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# Drakes Bay Oyster Co. v. Jewell

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# *Drakes Bay Oyster Co. v. Jewell,* 747 F.3d 1073 (9th Cir. 2013), *cert. denied*, 134 S.Ct. 2877 (Mem)

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## I. ABSTRACT

In *Drakes Bay* the United States Court of Appeals, Ninth Circuit ruled that language within appropriations legislation aimed specifically at the expiration of the Drakes Bay Oyster Company's Reservation of Use and Occupancy within Point Reyes National Seashore provided the Secretary of the Interior discretion whether to issue a new special use permit for oyster farming. The inclusion of the term "notwithstanding" ensured that the Secretary was not obligated to consider previously passed legislation, department policy, or any other requirements in reviewing whether to reauthorize the special use permit. The Ninth Circuit held that they had jurisdiction to review the narrow issue of whether the Secretary misinterpreted granted authority.

## II. INTRODUCTION

In *Drakes Bay Oyster Co. v. Jewell*, the United States Court of Appeals, Ninth Circuit ("Ninth Circuit") held that the Secretary of the Interior ("Secretary") acted within defined parameters of § 124 of a Department of the Interior Appropriations Act ("DOI Act") by allowing a special use permit for oyster farming within California's Point Reyes National Seashore to expire.[1] Drakes Bay sought injunctive relief under the Administrative Procedures Act ("APA") based on several legal theories, which included violations of: § 124 of the DOI Act, the National Environmental Policy Act ("NEPA"), and other federal regulations.[2] The Ninth Circuit held that the Secretary did not violate any statutory mandate because the "notwithstanding" clause within § 124 provided the Secretary discretion to decide whether or not to extend the existing special

[1] *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073 (9th Cir. 2014) , *cert. denied*, 134 S.Ct. 2877 (Mem).
[2] *Id*. at 1077-78.

use permit.[3] Although a NEPA review of the permit denial was completed, the Ninth Circuit deemed it unnecessary, and any error tied to the review was found harmless.[4]

## III. FACTUAL AND PROCEDURAL BACKGROUND

In 1976, portions of the Point Reyes National Seashore, including an area known as Drakes Estero, were designated "wilderness" under the Wilderness Act.[5] Due to the existence of commercial oyster farming operations within Drakes Estero, these areas were designated as "potential wilderness."[6] Congress slated lands designated "potential wilderness" for conversion to "wilderness" upon termination of incompatible use.[7]

In 1972 the Johnson Oyster Co. conveyed lands designated as "potential wilderness" to the United States.[8] As part of the sale, a forty-year reservation of use and occupancy for oyster farming was retained.[9] The reservation of use and occupancy stated that upon '"expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property.'"[10] The property reservation and use transferred to Drakes Bay upon its purchase of the Drakes Estero oyster farm from Johnson Oyster Co.[11]

In 2009, Congress passed a special provision, known as §124 related to oyster farming in Drakes Estero as part of the of the 2009 DOI Act.[12] Section 124 provided that "*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 . . . for a period of 10 years from

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[3] *Id*. at 1078.
[4] *Id*.
[5] *Id*. (citing Pub. L. No. 87-657, 76 Stat. 538, 538 (1962)).
[6] *Id.* at 1079.
[7] *Drakes Bay Oyster Co.*, 747 F.3d at 1079.
[8] *Id*.
[9] *Id*.
[10] *Id*. at 1079. (emphasis removed) (quoting Johnson Oyster Co. Reservation of Use and Occupancy, Exhibit "C" § 11 at 4, www.nps.gov/pore/parkmgmt/upload/planning_dboc_sup_background_ruo_1972.pdf (Dec. 19, 1973)).
[11] *Id*.
[12] *Id*. at 1080.

November 30, 2012."[13]

Recognizing that "Section 124 'grant[ed] [him] the authority to issue a new SUP,'" the Secretary directed the National Park Service to allow the Drakes Bay special use permit to expire.[14] The decision was based on the terms of the reservation and use of occupancy, National Park Service policy, and specific legislation aimed at Point Reyes National Seashore wilderness designation.[15]

Drakes Bay sought an injunction and declaratory judgment based on violation of the APA. The U.S. District Court for the Northern District of California denied the preliminary injunction and held it lacked jurisdiction to rule on the declaratory judgment because the Secretary's decision was fully discretionary within the statutory context.[16]

## IV. ANALYSIS

### A. Jurisdiction and Scope of the "Notwithstanding" Clause

Federal courts have "'jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation . . . of constitutional, statutory, regulatory, or other legal mandates or restrictions.'"[17] Here, due to § 124's "notwithstanding" clause, the Ninth Circuit found, reversing the district court, that it had jurisdiction to review whether there was a misunderstanding of authority or a misinterpretation of how other statutory provisions impacted the Secretary's decision-making process.[18]

The Ninth Circuit found that §124 provided the Secretary with the authorization to act on the special use permit.[19] This authorization provided the Secretary discretion to either issue or

[13] *Drakes Bay Oyster Co.*, 747 F.3d at 1080 (emphasis added).
[14] *Id.* at 1081.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 1082 (quoting *Ness Inv. Corp. v. U.S. Dept. of Agr., Forest Serv.,* 512 F.2d 706, 715 (9th Cir.1975)).
[18] *Id.* at 1083.
[19] *Drakes Bay Oyster Co.*, 747 F.3d at 1084.

deny a permit.[20] The "notwithstanding" clause clarifies that conflicting laws do not block the Secretary's discretion.[21] The Point Reyes Wilderness Act was one of those laws.[22] The dissent contended that legislative history tied to the Point Reyes Wilderness Act supports continuation of oyster farming as a compatible use within Drakes Estero and lands designated "wilderness."[23] The Ninth Circuit held that the clear inclusion of the "notwithstanding" clause was to ensure previous legislation, like the Point Reyes Wilderness Act, would not prevent the Secretary from exercising discretionary authority under § 124.[24]

The inclusion of the "notwithstanding" clause in § 124 provided the Secretary discretion in deciding whether or not to renew Drakes Bay's special use permit.[25] Had Congress intended to require the Secretary to grant the permit, the Ninth Circuit determined, Congress would have excluded the "notwithstanding" provision from § 124 and specifically required such an action.[26]

**B. Preliminary Injunction Not Warranted**

To receive injunctive relief, Drakes Bay had to establish a likelihood that it would succeed on the merits, it would suffer irreparable harm without an injunction, the balance of equities was in its favor, and that it was in the public's interest to grant such relief.[27]

Drakes Bay alleged that the Secretary misinterpreted his authority under § 124.[28] The Ninth Circuit, in denying injunctive relief, found that the Secretary's decision to allow the permit to expire was clearly within his authority.[29] The Secretary, in rendering his decision, stated, §

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[20] *Id*. at 1083.
[21] *Id*. at 1084.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Drakes Bay Oyster Co.*, 747 F.3d at 1085.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id.* at 1086.

124 "does not prescribe the factors on which I must base my decision."[30] In reaching the decision, the Secretary considered existing department policy and congressional intent that had been expressed in the House committee report of the appropriations bill.[31] The Secretary correctly recognized that he had the authority to either extend or allow expiration of the existing permit.[32]

In addition to failing on the merits, Drakes Bay could not show that a balance of equities weighed in its favor.[33] The Ninth Circuit upheld the district court's ruling, stating "[t]he public benefits both from the enjoyment of protected wilderness and of local oysters."[34] The Ninth Circuit also noted that Drakes Bay had been repeatedly warned of the Secretary's impending decision and was fully aware the reservation of use and occupancy was set to expire in 2012.[35]

## V. CONCLUSION

Congress' use of the "notwithstanding" clause in § 124 left the decision to extend the special use permit to the discretion of the Secretary of the Interior. The sole stipulation tied to the decision was that it had to consider existing federal policy, as it pertained to the Wilderness Act, the Point Reyes Wilderness Act, and National Park Service management policies. These existing regulatory and policy structures, coupled with the discretionary provision of § 124, confirmed the designation of Drakes Estero as "wilderness" and the end of oyster farming within the Point Reyes National Seashore.

[30] *Id*. at 1087 (ellipses in original).
[31] *Drakes Bay Oyster Co.*, 747 F.3d. at 1087
[32] *Id*. at 1086.
[33] *Id.* at 1092 (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011)).
[34] *Id*.
[35] *Id.*