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 Roger, Presiding)
District Court Case No. 12-cv-06134-YGR

AMICUS SUPPORT FOR PLAINTIFF-APPELLANTS' PETITION FOR REHEARING EN BANC; FILED WITH CONSENT OF ALL PARTIES PURSUANT TO FRAP 29(a)

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CORPORATE DISCLOSURE STATEMENT AND RULE 29(c)(5) STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), Amicus Monte Wolfe Foundation ("Amicus") states that: 1) it does not issue stock or shares to the public; 2) it does not have any parent corporation(s); and 3) there is no publicly held corporation that has any ownership interest in Amicus.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amicus further states that its counsel was the sole author of this brief and that Amicus bore all costs of this brief, with no financial contributions from any party, party's counsel, or any other person not affiliated with Amicus and its counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FRAP RULE 29(c)(4) STATEMENT

The Monte Wolfe Foundation is a California non-profit public benefit corporation whose core mission is the preservation of the Monte Wolfe Cabin, a structure located within the Mokelumne Wilderness Area. The Cabin is eligible for listing on the National Register of Historic Places and is under the aegis of the National Historic Preservation Act.

The present amicus support for *en banc* rehearing presupposes issues that are "novel or particularly complex." (Circ.Adv.Com.Note to Circuit Rule 29-2.) The matter presents both *novel issues* relating to the legal characterization of ostreoculture, and *particular complexities* including the interplay of divergent environmentalist strains, a conflict between state and federal law, and jurisprudential inconsistencies within the Circuit: A District Court has requested guidance on a question of Wilderness Act construction that could help shape the outcome of this matter.

Having been consented to by all parties, this amicus brief is filed pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure in support of petitioning Appellant.

WHY REHEARING SHOULD BE GRANTED

1: To reaffirm a pragmatic approach to the Wilderness Act

The issue of the role of "wilderness" in Wilderness Act law needs urgent attention from an en banc court

The environmental community is divided over the use of the Point Reyes National Seashore a division between "purists" and "pragmatists." Application of the Wilderness Act is ground zero for this division. Purists take "wilderness" to mean "pristine wildness." Pragmatists see "wilderness" as a nuanced legal framework where the pristine ideal can coexist with a wider range of use and purpose, although always shaped by overarching preservationist values.[1] This fault-line appears and reappears throughout this matter,

- in the division between the majority and dissenting opinions,
- in what may be a division within the Park Service itself, and
- in what is definitely a division in public opinion, not just about the oyster farm, but about agricultural activity in general within the National Seashore.

[1] : The pragmatic approach seems to me to be the one taken in the jurisprudence of this Court, especially in *High Sierra Hikers v. Blackwell*, 390 F.3d 630 (9thCir. 2004) and *Wilderness Watch v. U.S. Fish and Wildlife Service*, 629 F.3d 1024 (9thCir. 2010).

2: To reassure that agriculture has its place in the National Seashore

There are issues specific to the National Seashore that will continue to be a source of dispute until squarely addressed.

The issue of agricultural uses in the Seashore inevitably evokes the historic bargain between preservationists and ranchers that created the Seashore by thwarting the urbanization of commercial real estate development. The attempt to remove the oyster farm is suspected by many in the Marin environmental community as a first step toward removal of all agriculture in the Seashore. Allowing the oyster farm to remain would assuage those suspicions. If the Secretary's decision were allowed to stand, these suspicions would persist regardless of any assurances by the Park Service. This, especially given the current understanding that Congress originally intended the oyster farm to perdure.

3: To restore confidence in the National Park Service

The Court's participation could help cleanse a negative image that elements within the National Park Service have engaged in sharp practices

There is a public perception is that wilderness purists within the National Park Service have ignored both Congressional intent and abused scientific impartiality. (See, for example, the dissent and the Brief in Support of Rehearing by Amicus Corey Goodman [DktEntry:77].)

Allowing the panel decision to stand would very likely be seen by those with this perception as rewarding the unethical actions of a particular faction of Park Service employees, thus bringing discredit on the Park Service as a whole.

I: GENERALITIES

This matter finds itself in an odd posture. Given the injunctive nature of the relief sought, the reasoning was rapidly presented and, quite understandably, given its complexities, perhaps less than fully developed below. What now appear to be crucial issues were raised not in previous briefing, but in the judicial take on the matter. The notion of "oysters in the wilderness" – the gravamen of the Congressional intent described in the dissent – was simply not an issue through oral argument because both parties agreed that a choice had to be made between either the oyster farm or wilderness designation, but not both. So too, the historic resource arguments, a corollary of the wilderness considerations, have not been raised by the parties. The Court will decide whether these arguments are fairly included within what is squarely before it. They do greatly contribute to a path toward resolving the dispute and are questions of law, not fact.

The following general issues tend to be dealt with at more length in other briefs, but are summarized here to make explicit the foundations of the reasoning presented below.

A: THE EFFECT OF SECTION 124 IS NARROW

It may be difficult to understand why the majority opinion gives such an expansive reading of Section 124: It bootstraps 124 into an all-consuming legal vacuum. However, the intent of 124, as the dissent sets forth, was more logically to overcome the Interior legal staff's misunderstanding of Congressional intent about whether the oyster farm should remain. Legal staff may well have seen itself as benefiting from *Chevron* deference in interpreting the statutory silence on the issue.

B: DESPITE STATUTORY SILENCE, CONGRESS UNAMBIGUOUSLY INTENDED THE OYSTER FARM TO REMAIN IN THE SEASHORE AND WILDERNESS

The dissent has convincingly demonstrated that there was substantial and unambiguous legislative intent that the oyster farm should remain indefinitely and was compatible with wilderness designation. The majority opinion does appear to acknowledge "the accuracy of the dissent's recitation of the legislative history" of the Point Reyes wilderness designation (Op., p.19).

If the dissent's account of legislative intent controls, then no *Chevron* deference is due the erroneous position of Interior legal staff, relied upon by the Secretary (Op., p.14), that the oyster beds precluded wilderness designation; indeed, it is incumbent upon the Court to set the error straight. (*Oshkosh Truck Corp. v. U.S.*, 123 F.3d 1477, 1481 (Fed.Cir. 1997.)

C: THE NEPA PROCESS WAS APPROPRIATE HERE

It is surprising that the majority (Op., pp.31-32) would enlarge the scope of *Douglas County v. Babbitt*, 48 F.3d 1495 (9thCir. 1995) when *Babbitt*'s more limited holding is already apparently the source of division between Court of Appeals Circuits. (See Support for Rehearing by Amici PLF *et al.*, pp.8-10 [DktEntry:81, pp.14-16].) The Petition for Rehearing (pp.16-17 [DktEntry:73-1, pp.20-21]) also addresses the problems with the majority's new rule. Furthermore, from the historic preservationist perspective the new rule could conflict with the National Historic Preservation Act "Section 106" process (16U.S.C.§470f) which, along with NEPA (42U.S.C.§4331(b)(4)), requires agencies to assess the effects of their actions on historic resources. (See, *e.g.*, *Preservation Coalition v. Federal Transit Administration*, 356 F.3d 444, 447 (2ndCir. 2004).) Abrogating the NEPA process would be a denial of well-established historic preservation

protections. It would allow a governmental agency to destroy historically significant resources in secret and pose a real threat to our historic heritage.

Perhaps the best argument against the new rule is that, had it been in effect at the inception of the efforts to remove the oyster farm, the authorities would presumably have been able to eliminate it without worrying about public input. The new rule should be rejected.

In the present matter there was, fortunately, an Environmental Impact Statement (EIS) that made frequent reference to a National Register of Historic Places Eligibility Determination regarding the oyster farm ("National Register study").[2]

D: THE NEPA ISSUE DEMONSTRATES THAT DIFFERENT PRESUMPTIONS ABOUT THE NATURE OF "WILDERNESS" MAY WELL DIVIDE THE MAJORITY AND DISSENT

The majority's new NEPA rule may highlight an implicit divergence between majority and dissent about how the Wilderness Act intends wilderness areas to be used and tracks the purist/pragmatist fault-line. The majority, with a purist inclination, has cast the issue as whether "any action

[2]: I was unable to locate a copy of this study within the Excerpt of Record on Appeal. It is frequently referenced in the EIS as "Caywood and Hagen 2011" and can be found on the NPS website at http://www.nps.gov/pore/parkmgmt/upload/planning_dboc_sup_background_nrhp_doe_with-shpo_letter_110804.pdf

that seeks to restore the primeval state" (Order, 5/10/2013 [DktEntry:56]) needs a NEPA or any review. In contrast, the dissent appears to accept that designated wilderness, while primarily for natural conservation, does admit of use and purpose beyond pristine natural preservation.

E: THE SECRETARY'S PUBLICATION OF THE ESTERO'S TRANSFER FROM "POTENTIAL" TO "DESIGNATED" WILDERNESS IMPLICITLY ACCEPTS OYSTER FARMING IN THE WILDERNESS

According to Congressional Act – and unaffected by Section 124 since after the time for SUP renewal – the Secretary's publication in the Federal Register of the change from "potential" to "designated" wilderness operated as a certification that all uses of the Estero prohibited by the Wilderness Act had ceased. (Op., p.35, fn.13.) Why did DBOC not simply take this certification as an acceptance that the oyster beds are consistent with wilderness designation? Perhaps it was at the time in the grip of an *idée fixe* that it was the wilderness designation itself that was the problem. But, as the dissent clearly explains, Congress intended the oyster beds to be compatible with wilderness designation. The Secretary's publication of the change of status without anything more can properly be taken as consistent with, and as a tacit affirmation of, that original Congressional intent.

II: THE OYSTER FARM

The oyster farm has two distinct parts that are subject to very different rules: One is not in a designated wilderness and the other is. There is also a jurisdictional dispute over which governmental agency has the right to issue oyster harvesting leases in the part of the oyster farm that is in the wilderness area.

A: THE OYSTER FARM HAS TWO DISTINCT PARTS: ONSHORE FACILITIES AND OYSTER BEDS

As can be most clearly seen in the EIS maps, Figures 1-2 and 1-3 (Appellees' Exhibit 1, excerpts from EIS, pp.4, 11 [DktEntry:17:2, pp.43, 50]) the oyster farm is in two parts. These parts are distinct both functionally and juridically.

First, at the top of Schooner Bay are the Drakes Bay Oyster "Company Onshore Facilities." (EIS, Fig.1-2, p.4 [DktEntry:17-2, p.43]) This part of the oyster farm, the oyster farm equivalent of a dairy farm's habitation, barn and outbuildings, is in the "pastoral" zone of the Point Reyes National Seashore. This part of the oyster farm is subject to the same rules as the other agricultural facilities within the National Seashore pastoral zone. For example, there is no general prohibition of "commercial activity" here, in contrast to the usual general prohibition of commercial activity in wilderness

areas, such as where the oyster beds are located. This means that there would be no legal barrier to maintaining the Onshore Facilities to process shellfish from elsewhere, say, Tomales Bay. There is certainly no legal barrier to maintaining the Onshore Facilities to process oysters from the Estero, if they are harvested. There is no more legal barrier to maintaining the Onshore Facilities than to maintaining barns, habitations and out-buildings on the dairy farms in other parts of the pastoral zone.

Second, in the waters of Drakes Estero are the oyster beds. This part of the oyster farm is in the area tinted purple on the map (EIS, Fig.1-3. p.11 [DktEntry:17-2, p.50]). It is the oyster farm equivalent of a dairy farm's pastures. It is entirely within the Point Reyes Wilderness Area. The map's characterization of the purple-tinted area as "potential wilderness" was superseded in December 2012 when the Secretary of the Interior published its transfer to full, "designated wilderness" status. (Op., pp.14, 35.) The oyster beds are subject to the same rules as other areas within the National Seashore wilderness areas. As will be seen below – the heart of this brief, in effect – exceptions to general wilderness area prohibitions of structures and commercial activities should permit oyster production to continue.

The oyster beds are basically of two types: First are oyster beds that simply rest on the bottom, often covered with a layer of oyster shells, and

second are the oyster beds that use oyster racks to suspend the oysters above the bottom. (National Register study, p.10.) These oyster racks are "structures" that would generally be prohibited within a wilderness area, but would benefit here from exceptions to that prohibition. (16U.S.C.§1133(b) and (c).)

B: THERE IS A DISPUTE OVER WHO SHOULD ISSUE OYSTER BED BOTTOM LEASES

The California Fish and Game Commission (CFGC) and the National Park Service (NPS) are at odds over which agency is empowered to issue the bottom leases necessary for legal oyster harvesting. The conflict is clear in this excerpt from the EIS:

> Even though the water bottoms in Drakes Estero were conveyed to the United States in 1965, the state has continued to issue state water bottom leases for shellfish cultivation in Drakes Estero. The continued issuance of state water bottom leases has created confusion and is inconsistent with the NPS's ownership and jurisdiction over Drakes Estero. Should the Secretary issue a new permit to DBOC under section 124, as a condition of receiving that permit, DBOC would be required to surrender its state water bottom lease to the CFGC prior to issuance of a new SUP by NPS. (EIS, p.18 [DktEntry:17-2, p.19].)

The Park Service obviously takes the state law claim as substantial, otherwise it would not have tried to pressure the oyster farm to give up its rights under state law.

The case for CFGC jurisdiction is presented at length in the Support for Rehearing of Amici Bagley *et al.*, pp.6-11. (DktEntry:74-1, pp.15-20.) Absent a final resolution of the jurisdictional issue in favor of the Park Service, the following observation appears valid:

> Even if the Secretary denies DBOC a permit for use of the onshore land and facilities, the State can continue to lease and DBOC can continue to cultivate shellfish in the Drakes Estero water bottoms. (*Ibid.* p.7.)

If it is awkward for this Court to resolve this State law issue in favor of the Park Service, the suggestion of referral to the highest state court could be worth considering. (*Ibid.*, p.11)

C: THE PARK SERVICE APPEARS TO DERIVE ITS OYSTER BED LEASING AUTHORITY FROM STATUTES RELATING TO GRAZING RIGHTS

If there were no Congressional intent that the Point Reyes oyster farm continue to operate in the wilderness, it is not immediately evident how the Park Service would have statutory authority to issue bottom leases for the estuary. It may be fair to assume that there is no regulatory provision that

would deny that authority. It may also be fair to assume that if the Park Service lacked that authority, only the State would have jurisdiction to issue bottom leases.

Since oysters' filter-feeding method is in fact grazing plankton from the ambient waters, the Park Service bottom-lease authority could logically derive from its authority to issue grazing leases for other animals. The Park Service organic law provides that

> the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze livestock within any national park. (16U.S.C.§3.)

The Point Reyes National Seashore is part of the national park system. The Wilderness Act also provides that

> the grazing of livestock, where established prior to September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary [3] (16U.S.C.§1133(d)(4)(2).)

Within the Point Reyes National Seashore, the lands leased for cattle grazing include lands both in the pastoral zone and in the wilderness area. (EIS, p.10 [DktEntry:17-2, p.49].) The oyster beds only exist in the wilderness area.

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[3]: Although the Wilderness Act specifically empowers the Secretary of Agriculture, the legislation creating the Point Reyes Wilderness explicitly extends that power to the Secretary of the Interior.

It would certainly be possible here for grazing "livestock" animals to be liberally construed to include grazing shellfish. In any case, given the statutory silence about oysters specifically, the fact that oysters and cattle are both grazers, could well have made them equivalent for purposes of an administrative determination, under *Chevron*, that the Park Service had the right to issue grazing leases in the Estero.

D: PARK SERVICE ISSUANCE OF BOTTOM LEASES IMPLIES THE OYSTER BEDS ARE COMPATABLE WITH WILDERNESS

The Wilderness Act provision that apparently gives the Park Service its bottom leasing authority is also a specific exception to the general prohibition of commercial activity within wilderness areas. (16U.S.C.§1133(c) and (d)(4)(2).) The same statutory provision that allows the Park Service to issue bottom leases also allows the oyster beds to remain in the wilderness.

III: WHAT "WILDERNESS" MEANS UNDER THE WILDERNESS ACT

Environmental purists would limit the scope of "wilderness" to "pristine wildness." Environmental pragmatists find it sensible for "wilderness" to imply a nuanced legal framework where that ideal can coexist with a wider range of use and purpose, always shaped by overarching wilderness values.

This Court has squarely addressed the tension between purist and pragmatic conceptions of wilderness in *Wilderness Watch v. U.S. Fish and Wildlife Service*, 629 F.3d 1024 (9thCir. 2010). It rejected an understanding of the Wilderness Act that would

> preserve the wilderness in a museum diorama, one that we might observe only from a safe distance, behind a brass railing and a thick glass window. (*Id.* at 1033)

Rather, it is the Act's intent to assure

> that the wilderness … be preserved as wilderness and made accessible to people, "devoted to the public purposes of recreational, scenic, scientific, educational, conservation and historical use." (*Id.*, citing 16U.S.C.§1133(b).)

A: WILDERNESS ACT PROHIBITIONS AND EXCEPTIONS

The purist and pragmatic approaches confront each other again and again in cases that address two general prohibitions in the Wilderness Act, "no commercial enterprise" and "no structure." (16U.S.C.§1133(c)). These general prohibitions admit of exceptions, the first, apparently, only to specific exceptions:

> Except as specifically provided for in [the Wilderness Act], and

> subject to existing private rights, there shall be no commercial enterprise … within any wilderness area . . .. (*Ibid.*).

and the second to a general exception:

> . . . except as necessary to meet minimum requirements for the administration of the area for the purpose of [the Wilderness Act] … there shall be … no structure .. within any [wilderness] area. (*Ibid.*)

1: EXCEPTIONS TO THE COMMERCIAL PROHIBITION

The cases on exceptions to the commercial prohibition tend to involve animals, specifically pre-existing grazing rights (16U.S.C.§1133(d)(4)(2); *Forest Guardians v. Animal & Plant Health Inspection*, 309 F.3d 1121 (9thCir. 2002)) and pack animal wrangling (16U.S.C.§1133(d)(5); *High Sierra Hikers Association v. Blackwell*, 390 F.3d 630 (9thCir. 2004)).

The exceptions to the commercial prohibition include both specific and, as it turns out, general exceptions as well. Thus, the grazing animal exception (seen above regarding Park Service authority to issue bottom leases, p.14) is in 16U.S.C.§1133(d)(4)(2). However, the pack animal wrangling exception to the commercial prohibition is controlled by

> Commercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of

the areas. (16U.S.C.§1133(d)(5).)

The reference to "other wilderness purposes" is a general exception that invokes 16U.S.C.§1133(b), the general exception that is also applicable to the structure prohibition.

2: EXCEPTIONS TO THE STRUCTURE PROHIBITION

The structure prohibition allows of a general exception to meet "the purpose" of the Wilderness Act. (16U.S.C.§1133(c). That exception includes the "public purposes" relied upon by this Court in the *Wilderness Watch* case:

> . . . public purposes of recreational, scenic, scientific, educational, conservation, and historical use. (16U.S.C.§1133(b).)

There is inconsistent or evolving caselaw on the exception to the "structure" prohibition. With regard to the maintenance of historic structures, *High Sierra Hikers Ass'n v. U.S. Forest Service*, 436 F.Supp.2d 1117 (E.D.Cal. 2006) held that the Wilderness Act prohibits their maintenance. Another District Court in the Circuit, the Western District of Washington, first applied the reasoning of the California Eastern District Court then, on rehearing, held that the Wilderness Act does allow maintenance of historic structures. (*Wilderness Watch v. Iwamoto*, 853 F.Supp.2d 1063 (W.D.Wash. 2012), superseded after rehearing by its "Order

Granting Defendants' Motion to Alter or Amend Judgment," *Wilderness Watch v. Iwamoto,* 2012 U.S. Dist. LEXIS 184197 (W.D. Wash., 2012) [Case 2:10-cv-01797-JCC, Document 77 Filed 09/20/12])

The Washington District Court noted the division in authority on the issue of whether "the preservation of historical structures is a valid goal of the Wilderness Act." However, it "concluded that the Ninth Circuit – in light of its prior interpretation of related language in the Wilderness Act – would most likely" allow maintenance of the historic watch-tower that was the subject of the case. (The Ninth Circuit case is *Wilderness Watch v. USF&G, op.cit.*) "Nevertheless," the District Court continued, "the Ninth Circuit has not yet squarely addressed the issue." (*Wilderness Watch v. Iwamoto,* 2012 U.S. Dist. LEXIS 184197 (W.D.Wash., 2012), p.3, fn.1.)[4]

This seems to me a clear request for guidance.

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[4]: In its rehearing Order, the *Wilderness Watch v. Iwamoto* court cites several cases to demonstrate the division of authority on the issue of whether "historical use" can furnish an exception to the structure prohibition. My reading of the cases is that only other District Court cases (all from the 9th Circuit) actually provide contrary authority. Although other District Courts did rely on an 11th Circuit opinion for the proposition that the Wilderness Act forbade all structures in wilderness areas, the relied-upon language was, I believe, non-binding *dictum,* given that, in the words of that Court,

> This appeal turns not on the preservation of historic structures but on the decision to provide motorized public access to them across designated wilderness areas. (*Wilderness Watch v. Mainella*, 375 F.3d 1085, 1092 (11thCir. – 2004)

It would be helpful for this Court to extend this holding to cover the "public purpose" of "historical use." If it does so in the present matter, it would provide a basis for maintaining the oyster racks.

B: THE NATIONAL REGISTER STUDY FOUND THE OYSTER RACKS TO BE OF HISTORIC SIGNIFICANCE

The National Register study lists "Oyster racks" as among those "resources present during the period of [historic] significance." (National Register study, p.10.) Indeed, the oyster racks are a central element to the site's historical significance:

> [T]he site is significant for its association with the introduction of Japanese off-bottom growing methods, specifically the hanging cultch method. In the early 1960s, Johnson Oyster Company successfully adapted this method to conditions in the *estero*, and in doing so, became one of the largest commercial oyster producers in the state…. When considering only historical significance, Johnson Oyster Company facility would be eligible for listing under National Register Criterion A . . .. The area of significance would be Maritime History. . . .. [T]he racks in the *estero* are in their original locations, and the property's setting—the pastoral landscape surrounding the bay—has been little altered since the early 1930s. (*Ibid*., p.12)

The National Register study ultimately determined that the site as a whole was not eligible for listing, but the reasons for the negative determination did not involve the oyster racks. (*Ibid.*, pp.12-13.) The reasons had to do with changes that had been made to the Onshore Facilities over recent decades, including those made in response to updated public health regulations. (*Ibid.*) Ultimately, some of the reasons may derive from a sense that the architecture, construction and upkeep are a bit too vernacular.

But the validity of the overall determination is not before this Court, nor need it be. Whatever the reasons for the determination regarding the site as a whole, it remains that the oyster racks are structures of historic significance and integrity. They thus serve a "public purpose" of "historic use" under the Wilderness Act and should benefit from the exceptions to the prohibitions of structures and commercial activity (16U.S.C.§1133(b),(c) and (d)(5).) For that "public purpose" to be served, the oyster racks must be maintained, that is, used to produce oysters, otherwise they will be lost.

CONCLUSION

Amicus asks this Court to hold, in light of clear Congressional intent and the Wilderness Act, the oyster farm should stay and the oyster beds belong in the wilderness. The controlling Wilderness Act provisions include

the "grazing" exception to the prohibition of commercial activity and the "historic use" exception to both commercial and structure prohibitions.

There are other issues that would merit consideration had they been sufficiently developed below to allow legal review. For example, given the context of the National Seashore and the historic bargain between ranchers and environmentalists that created it, sustainable agriculture might be shown to be a "conservation use."

Finally, it seems to me that, like cheeses produced from milk of the pastoral zone, the oysters of Drakes Estero provide a sensory window into the past, and tasting them could well be deemed an "historic use" worthy of protection.

Savoring a Drakes Estero oyster is a wilderness experience.

DATED: October 28, 2013

Respectfully submitted,

/s/ James Talcott Linford

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The Monte Wolfe Foundation

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Circuit Rule 29-2(c)(2), that this brief contains 4,153 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 for Mac 2011 and 14 point Times New Roman.

/s/ James Talcott Linford

James Talcott Linford