No. 13-15227

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY and KEVIN LUNNY,
Plaintiff-Appellants,

v.

SALLY JEWELL, in her official capacity as Secretary, U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; U.S. NATIONAL PARK SERVICE; and JONATHAN JARVIS, in his official capacity as Director, U.S. National Park Service,

Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of California
(Hon. Yvonne Gonzales Rogers, Presiding)
District Court Case No. 12-cv-06134-YGR

BRIEF OF DR. LAURA A. WATT, AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. PROTECTION OF AGRICULTURE IN POINT REYES.....1

III. THE OYSTER FARM AS A PRE-EXISTING USE IN WILDERNESS 6

IV. THE ONLY OBSTACLE TO WILDERNESS STATUS FOR DRAKES ESTERO WAS INCOMPLETE FEDERAL TITLE 9

V. CONCLUSION 12

TABLE OF AUTHORITIES

Federal Statutes

16 U.S.C. §§ 459c et seq 5
16 U.S.C. § 459c 5
16 U.S.C. §§ 1131 et seq 6
16 U.S.C. § 1133(a) 6
16 U.S.C. § 1133(c) 6, 11
16 U.S.C. § 1133(d)(1) 6, 11
16 U.S.C. § 1133(d)(7) 6, 11
16 U.S.C. § 1134 6
Pub. L. No. 94-544 7
Pub. L. No. 94-567 ..... 7, 11

California Statutes

1965 Cal. Stat. Ch. 983 7

Other Authorities

77 Fed. Reg. at 71,826 (Dec. 4, 2012) 11

FRAP RULE 29(c)(4) STATEMENT

This brief is filed pursuant to FRAP 29(a) and FRAP 29-2(a). All parties have consented to its filing.

Dr. Laura A. Watt is Associate Professor and Chair of the Department of Environmental Studies and Planning at Sonoma State University. Her interest in this case stems from her doctoral research at the University of California Berkeley, which examined the evolution of the working pastoral landscape at Point Reyes, after becoming a National Seashore in 1962. She is currently extending this research into a book manuscript, which is under contract for publication with the UC Press. Her depth of knowledge of the legislative history of the Seashore has led her to write numerous articles/op-eds in local media about the oyster farm controversy, as well as her academic work.[1]

Counsel for Appellants, who are also counsel for Dr. Watt, have assisted in the drafting and filing of this brief.

[1] Dr. Laura A. Watt is not related to James Watt, former Secretary of the Department of Interior.

I. INTRODUCTION

Judge Watford's dissent correctly concluded that, in the Point Reyes wilderness legislation of 1976, "all indications are that Congress viewed the oyster farm as a beneficial, pre-existing use whose continuation was fully compatible with wilderness status." (Slip op. at 44, Watford, J., dissenting.)

This brief makes two points in support of that conclusion: (1) the Point Reyes National Seashore (PRNS) was established with the explicit intention to protect local agriculture, including aquaculture, rather than to erode or remove it; and (2) the 1976 legislation was intended to allow "potential wilderness" to be converted to "wilderness" once California ceded its reserved rights—and even then the oyster farm could continue within wilderness.

II. PROTECTION OF AGRICULTURE IN POINT REYES

For over a century before it became a national seashore, Point Reyes was famous for its agriculture. Starting in the 1850s, renowned dairy and beef ranches were established on privately-owned property across the peninsula. And in the 1930s, California began leasing its tidal and submerged lands in Drakes Estero for oyster farming.

Point Reyes was initially studied as a national park site in the 1930s, but efforts did not get serious until the 1950s, when National Park Service (NPS) Regional Chief of Recreation and Planning George Collins spearheaded a drive to create the National Seashore. (*See generally* House Hearing [etc.] on S.2428, 86th Congress, 2d Session (April 14, 1960), App. Ex. 1, at 5-11 (NPS Director Wirth

describing initial efforts).) As a Seashore, the primary focus was to provide recreation opportunities close to the metropolitan Bay Area, but even in the earliest discussions, a key concern was the possible effects of establishing a park on the local agricultural economy. As early as 1958, in a letter to Senator Clair Engle (one of the initial sponsors of the legislation), then-president of Marin Conservation League Caroline Livermore wrote: "As true conservationists we want to preserve dairying in this area and will do what we can to promote the health of this industry which is so valuable to the economic and material well being of our people and which adds to the pastoral scene adjacent to the proposed recreation project."[2]

And so, in 1960, California Senator Clair Engel and Representative Clem Miller introduced legislation to create a new "national seashore" in Point Reyes, with a design that would retain existing agricultural uses. California's other Senator, Thomas Kuchel, described the "novel" concept as one to "maintain the character" of the "historic" area:

> [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.

(App. Ex. 1, at 3.)

[2] Letter from Mrs. Normal B. Livermore to Hon. Clair Engle, July 28, 1958, Anne T. Kent California Room, Marin County Library.

NPS supported this concept—and specifically supported maintaining the oyster farm as well as the historic ranches. NPS Director Conrad Wirth proposed that "the oyster cannery at Drakes Estero could be encouraged as concession operations to provide for further public recreation enjoyment." (*Id.* at 7.) At the same hearing, NPS Regional Planning Chief George Collins added, "Existing commercial oyster beds—which we saw yesterday as we flew around there, a very important activity—and the cannery at Drake's Estero … would continue under national seashore status because of their public values." (*Id.* at 14.)

California, through its Department of Fish and Game, also testified that "reasonable utilization of harvestable resources" should continue to be allowed under "California rules and regulations." (*Id.* at 133.) Specifically, the oyster farm should continue: "[c]ommercial oyster beds exist in Drake's Estero and … [u]se of all these resources should be continued and enhanced." (*Id.*)

These sentiments were echoed by Harold Gilliam, member of the Point Reyes Foundation (and author of *Island in Time: The Point Reyes Peninsula*), who declared that the bill "should scrupulously preserve the rights of individual residents who want to continue living or ranching on their property. … I believe that it is possible both to protect the rights of present residents and to preserve the scenic beauty of the area for the crowded future." (*Id.* at 199.)

NPS incorporated these concepts into planning documents for PRNS, released in 1961. NPS explained that land uses in a national *seashore* should be "less restrictive" than in a national *park*. (National Park Service, Proposed Point

Reyes National Seashore: Land Use Survey & Economic Feasibility Report (February 1961), App. Ex. 2.) In the proposed national seashore for Point Reyes, this meant that existing agricultural uses, including the oyster farm, should continue because of their "exceptional" public values:

> Existing commercial oyster beds and an oyster cannery at Drakes Estero … 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.

(*Id.*)

These proposals came before Congress later that year. (*See* Senate Hearing [etc.] on S.476 ("A Bill To Establish The Point Reyes National Seashore In The State Of California, And For Other Purposes"), 87th Congress, 1st Session (March 28, 30, 31, 1961) at 19-30 (reprinting February 1961 NPS Economic Feasibility Report), App. Ex. 3.) The Secretary of the Department of the Interior, Stuart Udall, testified that the proposals provided that "the oyster … fisheries would be able to continue operation and provide both recreation and economic value to the seashore." (*Id.* at 17.) The sponsors of the legislation, California's Senators Engle and Kuchel and Representative Clem Miller, endorsed the proposal that "the oyster beds and oyster cannery on Drakes Estero … continue in operation." (*Id.* at 53.) NPS Director Wirth testified, in response to questioning, that NPS would "permit" the oyster farm for two reasons:

> First, we think that the oyster operation is very interesting. A lot of people don't know about it. Secondly, there are commercial oysterbeds out here

> which we would not cut off. That is a natural way of development.

(*Id*. at 235.) And the California legislature unanimously passed a bill supporting the NPS proposal, which highlighted that: "the bills contain provisions safeguarding the legitimate interests of residents, ranchers, and fishermen in the proposed park area." (*Id.* at 240-241.)

In 1962, Congress adopted NPS's proposals by passing the Point Reyes National Seashore Act. (Pub. L. No. 87-657, 76 Stat. 538 (1962), codified at 16 U.S.C. §§ 459c et seq..) The purpose of that Act was 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." (16 U.S.C. § 459c.) No one testified at any time in favor of shutting down existing ranching, dairying, or oystering operations. Instead, the legislation reflected a strong commitment to retaining and sustaining existing agricultural and aquacultural uses, as they served the public values that the new national seashore was created to protect.[3]

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[3] The Senate Report on the legislation explained:

> [T]he oyster production…, in the thinking of the National Park Service planners, should continue under national seashore status because of [its] public values.
>
> […]
>
> Under the present proposal, … the existing oyster cannery at Drakes Estero would continue under private operation as at present, but with some added facilities such as entrance roads and parking areas.

(S. Rep. No. 87-807 at 8-9 (1962), App. Ex. 4.)

III. THE OYSTER FARM AS A PRE-EXISTING USE IN WILDERNESS

Two years later, Congress passed the Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (1964), codified at 16 U.S.C. §§ 1131 et seq. The Wilderness Act is best read as a restriction on *new* uses in designated wilderness areas, but as allowing many existing uses to continue. (*See* 16 U.S.C. § 1133(a)(Wilderness Act is "supplemental" to other established purposes for public lands).) Although the Wilderness Act broadly prohibits "commercial enterprise, permanent or temporary roads, mechanical transports, and structures or installations" in Congressionally-designated wilderness areas (16 U.S.C. § 1133(c)), the Act contains a long list of exceptions for pre-existing rights and uses. For example, wilderness designation is "subject to existing private rights" (*id.*), and has no effect on "the jurisdiction or responsibilities of the several States with respect to wildlife and fish" (*id.* para. (d)(7)). The Act requires the federal government to allow States and individuals reasonable access to their property or inholdings on or through designated wilderness areas. (*Id.* § 1134.) And the Act allows "the use of aircraft or motorboats, where these uses have already become established." (*Id.* § 1133(d)(1).)

The House Report also noted that "oyster farming" is not "incompatible" with the proposal, but that the government intended to negotiate a "right of first refusal" in the event the farm ever wanted to sell. (H. Rep. No. 87-1628 at 6 (1962), App. Ex. 5.) The owner of the oyster farm at the time, the Johnson Oyster Company, did end up negotiating a right of first refusal with the government. (ER 600 ¶14.) But when, in 2004, the Johnson Oyster Company decided to sell the oyster farm, the government did not exercise that option—and so Drakes Bay Oyster Company purchased the farm instead.

In 1976, Congress passed two laws designating Drakes Estero as "potential wilderness." (Pub. L. Nos. 94-544 § 1; 94-567 § 1(k).) Some have argued that this meant that Congress intended the oyster farm to cease operations once its federal lease for its upland facilities ran out in 2012. The only statement that remotely hints at this intent is a single sentence in a House Report, and even that only suggests that the NPS "steadily remove" "obstacles" to full wilderness status from "potential wilderness" areas. (H.R. Rep. No. 94-1680, at 3 (1976)("House Report"), App. Ex. 6.) "Steadily remove" does not mean "as soon as possible"; it is ambiguous about timeframe. And citing this sentence presumes that the oyster farm was seen in the 1970s as an obstacle to full wilderness. It wasn't.

Rather, there was a remarkable consensus among the public that the oyster farm should remain operating under wilderness designation in perpetuity. The Sierra Club, while crediting the peninsula's wilderness qualities to its "lingering ranching commitment," argued that, in Drakes Estero, "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." (Sierra Club comment letter to National Park Service (May 30, 1973), *appended to* Department of Interior, Proposed Wilderness Point Reyes National Seashore California: Final Environmental Statement ("1974 FEIS"), at A41, A51 (April 1974), App. Ex. 7.) Colonel Frank Boerger, writing on behalf of the Citizens Advisory Commission for the Golden Gate National Recreation Area, recommended much the same thing to the Senate. (Senate Hearing [etc.] on S. 1093 and S. 2472 ("Senate Hearings"), at 359-361 (March 2,

1976), App. Ex. 8.) He observed that the oyster farm is "considered desirable by both the public and park managers," and recommended that it be allowed to "continue unrestrained by wilderness designation." (*Id.* at 361.) Jerry Friedman, Chairman of the Marin County Planning Commission, also wrote on behalf of many Marin County environmental organizations[4] to endorse the recommendations of the Citizens Advisory Commission, and to specifically recommend "the continued use and operation of [the oyster farm] in Drake's Estero." (*Id.* at 356-358.)

The co-sponsors of the legislation, Senator Alan Cranston, Senator John Tunney, and Representative John Burton, all agreed that the oyster farm should continue. Senator Tunney wrote: "Established private rights of landowners and leaseholders will continue to be respected and protected. The existing agricultural and aquacultural uses can continue." (*Id.* at 271.) Senator Cranston and Representative Burton both explicitly endorsed the Citizens Advisory Commission's recommendations. (*Id*. at 265, 272-273.) And local California Assemblyman Michael Wornum concluded his testimony by observing: "Finally, I believe everyone concerned supports the continued operation of oyster farming in Drakes Estero as a non-conforming use." (*Id.* at 355-356.)

[4] Mr. Friedman represented the Environmental Action Committee of West Marin, Marin Conservation League, Tomales Bay Association, Inverness Association, Bay Area League of Women Voters, and the Marin and Sonoma Environmental Forum. (*Id.* at 356.)

House hearings held later that year echoed this sentiment and endorsed continued oyster farming. William Duddleston, former legislative assistant to Clem Miller and representing, among others, the Environmental Action Committee of West Marin, testified that designating Drakes Estero as wilderness would still "allow continued use and operation of [the oyster farm] at Drake's Estero, as a pre-existing non-conforming use." (House Hearings [etc.] on H.R. 8002, statement of William Duddleson at 3-4 (September 9, 1976)("House Hearings"), App. Ex. 9.) The Wilderness Society's representative, Raye-Page, agreed: "the oyster culture activity, which is under lease, has a minimal environmental and visual intrusion. Its continuation is permissible as a pre-existing non-conforming use and is not a deterrent for inclusion of the federally owned submerged lands of the Estero in wilderness." (*Id.*, statement of Raye-Page at 6.)

In fact, nowhere in the legislative history does anyone make a specific objection to the oyster farm or discuss an end to its operation in the future; nor did Congress or the public give any indication that wilderness designation would be hindered by the farm's continued presence.

IV. THE ONLY OBSTACLE TO WILDERNESS STATUS FOR DRAKES ESTERO WAS INCOMPLETE FEDERAL TITLE

If the oyster farm was not seen as incompatible with wilderness, why was Drakes Estero not designated as full wilderness? NPS argued, and Congress agreed, that areas where California retained mineral and fishing rights, resulting in

incomplete federal *title*, were "inconsistent with wilderness." (House Report at 5-6, App. Ex. 6.) One such area was (and remains) Drakes Estero.[5]

NPS's representative, Dr. Richard Curry, testified that tidelands should be designated as potential wilderness, "to become wilderness when all property rights are federal, and the areas are subject to [NPS] control." (House Hearings, Statement of Dr. Curry at 3, App. Ex. 9.) NPS's regional director also stated that wilderness areas "should not be left with the possibility—no matter how remote—that we do not completely control the property." (Senate Hearings at 329, App. Ex. 8.)

Congressman Burton proposed the key compromise in the bill that Congress ultimately passed, which essentially adopted NPS's proposal that Drakes Estero be designated as "potential wilderness" instead of full wilderness. In his written statement, he explained that "potential wilderness" areas "would be designated as wilderness effective when the State ceeds [sic] these rights to the United States." (House Hearings, Written Statement of Congressman Burton at 2-3, App. Ex. 9.)

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[5] In 1965, California conveyed Drakes Estero to the United States, but reserved certain mineral and fishing rights. (1965 Cal. Stat. Ch. 983 §§ 2-3.) When making its wilderness proposals for Point Reyes in the 1970s, NPS understood that the "rights reserved" by California allowed it to continue leasing Drakes Estero for oyster farming "indefinitely":

> Control of the lease from the California Department of Fish and Game, with presumed renewal indefinitely, is within the rights reserved by the State on these submerged lands … and there is no foreseeable termination of this condition.

(1974 FEIS at 56, App. Ex. 7.)

In his oral statement, he elaborated that California's retained rights made these areas "ineligible for actual wilderness designation":

> There are certain areas that we feel should be designated potential wilderness now because they would be ineligible for actual wilderness designation because of a statute on the books of California … where the State reserved the subwater mineral rights. [¶] We have not been able to negotiate that out with the State of California at present ….

(*Id.*, Oral Statement of Congressman Burton at 4:22-5:5.)

In the final version of the legislation, Congress designated Drakes Estero as "potential wilderness." That designation had never been used before and it remains undefined in the legislation. Potential wilderness areas become wilderness "upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased." (Pub. L. 94-567 § 3.) Since the oyster farm has leases to operate from California, and the farm long pre-dates the Wilderness Act, it never actually was a "use[] … prohibited by the Wilderness Act" whose termination was a precondition for Drakes Estero to become wilderness. (*See* 16 U.S.C. § 1133 para. (c)(Wilderness Act "subject to existing private rights"); para. (d)(7)(Act has no effect on "the jurisdiction or responsibilities of the several States with respect to wildlife and fish"); para. (d)(1)(allowing motorboats in wilderness "where these uses have already become established").) Nevertheless, Congress seems to have intended this language in the 1976 legislation to mean that Drakes Estero could become full wilderness when California ceded its reserved rights, and the United States finally gained "full title" to the area. (S. Rep. No. 94-1357 at 7, App. Ex. 10.)

V. CONCLUSION

The federal government has now published a notice designating Drakes Estero as wilderness, despite the fact that it does not have full title. (77 Fed. Reg. at 71,826 (Dec. 4, 2012).) This wilderness designation, however, does not bar continued operation of the oyster farm because, as Judge Watford correctly concluded, "all indications are that Congress viewed the oyster farm as a beneficial, pre-existing use whose continuation was fully compatible with wilderness status."

DATED: October 21, 2013

Respectfully submitted,

By: _____

Dr. Laura A. Watt, Amicus Curiae

DATED: October 21, 2013

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By: _____

Peter Prows

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Circuit Rule 29-2(c)(2), that this brief contains 2,889 words, excluding the parts exempted by FRAP 32(a)(7)(B)(iii); and that this brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 and 14 point Times New Roman.

/s/ Peter Prows

Peter S. Prows