTORY OF POINT REYES

The Seashore, established in 1962 and administered by NPS, is located approximately 30 miles north of San Francisco.¹⁰ Humans have inhabited lands that became the Seashore for millennia.¹¹ Congress established the Seashore as a working landscape of diverse uses¹² to “save and preserve, for purposes of public recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped.”¹³ The Seashore received its designation by Congress in 1962, making it the third of fourteen national seashores and lakeshores in the park system,¹⁴ covering more than 71,000 acres.¹⁵ It includes areas of historical importance, with designated cultural landscapes scattered throughout the rugged coastline.¹⁶ Additionally, the Seashore is home to a diversity of wildlife, including marine mammals, birds, fish, and one of the largest populations of tule elk.¹⁷ The Seashore also includes a marine area, Drakes Estero, an estuary located within the Seashore that harbors a complex marine environment.¹⁸

Some of the first humans to populate the Seashore and leave remnants of their inhabitation were the Coast Miwok, who used the Seashore as a source of food and shelter.¹⁹ After the disappearance of the Coast Miwok, Mexican land grantees and Franciscan missionaries inhabited the Point Reyes region and introduced cattle ranching to the area.²⁰

The early California settlers in Point Reyes in the 1850s were lured by the cool, moist climate of Point Reyes, an ideal environment in which

¹⁰ *Point Reyes Timeline*, POINT REYES NAT'L SEASHORE ASS'N, <http://www.ptreyes.org/learn-about-seashore/point-reyes-timeline> (last visited Jan. 8, 2018).

¹¹ PAUL SADIN, *MANAGING A LAND IN MOTION: AN ADMIN. HISTORY OF PT. REYES NAT'L SEASHORE* 11 (2007).

¹² Peter Prows, *Ninth Circuit Grants Emergency Injunction To Protect Drakes Bay Oyster Company From “Artificial Wilderness” Designation* (Mar. 11, 2013), <http://briscoelaw.net/3-11-13/>.

¹³ *Drakes Bay Oyster Co. v. Jewell*, 747 F. 3d at 1078.

¹⁴ See SADIN, *supra* note 11, at 3.

¹⁵ *Id.*

¹⁶ *Historic Landscapes of Point Reyes*, NAT'L PARK SERVICE, https://www.nps.gov/pore/learn/historyculture/places_historiclandscapes.htm (last visited Nov. 14, 2016).

¹⁷ *Wildlife Viewing*, NAT'L PARK SERVICE, https://www.nps.gov/pore/planyourvisit/wildlife_viewing.htm (last visited Jan. 8, 2018).

¹⁸ *Drakes Estero Restoration*, NAT'L PARK SERVICE, https://www.nps.gov/pore/learn/management/planning_drakesestero_restoration.htm (last visited Oct. 12, 2016).

¹⁹ *Ranching History at Point Reyes*, NAT'L PARK SERVICE, https://www.nps.gov/pore/learn/historyculture/people_ranching.htm (last visited Jan. 8, 2018).

²⁰ See SADIN, *supra* note 11, at 17.

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to raise dairy cows.²¹ Point Reyes attracted ranchers due to its broad coastal prairie, an abundance of grass, long growing season, and available fresh water supply. The early ranchers created small individual ranches, later acquired by the Shafter family (Shafters).²² The Shafters eventually acquired 50,000 acres of land with the goal of marketing large quantities of butter (later known as the Shafter/Howard dairy enterprise).²³ In 1866, as part of the Shafter family re-organization, the area was partitioned into 33 ranches, known as the “alphabet” ranches, as each ranch was named a letter A-Z.²⁴

The establishment of these ranches led to the notorious “Butter Rancho” period, in which “record yields” of butter and cheese were produced from Point Reyes dairies.²⁵ In 1867, Marin County produced 932,428 pounds of butter.²⁶ The Butter Rancho period ceased after the 1906 earthquake and subsequently the Great Depression, but new owners came in, bought the ranches, and improved them in 1935.²⁷ The new owners established a robust dairy industry. As Marin County developed through the 1950s, the ranchers became concerned about rising property taxes²⁸ and dropping dairy prices.²⁹

Dairy and cattle ranchers “secure[d] their place in Point Reyes,” by forming an alliance with the Sierra Club³⁰ to preserve the ranchland in the Seashore upon its establishment in 1962.³¹ In establishing the Seashore, the NPS became the area’s landlord when the NPS bought all parcels of land that are now the Seashore by negotiating a purchase with the ranchers to allow the ranchland to remain.³² The establishment of the

²¹ NAT’L PARK SERVICE, *supra* note 19.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ In 1965, the California legislature enacted the Williamson Act. This act allows local governments to enter into contracts with private landowners to preserve agricultural uses in return for property tax savings. THE LAND CONSERVATION ACT, <http://www.conservation.ca.gov/dlrp/lca> (last visited Feb. 20, 2017). In the case of the ranchers in the Seashore, not all ranchers enrolled because they feared that, while enrollment would save property taxes, there were disadvantages related to estate tax obligations that arise in the event of a death of a rancher patriarch or matriarch. WATT, *supra* note 6, at 83-84.

²⁹ NAT’L PARK SERVICE, *supra* note 19.

³⁰ John Muir founded the Sierra Club in 1892. It is one of the largest grassroots environmental organizations in the U.S. Today, there are over two million supporters who advocate, promote, and educate about environmental awareness. The organization has been successful in protecting wilderness, passing the Clean Air Act, Clean Water Act, and Endangered Species Act. SIERRA CLUB, <http://www.sierraclub.org/about> (last visited Feb. 20, 2017).

³¹ NAT’L PARK SERVICE, *supra* note 19.

³² WATT, *supra* note 6, at 129.

Seashore created concern among the ranchers because they viewed the Seashore's goals as conflicting with the long-time family ranching operations of the area. So, the ranchers and the NPS compromised to allow for the "retention of the ranches in a designated pastoral zone, with ranchers signing 25 to 30-year reservations of use and occupancy leases, and special use permits for cattle grazing" within the Seashore.³³ Most of the ranchers entered into 20-year reservations of use and occupancy (RUO) to remain in operation within the Seashore.³⁴ One ranch opted for a longer RUO of 30 years, and Johnson Oyster Company entered into a 40-year RUO.³⁵ Most of the ranches that remain today operate under leases between the ranch and the NPS, most of which are for five-year terms with the option of renewal. The language in these leases is "almost identical" to the language in special use permits (SUPs), granted to some ranchers, as well as to DBOC.³⁶

1. *The Establishment of Point Reyes National Seashore*

In 1960, California Senator Clair Engel and Representative Clem Miller introduced legislation to create the Seashore "with a design that would retain existing agricultural uses."³⁷ A key concern in establishing the Seashore was "the possible effects of establishing a park on the local agricultural economy."³⁸ Thomas Kuchel, a California Senator, described the concept:

[T]he bill before your subcommittee is perhaps a precedent setting proposal in that it would authorize the Federal establishment in the State of California of a novel type of reservation designed to protect the public interest in and maintain the character of rare scenic, recreational, inspirational, and historic features of a section of our lengthy Pacific seacoast.³⁹

The NPS Director, Conrad Wirth, supported this idea, including maintaining the oyster farm that already existed in the Seashore.⁴⁰ The NPS Planning Chief, George Collins, stated the oyster beds are ". . . a very

³³ NAT'L PARK SERVICE *supra* note 19.

³⁴ WATT, *supra* note 6, at 130.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Brief of Dr. Laura A. Watt et al. as Amici Curiae Supporting Plaintiff-Appellants at 2, *Drakes Oyster Bay Co. v. Jewell*, 747 F. 3d 1073 (2014), http://cdn.ca9.uscourts.gov/datastore/general/2013/10/25/13-15227_Amicus_brief_by_Dr_Laura_Watt.pdf.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 3.

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important activity” and the oyster cannery in Drakes Estero should remain in operation “under national seashore status because of [its] public values.”⁴¹ These values were included in proposals that made their way to Congress in 1961.⁴² Mr. Wirth endorsed this language in a statement that the NPS would permit the oyster farm to remain in operation because many people were not aware of its operation and because the commercial oyster beds in operation were “a natural way of development.”⁴³

The NPS included language in the Seashore’s planning documents that “the land uses in a national *seashore* should be ‘less restrictive’ than a national *park*.”⁴⁴ These documents set forth the notion that the oyster farm should remain in operation due to its “exceptional public values.”⁴⁵ These values included exposing the public to a “unique industry” and providing “educational opportunities.”⁴⁶

These proposals culminated in the passage of the Point Reyes National Seashore Act in 1962.⁴⁷ The Senate Report on the Point Reyes National Seashore Act reiterated the importance of these “public values,” and the idea that the oyster farm would continue in operation with the passing of the act.⁴⁸

2. *The Federal Wilderness Act of 1964*

To understand the immense conflict that exists between legislation administering the Seashore, it is important to understand wilderness regulation on a federal level. Congress passed the Wilderness Act of 1964 two years after the establishment of the Seashore. Wilderness designation differs from other public lands in that it is the highest level of conservation protection for federal lands.⁴⁹ The act diverged from the NPS’s purpose of encouraging nature tourism.⁵⁰ Instead, it was put in place to protect wilderness areas from tourists and the impacts associated with vehicles brought by tourists.⁵¹ The drafters of the Wilderness Act in-

⁴¹ *Id.* (citing Excerpts from House Hearing on S.2428, Apr. 14, 1960).

⁴² *Id.* at 4.

⁴³ *Id.* at 4-5. See *An Act To Establish The Point Reyes National Seashore in the State of California: Hearing on S. 476 Before the Subcomm. on Public Lands of the H. Comm. on Interior and Insular Affairs*, 87th Cong. (1961) (statement of Conrad Wirth, NPS Director).

⁴⁴ NAT’L PARK SERVICE, PROPOSED PT. REYES NAT’L SEASHORE: LAND USE SURVEY & ECONOMIC FEASIBILITY REPORT 1 (1961).

⁴⁵ Brief of Dr. Laura A. Watt, et al., *supra* note 37, at 4.

⁴⁶ See *supra* note 44, at 16.

⁴⁷ Brief of Dr. Laura A. Watt, et al., *supra* note 37, at 5.

⁴⁸ *Id.*

⁴⁹ *The Wilderness Act*, NAT’L PARK SERVICE, <https://www.nps.gov/pore/learn/management/wildernessact.htm> (last visited Dec. 6, 2016).

⁵⁰ WATT, *supra* note 6, at 104.

⁵¹ *Id.*

cluded language that was meant to accommodate “many existing commercial land uses, particularly for subsistence or small-scale local economies.”⁵² The language of the Wilderness Act stated that wilderness areas are to be “administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness, and so to provide for the protection of these areas [and] the preservation of their wilderness character.”⁵³

The Wilderness Act “creates congressionally designated wilderness zones that act primarily as a restraint on the actions of federal agencies, not private entities.”⁵⁴ The language of the Wilderness Act makes clear that a “wilderness designation is *supplemental*” to other land use designations.⁵⁵

3. *The Point Reyes Wilderness Act*

In 1976, Congress passed Public Law 94-544, the Point Reyes Wilderness Act, which created the Point Reyes Wilderness.⁵⁶ This act designated 25,375 acres as “wilderness” in accordance with the federal Wilderness Act of 1964, including 8,003 acres designated as “potential wilderness.”⁵⁷ Public Law 94-567, enacted almost simultaneously, designated wilderness areas within 13 units⁵⁸ of the National Park System, including the Seashore.⁵⁹ This federal act vaguely defined potential wilderness as “all lands . . . upon publication in the Federal Register of a notice by the Secretary that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated as wilderness.”⁶⁰ This new category of wilderness was “intended to limit NPS’s ability to develop recreational services while allowing some existing land uses to continue.”⁶¹

⁵² WATT, *supra* note 6, at 105.

⁵³ *Drakes Bay Oyster Co. v. Jewell*, 747 F. 3d at 1078.

⁵⁴ WATT, *supra* note 6, at 107.

⁵⁵ *Id.*

⁵⁶ *Drakes Bay Oyster Co. v. Jewell*, 747 F. 3d at 1078.

⁵⁷ Point Reyes Wilderness Act of 1976, Pub. L. No. 94-544, 90 Stat. 2515 (1976).

⁵⁸ ‘A “unit” in the NPS is one of the following: national park, national monument, national preserve, national reserve, national seashore, national lakeshore, national historic park, national battlefield park, national military park, national battlefield, national battlefield site, national historic site, national memorial, national wild, scenic, and/or recreational river, national parkway, national scenic and historic trail, national memorial, national recreation area, national scientific reserve, national capital parks, or “other.”’ Robin W. Winks, *The National Park Service Act of 1916: “A Contradictory Mandate”?*, 74 DENV. U. L. REV. 575, 576 (1997).

⁵⁹ WATT, *supra* note 6, at 117.

⁶⁰ *Id.*

⁶¹ WATT, *supra* note 6, at 101.

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Before the designation of “wilderness” areas within Point Reyes, Congress began appropriating funds to acquire the lands within the Seashore’s boundaries.⁶² Part of this process involved the State of California conveying its ownership of submerged lands and coastal tidelands within the Seashore’s boundaries to the federal government, including Drakes Estero.⁶³ This conveyance “reserved certain mineral and fishing rights, which allowed the State to ‘prospect for, mine, and remove [mineral] deposits from the lands,’ and ‘reserved to the people of the state the right to fish in the waters underlying the lands.’”⁶⁴

The House Report on the Point Reyes Wilderness Act included a statement that NPS will “steadily continue to remove all obstacles” to convert the land from potential wilderness to full wilderness status.⁶⁵ However, the legislative intent of the creation of the Seashore supports the main argument of this comment, in that the wilderness designation provided for “explicit protection of existing agricultural uses, including dairying, beef, cattle ranching, and oyster production.”⁶⁶

4. *Agriculture in the Seashore and DBOC*

The legislative intent behind the steady removal of obstacles did not justify immediate removal upon the expiration of the permit for DBOC due to the Ninth Circuit’s decision. Furthermore, DBOC’s oyster farm was not an obstacle prohibiting either a potential or full wilderness designation.⁶⁷

In establishing Drakes Estero as potential wilderness, Congress recognized the existence of the oyster operations within the wilderness area, but decided not to designate that particular area as pure wilderness; instead, it designated the area as “potential wilderness.”⁶⁸ The NPS “argued vigorously” that, due to California’s reserved mineral and fishing rights, Drakes Estero had an “incomplete title precluded any wilderness designation.”⁶⁹

Originally, Drakes Estero was planned to be designated as wilderness.⁷⁰ However, the presence of the oyster farm, combined with the lease of the bottomlands from the State, made Drakes Estero “unsuitable

⁶² *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1093 (Watford, J., dissenting).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1087 (majority opinion).

⁶⁶ WATT, *supra* note 6, at 107.

⁶⁷ Brief of Dr. Laura A. Watt, et al., *supra* note 37, at 7.

⁶⁸ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1094 (Watford, J., dissenting).

⁶⁹ WATT, *supra* note 6, at 111.

⁷⁰ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1094 (Watford, J., dissenting).

for wilderness designation.”⁷¹ The decision to designate Drakes Estero as potential wilderness occurred because it included “lands which [were] . . . essentially of wilderness character, but retain[ed] sufficient nonconforming structures, activities, uses or private rights so as to preclude immediate wilderness classification.”⁷² During the hearings on the creation of the Point Reyes Wilderness Act in 1976, “[n]o one advocating Drakes Estero’s designation as wilderness suggested that the oyster farm needed to be removed before the area could become wilderness.”⁷³

The designation of Drakes Estero as potential wilderness made it one of eleven marine potential wilderness areas in the United States.⁷⁴ Due to its unique nature as a marine protected area, Drakes Estero is governed by a number of public agencies, including the NPS, the California Fish and Game Commission, the California Coastal Commission, the National Marine Fisheries Service, and the U.S. Fish and Wildlife Service.⁷⁵ The NPS is the primary manager of Drakes Estero, and the California Department of Fish and Game regulates the use of the state water bottom in Drakes Estero, which included a lease to DBOC to grow oysters (called a mariculture lease).⁷⁶

B. SECTION 124

In 2009, the NPS argued, using a National Academy of Sciences Study, that DBOC’s oyster farming negatively impacted the harbor seal population in Drakes Estero.⁷⁷ Following this allegation, the NPS conducted internal research on DBOC and Drakes Estero to establish the potential impact that the oyster farm had on the harbor seal population.⁷⁸ DBOC disputed the study, arguing that it was biased and withheld material and relevant research.⁷⁹ Later, Senator Diane Feinstein’s involvement urged the Superintendent of the Seashore, Don Neubacher (Neubacher), to renew Drakes Bay’s SUP upon expiration.⁸⁰ Neubacher claimed he did not have authority to do so.⁸¹ As a result, Senator Fein-

⁷¹ WATT, *supra* note 6, at 111.

⁷² Drakes Bay Oyster Co. v. Jewell, 747 F.3d at 1095 (Watford, J., dissenting).

⁷³ *Id.* at 1094.

⁷⁴ COMM. ON BEST PRACTICES FOR SHELLFISH MARICULTURE AND THE EFFECTS OF COM. ACTIVITIES IN DRAKES ESTERO, PT. REYES NAT’L SEASHORE, CAL., NAT’L RES. COUNCIL, SHELLFISH MARICULTURE IN DRAKES ESTERO, PT. REYES NAT’L SEASHORE, CALIFORNIA 9 (2009).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ WATT, *supra* note 6, at 190.

⁷⁸ *Id.* at 191.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

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stein sponsored a legislative rider in Congress, Section 124 (Section 124) of the National Environmental Policy Act (NEPA).⁸² In writing Section 124, Congress “sought to override” NPS’s 2005 legal analysis in a memorandum sent to Lunny that stated that the Point Reyes Wilderness Act mandated elimination of DBOC.⁸³

Section 124’s controversial “notwithstanding clause” “precluded” the Secretary from basing his decision on a misinterpretation of the Point Reyes Wilderness Act.⁸⁴ Section 124 stated: “*Notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization.*”⁸⁵ The Secretary “recognized” that Section 124 gave him the authority to issue a new special use permit to DBOC.⁸⁶ However, the Secretary asserted that he would not grant the SUP because renewal was not compatible with the 1976 Point Reyes Wilderness Act.⁸⁷

C. DRAKES BAY OYSTER COMPANY

Before the European settlers wiped them out, oysters had grown in Drakes Estero for millennia.⁸⁸ Oyster farming then returned to Drakes Estero starting in the 1930’s.⁸⁹ The California Fish and Game Department began leasing the waters of Drakes Estero to oyster farms as early as 1934.⁹⁰ In 1954, the Johnson Oyster Company, owned by Charles Johnson (Johnson), began cultivating oysters in Drakes Estero on the beach and in onshore areas adjacent to Drakes Estero.⁹¹ Johnson subsequently sold the land (not the submerged oyster beds) on which the oyster farm was located to the United States in 1972.⁹²

On that same parcel, DBOC cultivated oysters until its RUO expired.⁹³ Upon selling his land to the United States, Johnson agreed to retain a 40-year RUO.⁹⁴ The RUO allowed the land to function as an

⁸² *Id.*

⁸³ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1093 (Watford, J., dissenting); *id.* at 1096-97.

⁸⁴ *Id.* at 1098.

⁸⁵ *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972, 977 (N.D. Cal. 2013).

⁸⁶ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1081.

⁸⁷ *Id.*

⁸⁸ Peter Prows, *Ninth Circuit Grants Emergency Injunction To Protect Drakes Bay Oyster Company From “Artificial Wilderness” Designation*, BRISCOE INVESTOR AND BAZEL LLP NEWSLETTERS (Mar. 11, 2013), <http://briscoelaw.net/3-11-13/>.

⁸⁹ *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d at 978.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

oyster farm within the Seashore until November 30, 2012.⁹⁵ The RUO stated, “[u]pon expiration of the reserved term a special use permit *may* be issued for the continued occupancy of the property for the herein described purposes.”⁹⁶ In addition, “[a]ny permit for continued use will be issued in accordance with the NPS regulations in effect at the time the reservation expires.”⁹⁷ In 2008, DBOC and the NPS executed the SUP that authorized DBOC to conduct operations on an adjacent area to the RUO area to process shellfish, allow for visitors, and operate a pump and sewage pipeline.⁹⁸ The SUP also expired on November 30, 2012.⁹⁹

Kevin Lunny (Mr. Lunny) and his wife, Nancy Lunny, founded DBOC after purchasing Johnson Oyster Company in 2004.¹⁰⁰ Mr. Lunny grew up on a cattle ranch adjacent to the oyster farm where he still resides, and became the first organic rancher in Point Reyes.¹⁰¹ Upon purchase, Mr. Lunny knew that the RUO for DBOC would expire on November 30, 2012.¹⁰² DBOC operated within the Seashore from 2004 until the Secretary mandated that it vacate the Seashore in 2014, upon the denial of the extension of its SUP.¹⁰³

Although Mr. Lunny was aware, at the time of purchasing Johnson Oyster Company, that the RUO would expire, the NPS gave him no notice that it would not renew the RUO or the SUP.¹⁰⁴ In 2005, the NPS issued Mr. Lunny a memorandum from the Solicitor of the Department Interior stating that the 1976 Point Reyes Wilderness Act “mandated elimination of the oyster farm,” without specifying any statutory language to support that mandate.¹⁰⁵ A subsequent memo stated that the NPS could not issue a permit for the oyster farm when its lease “came up for renewal in November of 2012.”¹⁰⁶ As the dissent points out, this statement in the memorandum was a misinterpretation of the history and intent of the Point Reyes Wilderness Act because the NPS “erroneously

⁹⁵ *Id.*

⁹⁶ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1079.

⁹⁷ *Id.*

⁹⁸ *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d at 980.

⁹⁹ *Id.*

¹⁰⁰ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1079.

¹⁰¹ Petition for Writ of Certiorari, *supra* note 5, at 6.

¹⁰² *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1079.

¹⁰³ Guy Kovner, *Facing closure deadline, Drakes Bay harvests final crop*, PRESS DEMOCRAT (Dec. 6, 2014), <http://www.pressdemocrat.com/news/3204619-181/oyster-operation-winding-down?gallery=4454733&artslide=0>.

¹⁰⁴ Petition for Writ of Certiorari, *supra* note 5, at 6.

¹⁰⁵ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1097.

¹⁰⁶ *Id.*

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deemed the oyster farm” as an obstacle, and relied on that assumption in making its decision.¹⁰⁷

Finally, after an environmental review under NEPA, in the form of an environmental impact statement (EIS), the Secretary issued a Memorandum of Decision (MOD) on November 29, 2012.¹⁰⁸ The MOD “directed the [NPS] to let the permit expire according to its terms.”¹⁰⁹

III. DBOC V. THE NPS IN THE NINTH CIRCUIT: THE DISSENT WAS RIGHT

The closing of DBOC was an attempt to create “an artificial wilderness in the middle of an important and historic farming area.”¹¹⁰ The end of the oyster farm’s era in a historic and agriculturally productive area, unfortunately, has negative implications on the future of agriculture in the Seashore. The issues adjudicated in *Drakes Bay Oyster Co. v. Salazar*, at the district court level, and upon appeal in the Ninth Circuit’s decision in *Drakes Bay Oyster Co. v. Jewell*, set a legal precedent that will likely, and unfortunately, guide future agriculture and land use decisions in the Seashore.

Familiarity with the procedural history of *Drakes Bay Oyster Co. v. Jewell* is fundamental to understanding the context of the case. In 2010, Mr. Lunny sent letters asking the Secretary to exercise his authority under Section 124 to extend the SUP past its set expiration date.¹¹¹ The NPS conducted an environmental review under NEPA to analyze the potential environmental impacts of Mr. Lunny’s request to extend the permit.¹¹² Section 124 of NEPA gave authority to the Secretary to authorize another SUP for operations within the park.¹¹³

Section 124 also included that “the Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture” in the Seashore.¹¹⁴ This report concluded there was a “lack of strong scientific evidence that shellfish farming has major adverse ecological effects on Drakes Estero at the current levels of production and under current operational practices.”¹¹⁵

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1081.

¹⁰⁹ *Id.*

¹¹⁰ Petition for Writ of Certiorari, *supra* note 5, at 2.

¹¹¹ *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d at 980.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 977-8.

¹¹⁵ NAT’L RESEARCH COUNCIL, *supra* note 74, at 6.

DBOC brought an action in U.S. District Court, Northern District on December 21, 2012, against Kenneth Salazar, the Secretary of the Department of the Interior at the time, seeking to have the November 29, 2012, MOD “voided” and declared “unlawful” by the court.¹¹⁶ The MOD stated Salazar would allow DBOC’s permit to expire as of November 30, 2012, and that he would not issue a new permit.¹¹⁷ DBOC brought action in the district court seeking a preliminary injunction against the Secretary.¹¹⁸ The court denied the motion for preliminary injunction.¹¹⁹ In bringing the action, DBOC argued that the Secretary’s decision violated regulations that gave the Secretary discretion to renew the permit.¹²⁰

After a denial of the preliminary injunction at the district court, DBOC sought review in the Ninth Circuit. On appeal, DBOC hoped to have the Secretary’s decision to not renew its permit overturned.¹²¹ DBOC filed its appeal on September 3, 2013.¹²²

A. MISINTERPRETATION OF THE POINT REYES WILDERNESS ACT AND SECTION 124

The district court concluded that it did not have jurisdiction to review the Secretary’s decision because Section 124 did not provide a “meaningful standard” on which to base a decision to renew the SUP.¹²³ Furthermore, the district court found that, to establish a likelihood of success on the merits, DBOC would have to show that NPS’s decision was “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law” under Section 706(2) of the Administrative Procedures Act (APA).¹²⁴ The district court held that DBOC could not “show a likelihood of success” under this APA standard.¹²⁵ The Ninth Circuit also held that it “lack[ed] jurisdiction to review the Secretary’s . . . decision whether to issue a new permit.”¹²⁶

Because Congress left it up to the Secretary’s discretion to decide whether to review the SUP, the Ninth Circuit’s majority held that it could not consider “the making of an informed judgment by the agency,” re-

¹¹⁶ *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d at 975.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 976.

¹²⁰ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1077.

¹²¹ *Id.* at 1073.

¹²² *Id.*

¹²³ *Id.* at 1082.

¹²⁴ 5 U.S.C. § 706(2)(a) (1966).

¹²⁵ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1082.

¹²⁶ *Id.*

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garding the Secretary's actions under Section 124.¹²⁷ The court reasoned that Section 124 authorized, but did not require, the Secretary to extend the SUP because it was the Secretary's discretionary decision as the voice of an agency.¹²⁸ The court also held that Congress gave complete authority to the Secretary to grant or deny a SUP extension and provided no "mandatory considerations."¹²⁹

The Ninth Circuit also found no violation under Section 124 because it determined the Secretary was "authorized" to issue a new permit, but was not "required" to do so.¹³⁰ Federal courts have "jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves a violation by the agency of constitutional, statutory, regulatory, or other legal mandates or restrictions."¹³¹

According to the majority, "notwithstanding clauses nullify conflicting provisions of law."¹³² The majority opinion held that the "notwithstanding" clause of Section 124 was in place to "convey that prior legislation should not have been deemed a legal barrier."¹³³ However, this interpretation was not consistent with the legislative intent of the Point Reyes Wilderness Act—which supported the existence of the oyster farm within the wilderness area, as supported by the dissenting opinion.¹³⁴

The Honorable Paul J. Watford's dissenting opinion stated the reasons the majority was in error. According to the dissent, notwithstanding clauses, as the United States Supreme Court has held, are intended to "override conflicting provisions of any other section."¹³⁵ Therefore, the dissent writes, the clause in Section 124 "was intended to override the Department's [2005] misinterpretation of the Point Reyes Wilderness Act," which stated that the Point Reyes Wilderness Act mandated the elimination of the oyster farm.¹³⁶ Thus, the dissent's interpretation of the "notwithstanding" clause of Section 124 is supported by the legislative intent of the previously analyzed Point Reyes Wilderness Act.

The majority believed it was not authorized to decide whether the Secretary made the wrong decision because the Secretary did not violate

¹²⁷ *Id.* at 1078.

¹²⁸ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1082 (citing 5 U.S.C. § 701(a)(2) (2012)).

¹²⁹ *Id.* at 1078.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 1083.

¹³³ *Id.* at 1084.

¹³⁴ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1095.

¹³⁵ *Id.* at 1096.

¹³⁶ *Id.*

any law in making his decision.¹³⁷ The dissent states, even in the absence of a notwithstanding clause, “it would make no sense to assume that Congress authorized the Secretary to base his decision on a misinterpretation of the Point Reyes Wilderness Act.”¹³⁸ Therefore, the dissent concludes that the intention of the notwithstanding clause of Section 124 was to override the previous misinterpretation of the Point Reyes Wilderness Act.¹³⁹ In basing its decision on factors which “Congress intended to override,” the ruling of the Secretary was “arbitrary and capricious” under the APA in deciding not to renew the SUP.¹⁴⁰ The dissent emphasizes that the Secretary misinterpreted the Point Reyes Wilderness Act; therefore, DBOC was “likely to prevail on the merits of its APA claim.”¹⁴¹ The dissent more accurately analyzes and reviews the agency decision in coming to the conclusion that the preliminary injunction should have been issued.

B. THE OYSTER FARM WAS A PRE-EXISTING, NON-CONFORMING USE

Prior to passage of the Point Reyes Wilderness Act, DBOC’s oyster farm was considered a pre-existing non-conforming use.¹⁴² The Federal Wilderness Act of 1964 provides “there shall be no commercial enterprise . . . within any wilderness area.”¹⁴³ This act is “best read as a restriction on *new* uses in designated wilderness areas, but as allowing many uses to continue.”¹⁴⁴ The legislative history of the Federal Wilderness Act sheds light on Congress’s belief that the “new wilderness-preservation system would not affect the economic arrangements of business enterprises ‘because existing private rights and established uses are permitted to continue.’”¹⁴⁵ The Act broadly prohibits commercial enterprises in wilderness areas.¹⁴⁶ However, it also contains a list of exceptions and pre-existing uses that may remain within a wilderness area.¹⁴⁷ The list of prohibitions in the Federal Wilderness Act is “subject

¹³⁷ *Id.* at 1085.

¹³⁸ *Id.* at 1097.

¹³⁹ *Id.*

¹⁴⁰ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1098.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1095.

¹⁴³ 16 U.S.C. § 1133(c) (1964).

¹⁴⁴ Brief of Dr. Laura A. Watt et al., *supra* note 37, at 6.

¹⁴⁵ *Drakes Bay Oyster Co. v. Jewell*, 747 F. 3d 1095 (quoting S. Rep. No. 88-109 at 2 (1963)).

¹⁴⁶ Brief of Dr. Laura A. Watt et al., *supra* note 37, at 6.

¹⁴⁷ *Id.*

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to existing rights,” and allows for the “use of aircraft or motorboats, where these uses have already become established.”¹⁴⁸

As the dissent points out, Johnson Oyster Company had existing private rights issued by California that “pre-dated both the passage of the [federal] Wilderness Act and creation of the Point Reyes National Seashore.”¹⁴⁹ Those opposing the extension of DBOC’s SUP argued that Drakes Estero’s designation as “potential wilderness meant that Congress intended the oyster farm to cease operations once its federal lease to operate on the land expired in 2012.¹⁵⁰ However, that position is not supported by the legislative intent of the Point Reyes Wilderness Act. The only suggestion of such an intent is a “single sentence in the House Report” to “steadily remove obstacles” to allow for full wilderness status of Drakes Estero.¹⁵¹ Reliance on this single sentence, however, is a flawed interpretation of the Point Reyes Wilderness Act, since the legislative history does not view the oyster farm as an “obstacle.”¹⁵²

The Sierra Club, in the years before passage of the Point Reyes Wilderness Act, also supported the idea of the oyster farm as a pre-existing, non-conforming use.¹⁵³ “The water area can be put under the Wilderness Act even while the oyster culture is continued—it will be a prior existing, non-conforming use.”¹⁵⁴ Many statements in the Senate Hearings on the Point Reyes Wilderness Act, including those from the cosponsors of the legislation, also support this interpretation.¹⁵⁵ Testimony at House Hearings also “echoed this sentiment and endorsed continued oyster farming.”¹⁵⁶ For example, the Wilderness Society’s representative, Raye-Page, expressed his agreement with this concept by testifying,¹⁵⁷ “the oyster culture activity, which is under lease, has a minimal environmental and visual intrusion . . . [the oyster farm’s] continuation is permissible as a pre-existing non-conforming use and is not a deterrent for inclusion of the federally owned submerged lands of Drakes Estero in wilderness.”¹⁵⁸

¹⁴⁸ *Id.* (citing 16 U.S.C. § 1133(c), § 1133(d)(1)).

¹⁴⁹ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1097.

¹⁵⁰ Brief of Dr. Laura A. Watt et al., *supra* note 37, at 7.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (citing Sierra Club comment letter to National Park Service (May 30, 1973), appended to Department of Interior, Propose Wilderness Point Reyes National Seashore California: Final Environmental Impact Statement (“1974 FEIS”), at A41, A51 (April 1974)).

¹⁵⁵ *Id.* at 8.

¹⁵⁶ *Id.* at 9.

¹⁵⁷ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1094.

¹⁵⁸ *Statement of (Ms.) Raye-Page for The Wilderness Society before the National Parks and Recreation Subcommittee of the House Interior and Insular Affairs Committee on H.R. 8002 and*

Therefore, the legislative intent of the Point Reyes Wilderness Act supports the existence of DBOC as a pre-existing, non-conforming use. The dissent holds that the oyster farm was allowed to remain under the potential wilderness designation because DBOC's operations were not "incompatible with the area's wilderness status."¹⁵⁹ The dissent also notes that the comments on the legislation to designate wilderness status included the comment: "the oyster farm was a beneficial pre-existing use that should be allowed to continue notwithstanding the area's designation as wilderness."¹⁶⁰ The dissent correctly found the intent of the Point Reyes Wilderness Act was to consider the oyster farm to be, in fact, a pre-existing, non-conforming use at the time of the designation of Drakes Estero as potential wilderness.

C. THE STRONG PUBLIC POLICY IN SUPPORT OF DBOC

DBOC's oyster cultivation provided significant environmental benefits.¹⁶¹ Oysters are filter feeders, which means that they consume phytoplankton (microscopic marine organisms) and thereby improve water quality by filtering the water.¹⁶² As the oysters grow, they form structured reefs on which other marine creatures can thrive.¹⁶³ To put in perspective the importance of oysters for water quality, consider that in the Chesapeake Bay, the oyster population is now one percent of what it once was, resulting in degraded water quality.¹⁶⁴ As a result, the National Oceanic and Atmospheric Administration implemented oyster restoration activities to help restore the water quality in the Chesapeake Bay.¹⁶⁵

DBOC played a significant role in shellfish production in the Bay Area and California, providing about 40 percent of California's oysters.¹⁶⁶ When DBOC was in operation, oyster production was approximately 500,000 pounds of oyster meat per year,¹⁶⁷ valued at one and a

H.R. 7198 to establish Point Reyes Wilderness in California, 94th Cong. at 6 (1976) (statement of Raye-Page, The Wilderness Society, Representative).

¹⁵⁹ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1094.

¹⁶⁰ *Id.*

¹⁶¹ Petition for Writ of Certiorari, *supra* note 5, at 2.

¹⁶² Nat'l Oceanic and Atmospheric Administration, Chesapeake Bay Office, *Oyster Reefs*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., https://chesapeakebay.noaa.gov/index.php?option=com_content&view=article&id=97&Itemid=124 (last visited Feb. 4, 2018).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *What Drakes Bay Oyster Means to Our Community*, DRAKES BAY OYSTER CO., <http://www.drakesbayoyster.com/community/> (last visited Feb. 20, 2017).

¹⁶⁷ Michael Ames, *The Oyster Shell Game*, NEWSWEEK (Jan. 18, 2015), <http://www.newsweek.com/2015/01/30/oyster-shell-game-300225.html>.

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half million dollars.¹⁶⁸ DBOC produced oysters on less than 150 acres of water bottom.¹⁶⁹ From an agricultural and nutritional perspective, oysters provide an excellent protein alternative without the use of feed, fertilizers, or pesticides.¹⁷⁰ As a comparison, it would take approximately 30,000 acres of pasture to produce an equivalent amount of protein from a grass-fed beef operation.¹⁷¹ Now that DBOC is no longer in production, the demand for oysters requires California to produce an additional 38,000 pounds of oysters per week.¹⁷²

Alice Waters¹⁷³ and Michael Pollan,¹⁷⁴ both food pioneers and advocates of local, sustainable agriculture, supported DBOC's operations as embodying the local, sustainable agriculture movement. An amici curiae brief in support of an appeal for the denial of the preliminary injunction expressed the viewpoints of these supporters and more.¹⁷⁵ The closing of the oyster farm had a "broad, negative impact" on the future of sustainable agriculture" and "on the local economy . . . [the] food industry in the San Francisco Bay Area . . . and, in the longer term, food security and the U.S. balance of trade."¹⁷⁶

Supporters of DBOC argued that, if the oyster farm's lease was not renewed, the effects would be detrimental on other shellfish production businesses. Other shellfish producers in the area, such as Tomales Bay Oyster Company,¹⁷⁷ expressed concerns about its capacity to meet the

¹⁶⁸ Matt Brown, *Drakes Bay Oyster Co. agrees to shut down*, PRESSDEMOCRAT (Oct. 6, 2014), <http://www.pressdemocrat.com/news/2927908-181/drakes-bay-oyster-co-agrees?artslide=2>.

¹⁶⁹ *What Drakes Bay Oyster Means to Our Community*, *supra* note 166.

¹⁷⁰ Petition for Writ of Certiorari, *supra* note 5, at 2.

¹⁷¹ *See supra* note 169.

¹⁷² *Id.*

¹⁷³ Alice Waters is a chef and author, and an "American pioneer" of the culinary philosophy of using seasonal, sustainable, and local ingredients. She is the proprietor of the historic Chez Panisse restaurant and is Vice President of Slow Food International. CHEZ PANISSE, <http://www.chezpanisse.com/about/alice-waters/> (last visited Feb. 20, 2017).

¹⁷⁴ Michael Pollan is an award-winning author who writes about the intersection of culture and nature within food, farms, gardens, and the human environment. He has written books such as *The Omnivore's Dilemma: A Natural History of Four Meals* (2006) and *Food Rules: An Eater's Manual* (2010). MICHAEL POLLAN, <http://michaelpollan.com/press-kit/> (last visited Feb. 20, 2017).

¹⁷⁵ Alice Waters, Hayes Street Grill, Tomales Bay Oyster Company, Marin County Agricultural Commissioner Stacy Carlsen, California Farm Bureau Federation, Marin County Farm Bureau, Sonoma County Farm Bureau, Food Democracy Now, Marin Organic, and Alliance for Local Sustainable Agriculture filed an amici curiae brief on March 13, 2013, in support of an appeal for the denial of the preliminary injunction in the district court. Motion for Leave to File Amici Curiae Brief in Support of Appellant DBOC Preliminary Injunction Appeal at 1, *Salazar*, 921 F. Supp. 2d 972 (2013) (No. 13-15227).

¹⁷⁶ *Id.*

¹⁷⁷ Tomales Bay Oyster Company is one of two oyster companies located on Tomales Bay, located east and inland of the Seashore. Motion for Leave to File Amici Curiae Brief at 8, *Salazar*, 921 F. Supp. 2d 972 (No. 13-15227). While part of Tomales Bay borders the Seashore, these two

higher demand resulting from DBOC's closing.¹⁷⁸ Because of limited local capacity to produce oysters, oysters now must be imported from other states or countries.¹⁷⁹

IV. FUTURE IMPLICATIONS FOR AGRICULTURE IN POINT REYES

The DBOC dispute was not the end of the fight to keep agriculture in existence in the Seashore. A coalition of environmental groups recently filed a parallel lawsuit¹⁸⁰ to the DBOC dispute in U.S. District Court in San Francisco in February 2016.¹⁸¹ A group of environmentalists filed *Resource Renewal Institute, Center for Biological Diversity, and Western Watersheds Project v. National Park Service* to challenge the continuation of ranching leases in the Seashore, claiming that ranching in the Seashore causes environmental harm.¹⁸² The plaintiffs allege a violation by NPS of federal law in determining to “move forward with a ranch plan without conducting sufficient environmental studies on how ranching affects the Seashore’s natural resources.”¹⁸³ Unfortunately, the decision in the DBOC case is not favorable for the ranchers in this new lawsuit.

The environmental groups bringing the suit allege that the NPS records “show that ranching operations [have] adverse effects, including impairing resources like water quality, wildlife, and recreational uses.”¹⁸⁴ In bringing this action, the plaintiffs (the environmental groups) hope to receive “a full and fair scientific review of the impacts of ranching on the many protected species in the park, as compared to other public uses of the seashore.”¹⁸⁵

oyster companies can remain in operation because they do not operate under SUPs within the Seashore.

¹⁷⁸ Motion for Leave to File Amici Curiae Brief at 2, *Salazar*, 921 F. Supp. 2d 972 (No. 13-15227).

¹⁷⁹ *Id.* at 7.

¹⁸⁰ After the U.S. District Court denied NPS's motion to dismiss the lawsuit in July 2016, this lawsuit continued was settled in July 2017. Twilight Greenaway, “Ranching in Point Reyes Seashore Called into Question,” *CIVIL EATS* (Sept. 16, 2016), <http://civileats.com/2016/09/16/ranching-in-point-reyes-national-seashore-called-into-question/>.

¹⁸¹ Complaint at 1, *Resource Renewal Institute, Center for Biological Diversity, and Western Watersheds Project v. National Park Service* (N.D. Cal. filed Feb. 10, 2016) (No. 3:16-cv-00688).

¹⁸² *Id.*

¹⁸³ Mark Prado, *Court says lawsuit targeting Point Reyes cattle operations can move forward*, *MARIN INDEPENDENT J.* (July 19, 2016), <http://www.marinij.com/article/NO/20160719/NEWS/160719800>.

¹⁸⁴ Devin Katayama, *Lawsuit Challenges Cattle Ranches at Point Reyes National Seashore*, *KQED NEWS* (Feb. 12, 2016), <https://ww2.kqed.org/news/2016/02/12/lawsuit-challenges-cattle-ranches-at-point-reyes-national-seashore/>.

¹⁸⁵ Prado, *supra* note 183.

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The ranchers argue that they have been an important part of the history and culture of Point Reyes and its landscape, as some of the families and farms have resided in the Seashore since the 1860s.¹⁸⁶ Specifically, the plaintiffs allege that the NPS must prepare a new or revised General Management Plan (GMP) before continuing its current planning process, to “fully analyze the impacts of livestock ranching on the natural and recreational resources of the Seashore.”¹⁸⁷ GMPs are required to be revised each year, and must include “measures for the preservation of the area’s resources.”¹⁸⁸ There are currently fifteen families with ranching operations in the Seashore, covering 18,000 acres.¹⁸⁹ Most of the ranchers now operate under “one year lease extensions,” as the NPS has said it cannot renew new leases until the GMP process is complete.¹⁹⁰

A settlement agreement in this suit was filed on July 12, 2017.¹⁹¹ The outcome of this agreement is that the Seashore will “update its general management plan and prepare an associated environmental impact statement that evaluates alternatives that include eliminating historic ranching and dairying operations.”¹⁹² This outcome may have been influenced by the dangerous precedent set by the DBOC case, in that the Seashore now will evaluate the option of eliminating ranching from its land. As a result of the settlement of the *Center for Biological Diversity* suit, the unfortunate potential remains that ranching may eventually be completely eliminated from the Seashore.

The most unfortunate consequence of the DBOC suit results from the fact that the Ninth Circuit held that it did not have jurisdiction to overrule the Secretary’s decision.¹⁹³ The DBOC case set the precedent that agency decisions of the nature of the Secretary’s cannot be overturned by judicial review. If this is the precedent by which the Ninth Circuit—and other courts—will consider any future actions by the NPS, regardless of whether the NPS decides to renew the ranchers’ leases, the court may again deny it has the discretion to overturn any decision by the Secretary.

¹⁸⁶ Katayama, *supra* note 184.

¹⁸⁷ Compl. At 3, *Resource Renewal Institute, Center for Biological Diversity, and Western Watersheds Project v. National Park Service* (2016) (No. 3:16-cv-00688).

¹⁸⁸ 54 U.S.C. § 100502(a).

¹⁸⁹ Prado, *supra* note 183.

¹⁹⁰ WATT, *supra* note 6, at 224.

¹⁹¹ Stipulated Settlement Agreement, *Resource Renewal Institute, Center for Biological Diversity, and Western Watersheds Project v. National Park Service*, No. 4:16-cv-00688, (N.D. Cal. July 12, 2017).

¹⁹² *Settlement reached in ranching suit*, Pt. REYES LIGHT (July 12, 2017), <https://www.ptreyeslight.com/article/settlement-reached-ranching-suit>.

¹⁹³ *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d at 1082.

V. CONCLUSION

The debate among environmentalists that this comment presents has substantial implications for the future of agriculture in Point Reyes National Seashore and the United States. As humans continue to have an impact on natural landscapes, there exists a need for altering the meaning of preservation. Societal trends “increasingly value sustainable agriculture and a more intimate connection with the natural world through cultural use and engagement.”¹⁹⁴

The Seashore, with its “working landscape,”¹⁹⁵ is a perfect example that showcases how agriculture and wilderness can coexist “side by side,” further demonstrating that “humans can coexist with the natural world.”¹⁹⁶ It is extremely unfortunate that the loss of DBOC has reduced the potential for this coexistence. Departures from the working landscape in the Seashore are “a tragic loss to this vibrant area’s sustainable agriculture and distinctive character.”¹⁹⁷

The NPS mandate terminating DBOC’s operations is highly negative precedent for the future of the relationship between humans and nature. The judicial process of reviewing DBOC’s operations required a closer look at the legislative intent, agricultural impact and cultural importance of the Seashore.

Overall, the precedent from the Ninth Circuit, which suggests that courts do not have the authority to overturn the decisions of an agency such as the NPS, is a flawed and highly detrimental standard for the future of agriculture within the NPS. The modern definition of “wilderness” has changed from the stringent standards of its historical use. It is now necessary to acknowledge the need for and importance of working landscapes that allow both wilderness and agriculture to coexist.

¹⁹⁴ WATT, *supra* note 6, at 215.

¹⁹⁵ Motion for Leave to File Amici Curiae Brief at 11, *Salazar*, 921 F. Supp. 2d 972 (No. 13-15227).

¹⁹⁶ WATT, *supra* note 6, at 226.

¹⁹⁷ *Id.*

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