NOTE: This post is by Legal Planet guest bloggers Nell Green Nylen, Heather Welles, Dan Carlin, Elisabeth Long, and Mary Loum, all members of UC Berkeley's Environmental Law Society during the 2011–12 academic year. (See more details about the work of these law students and new lawyers at the end of the post.)

Aerial view of Drakes Estero, which became wilderness on December 4th, from sand spit at inlet. Photo credit to David Zinniker.

If you have been following the controversy surrounding oyster farming in Drakes Estero, part of California's Point Reyes National Seashore, you might have been surprised to learn why the Secretary of the Interior ultimately decided not to give Drakes Bay Oyster Company (DBOC) a permit to continue its shellfish farming operations in the estuary. It's a move that allows the waterway to finally achieve full wilderness status after spending 36 years in limbo as congressionally designated potential wilderness. In his November 29th decision memorandum Secretary Salazar explained that his decision was *not* premised on local environmental or social concerns, but solely "on matters of law and policy," namely:

1. "[t]he explicit terms of the 1972 conveyance" of 5 acres of land adjacent to Drakes Estero from DBOC's predecessor, Johnson Oyster Company (JOC) to the federal government, in which JOC kept a 40-year Reservation of Use and Occupancy (RUO) for the 1.5 acres bearing its oyster processing facility, and
2. allowing DBOC to continue operating in the estuary would violate National Park Service policy "concerning commercial use within a unit of the National Park System and nonconforming uses within potential or [full] wilderness, as well as specific wilderness legislation for Point Reyes National Seashore."

Why did this rationale shock many observers?

For years, media coverage has tended to portray the dispute as hinging on inconclusive scientific assessments of DBOC's environmental impacts, with the National Park Service and DBOC presenting competing views. In fact, as Secretary Salazar's decision memorandum reflects, there are independent, long-standing legal and policy bases for ending the shellfish farming operation. While the uncertain science has led to a series of prominent reviews by the National Research Council (in 2009 and 2012; see Ian Fein's 2011 article for a description of the NRC's role), the Marine Mammal Commission (in 2011), and the U.S. Geological Survey (in 2012), among others, there is much more to the Drakes Estero/DBOC story.

DBOC is a relative newcomer to Drakes Estero. Although the company's owner, Kevin Lunny, and his family have run a cattle ranch on land adjacent to the estuary in Point Reyes' "pastoral zone" for years, DBOC has only been a reality since December 2004, when Lunny purchased JOC's assets, including the remainder of the RUO JOC negotiated in 1972. Although the RUO contained a renewal clause that would have allowed the National Park Service to discretionarily issue a new permit when it expired on November 30, 2012, Congress nullified that possibility when it designated Drakes Estero as potential wilderness as part of the Point Reyes Wilderness Act of 1976. Notably, this was the first time Congress used the "potential wilderness" designation, intended to preserve land Congress deemed worthy of wilderness designation but which contained temporary non-conforming uses that prevented immediate conversion to full wilderness. As Secretary Salazar pointed out in his memorandum, the House committee report accompanying the act emphasized that

> [a]s is well established, it is the intention that those lands and waters designated as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily remove all obstacles to the eventual conversion of these lands and waters to wilderness status.

DBOC's (previously, JOC's) commercial shellfish farming operation comprised the sole non-conforming use preventing Drakes Estero from becoming unqualified wilderness. (Section 4 of the Wilderness Act generally prohibits motorized vehicles and all commercial activities except those intimately tied to enjoyment of wilderness values.) Therefore, although the National Park Service was bound to honor the remainder of the RUO and DBOC's existing Special Use Permit, the agency believed it lacked authority to renew these instruments once expired.

Lunny knew this at the time he purchased JOC's operation, but says his lawyers told him there might be room to negotiate an extension. Despite the odds (multiple acts of Congress, including the Wilderness Act itself) stacked against him, Lunny did not quail. Instead he enlisted public support—including the active participation of California's senior senator, Dianne Feinstein—to craft his oyster operation an exemption from federal environmental law. It worked. In October 2009, Senator Feinstein's rider to the Senate appropriations bill for the Department of the Interior became law. Section 124 of Public Law 111-88 provided that:

> notwithstanding any other provision of law, the Secretary of the Interior is

> authorized to issue a special use permit [to DBOC] with the same terms and conditions as the existing authorization, except as provided herein, for a period of 10 years from November 30, 2012 . . . .

This represented a step back from Senator Feinstein's earlier, unsuccessful attempts to insert language that would have *required* the National Park Service to let DBOC continue operations. However, for the first time in 33 years, the Secretary of the Interior could legally consider the option.

Because Section 124 (through its "notwithstanding" clause) almost certainly freed Secretary Salazar from the necessity of complying with (at a minimum) NEPA, the Wilderness Act, and the Point Reyes Wilderness Act, he could have made the decision regarding DBOC's proposed permit in an environmental-law vacuum. Indeed, Secretary Salazar made clear he believed Section 124 expressly exempted his decision "from any substantive or procedural legal requirements."

Despite the "notwithstanding" clause, the National Park Service prepared an EIS to inform the Secretary's decision, as it would be required to do for any other proposed major federal action with potentially significant environmental impacts. This EIS, however, acknowledged its difference. For example, it explained that, while Section 124 exempted the Secretary's decision from NEPA's mandate, the Department of the Interior "determined that it is helpful to generally follow the procedures of NEPA." Normally, the Final EIS would have identified a preferred alternative, and, after a 30-day waiting period, the agency would issue a Record of Decision. Here, however, the FEIS, released on November 20th, expressly cited Section 124 as authority for not identifying a preferred alternative, and the National Park Service is unlikely to issue a Record of Decision, which would be redundant in light of the Secretary's decision memorandum.

Similarly, despite that fact that Section 124 did not "prescribe [] factors on which" the Secretary had to base his decision (and exempted it from other legal encumbrances), he decided to give "great weight to matters of public policy." In the first paragraph of his "Discussion," the Secretary acknowledged that

> the scientific methodology employed by the NPS in preparing the DIES and FEIS and the scientific conclusions contained in those documents have generated much controversy and have been the subject of several reports. Collectively, those reports indicate that there is a level of debate with respect to the scientific

> analyses of the impacts of DBOC's commercial mariculture operations on the natural environment within Drakes Estero.

However, he pointed out that, regardless of the "scientific uncertainty and [] lack of consensus in the record regarding the precise nature and scope of the impacts . . . , the DEIS and FEIS support the proposition that the removal of DBOC's commercial operations in the estero would result in long-term beneficial impacts to the estero's natural environment." Therefore, these documents, "while not material to the legal and policy factors" that ultimately controlled his decision, informed him about the scientific "complexities, subtleties, and uncertainties of this matter."

Avoiding reliance on the uncertain and contested data regarding DBOC's environmental impacts, Secretary Salazar chose to base his decision "on the incompatibility of commercial activities in wilderness," consistent with the Wilderness Act and Congress's intent in designating Drakes Estero as potential wilderness in 1976. The fact the Secretary used Congress's 2009 grant of authority in this fashion provides persuasive administrative precedent for bringing nonconforming uses in other congressionally designated potential wilderness areas to a rapid close once they become optional. If he had chosen to grant the permit, this would have effectively just kicked the can down the road. Absent further congressional action, in 10 years the original (pre-Section 124) dilemma would have re-emerged.

On December 4th, the National Park Service performed the administrative formality of publishing a Federal Register notice announcing the conversion of 1,363 acres of Drakes Estero from congressionally designated potential wilderness to full wilderness. As the Secretary noted in his decision memorandum, this bit of paperwork enlarges the only "marine wilderness on the Pacific coast of the United States outside of Alaska" (Estero de Limantour, the southeastern finger of the estero, made a similar transition after its nonconforming use ended in 1999; see map).

However, this saga is not over yet. DBOC, represented by the free-market advocacy group Cause of Action, filed a lawsuit on December 3rd in the U.S. District Court for the Northern District of California. Among other things the hastily cobbled-together complaint includes constitutional (takings and due process) claims, alleges NEPA and other statutory violations, requests temporary and permanent injunctive relief preventing "any action to implement the decision or to deny DBOC the 10-year SUP contemplated by Section 124," and asks the court to "order the issuance to DBOC of the 10-year SUP." In essence, the complaint directly contests the Secretary's reading of Section 124, including his interpretation of

Congress's grant of authority and the effect of the "notwithstanding" clause.

Regardless of how the litigation evolves, one thing seems certain: Going forward, media coverage of this controversy will be more likely to acknowledge the central role played by the potential wilderness designation Congress bestowed upon Drakes Estero.

The authors, members of UC Berkeley's Environmental Law Society during the 2011–12 academic year, researched the administration of nonconforming uses in congressionally designated potential wilderness areas and summarized the results in a comment submitted during the public comment period for the Drakes Bay Oyster Company Special Use Permit Draft Environmental Impact Statement*. Subsequently, they converted their comment into an article, titled "*Will the Wilderness Act be Diluted in Drakes Estero?*," published over the summer in* Ecology Law Currents*. Based on their research, they argued that the unprecedented nature of extending a non-recreation-focused commercial enterprise in a congressionally designated potential wilderness area—and the purpose and substance of the 1964 Wilderness Act and the 1976 Point Reyes Wilderness Act—counseled against granting a new permit.*