Drakes Estero. Photo by Ralph TQ, Flickr.

The debate over Drakes Bay Oyster Company's continued operation within the Point Reyes National Seashore created two unlikely foes: environmentalists in favor of transitioning the land to wilderness, and supporters of local, organic food and a longstanding family business. The San Francisco Chronicle aptly termed it a "legal and philosophical slugfest."

The door seems to be closed for the oyster farm's continuation beyond March 15, 2013, as Department of the Interior (DOI) Secretary Ken Salazar decided not to renew the company's lease, and instructed it to wind down operations by mid-March. Drakes Bay has filed a lawsuit challenging the decision to deny a special use permit for its continued operation, alleging violations of NEPA, the Data Quality Act, the Administrative Procedure Act and the U.S. Constitution.

Five members of Berkeley Law's Environmental Law Society did an excellent job reviewing the history of the oyster farm's tenure on a narrow stretch of the Point Reyes National Seashore estuary in Marin County, California. In addition to their blog post commenting on the denial of the lease extension, they published an article in *ELQ*'s online edition, *Currents*, which summarizes their comments on the Draft Environmental Impact Statement.

In my view, Secretary Salazar's decision and supporting memorandum is legally-defensible. This is clear from the terms of the company's 40-year lease, the Point Reyes National Seashore Act, as well as the 2009 rider introduced by Senator Diane Feinstein that permitted – but did not require – DOI to extend the lease beyond November 30, 2012. Below, I offer some additional thoughts on the legal issues, legislative history, and larger questions about defining "wilderness" in the 21st century.

Legal Issues

Supporters of Drakes Bay contend that NPS could have granted a special use permit for the the farm's continued operation beyond November 30, 2012, as this would be consistent with the Organic Act's dual mandate to conserve park resources and provide for their use and enjoyment (*see* 16 U.S.C. § 1), as well as the Point Reyes National Seashore Act and Wilderness Act. Indeed, a long line of cases discuss the

"broad grant of authority" to NPS to make decisions effectuating the Organic Act's dual mandate. *See, e.g., Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1446, 1452 (9th Cir. 1996). Proponents of the oyster farm argue that NPS should have used its discretion to balance conservation and cultural, social, and historical uses, and extend the lease.

NPS claims that its hands were tied, citing the specific wilderness designation for the Point Reyes National Seashore which names Drakes Estero, encompassing the oyster farm, as "potential wilderness."

In 1964, Congress passed the Wilderness Act to set aside areas "for the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness." Public Law 88-577, Sec. 2 (1964). The Act states that "wilderness areas shall be devoted to the public purpose of recreational, scenic, scientific, educational, conservation, and historical use." 16 U.S.C § 1133(b). The law is clear that NPS is required to prevent commercial enterprises in wilderness areas. *See, e.g., Wilderness Soc'y v. USFWS*, 353 F.3d 1051 (9th Cir. 2003).

NPS may, however, allow commercial enterprises such as commercial fishing in non-wilderness areas, including potential wilderness areas. *See, e.g.*, *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1070 (9th Cir. 1997) (upholding NPS decision to allow commercial fishing in Glacier Bay National Park). The Wilderness Act contains no specific reference to "potential wilderness;" Congress created this new category when it designated "potential wilderness" areas at PRNS in 1976. *See* Pub. L. No. 94–544, § 1, 90 Stat. 2515 (1976). These lands are defined as, "lands that are surrounded by or adjacent to lands proposed for wilderness designation but that do not themselves qualify for immediate designation due to temporary nonconforming or incompatible conditions." National Park Service, Management Policies, 6.2.2.1 (2006). However, "potential wilderness" is not defined in the Wilderness Act.

NPS has allowed several non-conforming uses in potential wilderness areas, such as: motorized boats in Grand Canyon National Park, operation of hydroelectric dams in potential wilderness areas such as Sequoia-Kings Canyon National Park, and continual use of the High Sierra camps and Ostrander ski hut in Yosemite Valley. In addition, there is no explicit timetable for when a non-conforming use must be removed, in order to convert the area to full wilderness. That said, it has been NPS practice to convert congressionally designated potential wilderness areas to full wilderness when the non-conforming use has ceased. *See, e.g.,* National Park Service, Reference Manual RM 41: Wilderness Presevation and Management, at 74

(1999)(“Designated potential wilderness should be converted to designated wilderness once the non-conforming uses have been extinguished”).

One could argue that preservation of Drakes Bay Oyster Company provides important recreational, educational, and historical benefits making it compatible with full wilderness. Yet, this very likely goes too far based on case law and NPS precedent. A potentially more legally-defensible action would be to allow the oyster farm to continue operations *temporarily* in the potential wilderness area of PRNS – extending the lease according to the terms of the Senator Feinstein rider. But, not withstanding the Feinstein rider’s express statement that the extension may *not* be used as precedent for other wilderness designations, extending the lease might open the door to additional riders and a consequent weakening of the Wilderness Act.

Members of Congress and Staff in
1961, with President Kennedy

Legislative History Reveals Support for the Continued Operation of the Oyster Farm

The legislative history of the Point Reyes National Seashore Act contains numerous references to the continued operation of the oyster farm within Point Reyes National Seashore.

In 1961, during Congressional hearings on the establishment of PRNS, former Director of NPS, Conrad Wirth, explained that: “[e]xisting commercial oyster beds and an oyster cannery at Drakes Estero, plus three existing commercial fisheries, should continue under national seashore status because of their public values. The culture of oysters is an interesting and unique industry which presents exceptional educational opportunities for introducing the public, especially students, to the field of marine biology.” National Park Service, Conrad L. Wirth, Director, Report on the Economic Feasibility of the Proposed Point Reyes National Seashore at 20 (1961).

Comments made during the 1961 Senate Hearings also show strong support for continued oyster farming: “[t]his proposed legislation provides a balanced use between the public and private interests concerned [because] the oyster and commercial fisheries would be able to continue operation and provide both recreation and economic value to the seashore.” Hearings Before the Subcommittee

on Public Lands of the Committee on Interior and Insular Affairs, U.S. Senate, 87th Congress, First Session on S. 476, A Bill to Establish The Point Reyes National Seashore in the State of California and for Other Purposes at 17 (March 28, 29 and 31, 1961).

Support for the operation of the oyster farm continued through the 1970's as Congress designated new wilderness areas within PRNS. Senator John Tunney stated, "The existing agricultural and aquacultural uses can continue." Hearings on S. 1093 and S. 2472 Before The Subcomm. on Parks and Recreation of the Comm. on Interior and Insular Affairs, 94th Cong. 271 (1976).

But despite this strong showing of support from Congress, the oyster farm was ultimately designated as "potential wilderness," making its operation within PRNS a "temporary" nonconforming use.

Looking Ahead: "Wilderness" in a Modern World

Given Secretary Salazar's decision to not renew the oyster farm's lease, Drakes Bay faces an uphill battle to secure a lease extension. But larger questions remain. Is it time to rethink our conception of "wilderness" in 2013? A few related thoughts:

- **Where does local, sustainable food fall on our list of environmental and social priorities?** As a result of the oyster farm's closure, Californians will have to replace 30 percent of the oysters they once consumed from Drakes Bay with oysters from out-of-state or outside the U.S. How will we feed a booming population and support local, sustainable agriculture while also preserving our national spaces for generations to come?
- **How do we define wilderness in the anthropocene?** Given climate change, every molecule of air, ecosystem, and organism is now impacted by human activity. Even if we remove all human machinery and dwellings, "wilderness" will still be impacted by our air emissions, upstream water pollution, and more. While their value remains, stewarding such wilderness areas will demand international action to reduce GHG emissions and other widespread impacts.
- **What cultural values will we preserve in the future?** Oyster farming in the Bay Area and the Point Reyes National Seashore actually pre-dates European settlement of the region. Coastal Miwok Native Americans harvested native shellfish hundreds of years ago. The National Resources Council report

widely cited in the Drakes Bay controversy and record notes on page one, “the cultural history of oyster farming predates the designation of Point Reyes as National Seashore in 1962.” NRC Report at 1 (2009). Yet, these cultural and historic values were deemed less important than conversion to full wilderness in this case.

- **Is wilderness really divorced from human influence and machinery?** Today, visitors drive to national park trailheads in air-conditioned vehicles, carry iPhones, French wines and packaged foods, camp in state of the art sleeping bags, and more. Our interaction with nature increasingly entails human influence. Perhaps visiting a place like an oyster farm – and viewing where our food comes from, holding oysters and tasting them – actually bring us “closer” to nature in a way that promotes better resource stewardship. One way we might re-conceptualize our relation to nature is to think of it on a spectrum, from wild to artificial, and conserve places across this wide spectrum according to their ecological and social values.

As we continue to grapple with conservation in a rapidly changing world, these questions will become more acute. This saga of mollusks and men should serve as a catalyst for future discussion and thinking.