No. 13-15227

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAKES BAY OYSTER COMPANY, ET AL.,

Plaintiffs-Appellants,

v.

KENNETH L. SALAZAR, ET AL.,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Northern District of California,
No. 4:12-CV-6134-YGR (Hon. Yvonne Gonzalez Rogers)

DEPARTMENT OF THE INTERIOR'S RESPONSE BRIEF

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GLOSSARY

APA	Administrative Procedure Act
DBOC	Drakes Bay Oyster Co.
EIS	Environmental Impact Statement
ER	Excerpts of Record filed by appellant Drakes Bay Oyster Co.
*NAS	National Academy of Sciences
NEPA	National Environmental Policy Act
*NPS	National Park Service
*RUO	Reservation of Use and Occupancy
SER	Supplemental Excerpts of Record filed with this brief
*SUP	Special Use Permit

* Terms marked with an asterisk are not used within this brief, but are common in the portions of the record cited in this brief.

INTRODUCTION

In this appeal, DBOC seeks a preliminary injunction that will allow it to operate its commercial business in a wilderness area of Point Reyes National Seashore, even though its prior authorizations to do so have expired. Although existing law would not allow the Park Service to reauthorize DBOC's activities, Congress passed "Section 124," a statute that allowed but did not require the Secretary to issue a permit to DBOC "notwithstanding any other provision of law." DBOC believes that Section 124 is an "asymmetrical statute enacted for [DBOC's] benefit," and that it left the Secretary very little discretion in considering DBOC's permit request: He was required to consider all laws and policies that might favor a permit, he was empowered to ignore any procedures that might delay a permit, but he was not allowed to consider any laws or policies that would weigh against a permit.

That is not the effect of Section 124. Congress committed to the Secretary the discretion to weigh the competing policies and interests at stake. By providing that the Secretary could act "notwithstanding any other provision of law," Congress removed any standards by which the district court or this Court could exercise review. Ultimately, the Secretary decided that the public's interest in wilderness at Drakes Estero was paramount, and chose not to issue a new permit to DBOC. The district court held this exercise of discretion is not subject to judicial review (and was in any event reasonable), and denied the preliminary injunction. This Court should affirm that holding.

STATEMENT OF JURISDICTION

DBOC's claim arises under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), and the National Environmental Policy Act ("NEPA"), 42 U.S.C § 4332. DBOC argued below that the APA, 5 U.S.C. § 702, confers jurisdiction. The district court correctly held that DBOC's claim falls within 5 U.S.C. § 701(a)(2), which provides that the APA does not grant jurisdiction to review agency action that is "committed to agency discretion by law." *See infra* pp. 20-34.

DBOC appeals the district court's denial of a preliminary injunction. This Court has jurisdiction to review that ruling under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. In this case, a statute authorized the Secretary to consider DBOC's permit request "notwithstanding any other provision of law." Did the district court err in concluding that this statute "committed to agency discretion" the Secretary's permit decision, foreclosing APA jurisdiction to review it?
2. The district court, finding that the Secretary made a valid choice not to issue a permit and supported that result with a reasonable explanation, held that DBOC is not likely to succeed on the merits of its APA claims. Was this an error of law?
3. The district court held that the balance of the equities does not favor a preliminary injunction, given the strong policy in favor of wilderness uses

for Drakes Estero and given DBOC's reasonable expectations at the time of its purchase. Was this an abuse of discretion?

STATEMENT OF THE CASE

DBOC requested that the Secretary of the Interior exercise his authority under Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009), known as "Section 124," to issue a new permit that would allow DBOC to operate its commercial business in Drakes Estero. In his Decision Memorandum of November 29, 2012, the Secretary chose not to exercise that authority.

The Secretary does not dispute DBOC's description, in its Statement of the Case, of the subsequent legal proceedings that led to this preliminary injunction appeal. *See* DBOC Br. at 4-6.

STATEMENT OF FACTS

A. Point Reyes National Seashore[1]

Point Reyes National Seashore ("Point Reyes") is a coastal peninsula in Marin County, California. Point Reyes sits atop the colliding tectonic plates at the San Andreas Fault, creating a variety of landscapes, including "fine beaches, estuarine areas, coastal grasslands, brush covered headlands, and steep forested slopes." S. Rep. No. 94-1357, at 7 (1976) (ER 237). It is a globally recognized center of biodiversity, and one of the best locations on the West Coast to observe the Pacific gray whale and

[1] For more detail on the history of Point Reyes National Seashore, Drakes Estero, and the DBOC property, *see* EIS at 6-24 (SER 92-109).

other open-ocean wildlife. *See* Final Environmental Impact Statement ("EIS") at 14 (SER 99). Point Reyes contains the only wilderness area between Canada and Mexico that includes marine waters. *See id.* All of the upland, tidal, and submerged lands at issue in this case are located within the Point Reyes National Seashore and are owned by the United States. *See id.* at 6 (SER 92).

At the heart of Point Reyes lies Drakes Estero, a series of shallow estuarial bays encompassing about 2,500 acres. Drakes Estero is "an exceptional nursery that provides abundant food, resting habitat, and shelter for a wide array of marine organisms and migratory waterbirds." *Id.* at 14 (SER 99); *see also id.* at 207-86 (EIS Chapter 3) (SER 138-217) (describing aspects of the Drakes Estero environment). The dominant vegetation within the waters of Drakes Estero is eelgrass, which provides important foraging and breeding habitat for fish, foraging for waterbirds and shorebirds, and environmental functions such as trapping sediment and preventing erosion. *Id.* at 223 (SER 154). Drakes Estero also supports a large breeding population of harbor seals and many resident and migratory bird species. *See id.* at 232-33, 235-36 (SER 163-64, 166-67).

Congress established a National Seashore on the Point Reyes Peninsula in 1962 "for purposes of public recreation, benefit, and inspiration." *See* Pub. L. 87-657, § 1, 76 Stat. 538 (1962). The 1962 enabling legislation authorized the Secretary to acquire lands and waters within the Point Reyes National Seashore, but allowed existing

property owners to "retain the right of use and occupancy . . . for noncommercial residential purposes for a term of fifty years," and allowed continued "ranching and dairying" uses within a "pastoral zone" that did not include Drakes Estero. *See id.* §§ 3, 4, 6, 76 Stat. at 539-41; *see also* EIS at 14-15 (SER 99-100) (including map of pastoral zone). California subsequently conveyed to the United States "all of the right, title and interest of the State . . . in and to all of the tide and submerged lands" within Point Reyes, including Drakes Estero, with limited exceptions. *See* 1965 Cal. Stat. 2605, § 1 (ER 621).

In 1976, Congress designated wilderness and potential wilderness areas within Point Reyes. *See* Pub. L. No. 94-544, 90 Stat. 2515 (1976); Pub. L. No. 94-567, 90 Stat. 2692 (1976). The Wilderness Act protects designated "wilderness areas" where "present and future generations" may enjoy "the benefits of an enduring resource of wilderness." 16 U.S.C. § 1131(a), (c). This Court recognizes that, in the Wilderness Act, Congress expressed "support for the principle that wilderness has value to society that requires conservation and preservation." *Wilderness Soc. v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1055 (9th Cir. 2003) (en banc). The Act provides that "there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter." 16 U.S.C. § 1133(c); *see also Wilderness Society*, 353 F.3d at 1060-62 ("There is no exception given [in the Act] for commercial enterprise in wilderness when it has benign purpose and minimally intrusive impact.").

Drakes Estero was among the 8,000 acres in Point Reyes that Congress designated as "potential wilderness." *See* Pub. L. No. 94-567, 90 Stat. 2693; *see also* SER 236 (map). The House Report accompanying Public Law 94-567 stated:

> As 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 continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.

H.R. Rep. No. 94-1680 at 3, reprinted in 1976 U.S.C.C.A.N. 5593, 5595. The Park Service defines "potential wilderness" as lands that "do not themselves qualify for immediate designation [as wilderness] due to temporary nonconforming or incompatible uses." NPS Management Policies § 6.2.2.1 (2006) (SER 268). Consistent with Congressional intent, Park Service policy is to seek "the most appropriate means of removing the temporary, nonconforming conditions that preclude wilderness designation from potential wilderness." *Id.* § 6.3.1 (SER 269). Congress also provided that potential wilderness would be converted to 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. No. 94-567, § 3, 90 Stat. 2692, 2693 (1976).[2]

[2] In 1999, the Park Service published a Federal Register notice to convert 1,752 acres, including the waters of Abbotts Lagoon and Estero de Limantour, from potential wilderness to full wilderness. *See* "Notice of Designation," 64 Fed. Reg. 63,057 (Nov. 18, 1999).

Commercial activity in Point Reyes is restricted by regulations and policies that the Park Service has promulgated to implement its statutory authorities. *See* 16 U.S.C. § 3. In general, those rules prohibit commercial activity within Point Reyes "except in accordance with a permit, contract, or other written agreement with the United States." *See* 36 C.F.R. § 5.3; *see also* EIS at F-18 to F-19 (SER 219-20). In some cases, "when authorized by regulations" and when consistent with federal law and Park Service policies, the Superintendent of a park area may issue a permit (known as a "special use permit") that allows an otherwise prohibited activity. 36 C.F.R. § 1.6. Park Service regulations spell out what activities may be authorized by a permit, *see, e.g.*, *id.* § 5.5, and establish the criteria and findings that are necessary to grant or deny a permit. *Id.* § 1.6(a), (d).

B. Commercial shellfish operations in Drakes Estero

One of the existing private uses when Congress created the Point Reyes National Seashore was the Johnson Oyster Company ("Johnson"), a commercial shellfish operation. Johnson used the waters of Drakes Estero for oyster cultivation, and its oyster processing facility was situated on a five-acre parcel on the shore of the Estero. *See* EIS at 19 (SER 104).

Johnson sold those five acres to the United States in 1972, reserving the right to use and occupy part of the property for shellfish processing – a right known as the "Reservation" or "RUO" – for a fixed term of forty years. *Id.*; *see also* Reservation (ER 596-601). The forty-year term ended on November 30, 2012. The Reservation

provided that the Park Service could issue a new special use permit when the Reservation expired, *if* such a permit would be allowed under the regulations in effect at that time. *See* Reservation at 4 (ER 599).

In 2004, the Department of the Interior considered whether the issuance of a new permit when the Reservation expired would be consistent with its policies and regulations. The Office of the Solicitor concluded in a memorandum that "the Park Service is mandated by the Wilderness Act, the Point Reyes Wilderness Act and its Management Policies to convert potential wilderness . . . to wilderness status as soon as the non conforming use can be eliminated." 2004 Solicitor Memo at 3 (ER 230).

In 2005, Johnson's assets were purchased by Kevin Lunny, and DBOC assumed the operations of the business. The purchase agreement explicitly included the Reservation. *See* Order at 6 (ER 20). The only reasonable expectation DBOC could have had at that time was that the Reservation would expire in 2012. In January 2005, the Park Service wrote to Mr. Lunny about "the issue of the potential wilderness designation," enclosing a copy of the Solicitor's 2004 memorandum. *See* Letter of January 25, 2005 (ER 227). In March, the Park Service again notified Mr. Lunny that: "Regarding the 2012 expiration date and the potential wilderness

designation, based on our legal review, no new permits will be issued after that date." Letter of March 28, 2005 (SER 228).[3]

The Asset Purchase Agreement between Johnson and DBOC also transferred Johnson's interest in water bottom leases issued by the state of California. Although the Park Service does not agree that California had the authority to issue such leases, California renewed them in 2004 for a period of 25 years, making them "expressly contingent" upon the Reservation and on any subsequent Park Service permit. Letter of May 15, 2007 at 2 (SER 230). The Park Service also issued a special use permit to DBOC in April 2008 (the "2008 Permit") regulating its activities in Drakes Estero and on additional areas adjacent to the Reservation. *See* 2008 Permit (ER 200-19). The expiration date for the 2008 Permit was the same as for the Reservation.

Thus, until November 30, 2012, DBOC's onshore operations were authorized by the Reservation (covering 1.5 acres) and the 2008 Permit (covering an additional 3.1 acres). Its offshore operations were governed by the 2008 Permit. *See generally* EIS Figs. ES-2, ES-3, 2-1, 2-3, and 2-4; (SER 7-8, 134-36) (maps). Both of those authorizations expired by their own terms on November 30, 2012.

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[3] The district court found that Mr. Lunny received these letters before closing the purchase. *See* Order at 6-7 & n.4 (ER 21). DBOC's brief did not attempt to demonstrate clear error in this finding, which is therefore conclusive for purposes of this appeal. *See, e.g.*, *Shell Offshore, Inc. v. Greenpeace, Inc.*, ____ F.3d ____, 2013 WL 936586 at *3 (9th Cir. 2013).

C. Congress's grant of authority to the Secretary

The question whether DBOC could continue to operate in Drakes Estero after its Reservation and 2008 Permit expired came before Congress in 2009. Considering a Department of the Interior appropriations bill, the Senate committee added an provision that "the Secretary of the Interior *shall extend*" DBOC's existing Reservation and permit. *See* H.R. 2996 (as amended) at 179 (SER 272) (emphasis added). The bill was further amended on the Senate floor to provide that: "the Secretary of the Interior *is authorized to* issue a special use permit." *See* 155 Cong. Rec. S9769, S9773 (daily ed. Sept. 24, 2009) (SER 275) (emphasis added). The Conference Report confirmed that this change "provid[ed] the Secretary discretion," in contrast to the original proposed mandatory language. *See* H.R. Rep. No. 111-316, at 107 (2009) (SER 277).

As enacted, "Section 124" provides:

> Prior to the expiration on November 30, 2012 of the Drake's Bay Oyster Company's Reservation of Use and Occupancy and associated special use permit ("existing authorization") within Drake's Estero at Point Reyes National Seashore, 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, except as provided herein, for a period of 10 years from November 30, 2012: Provided, That such extended authorization is subject to annual payments to the United States based on the fair market value of the use of the Federal property for the duration of such renewal. The Secretary shall take into consideration recommendations of the National Academy of Sciences Report pertaining to shellfish mariculture in Point Reyes National Seashore before modifying any terms and conditions of the extended authorization. Nothing in this section shall be construed to have any application to any location other than Point Reyes National

> Seashore; nor shall anything in this section be cited as precedent for management of any potential wilderness outside the Seashore.

See Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009).

D. The Secretary's Decision Memorandum

In July 2010, DBOC sent two letters to Secretary Salazar, requesting that he issue a new special use permit that would allow DBOC to operate for ten more years. *See* Letters of July 1 and July 6, 2010 (ER 368-376). In those letters, DBOC did not use any existing regulatory procedure to apply for a special use permit. Rather, citing Section 124 as the relevant authority, DBOC directed its request to the Secretary himself. *See* Letter of July 6 at 7-8 (ER 375-76); Letter of September 17, 2012, at 1 (SER 237).

The Secretary recognized that he had discretion to issue or not to issue a permit to DBOC "notwithstanding any other provision of law," including NEPA. *See* EIS at 2, 52 (SER 88, 119). However, he determined that "it is helpful to generally follow the procedures of NEPA." *Id.* at 53 (SER 120). By preparing an Environmental Impact Statement ("EIS"), the Park Service sought to provide the Secretary with "sufficient information on potential environmental impacts, within the context of law and policy, to make an informed decision." *Id.*; *see also* "Drakes Bay Oyster Company Special Use Permit," 75 Fed. Reg. 65,373 (Oct. 22, 2010).

DBOC expressed concerns over whether the NEPA process would be complete in time to support a permit decision before DBOC's existing authorizations

expired on November 30, 2012. *See* Letter of September 17, 2012, at 1 (SER 237); Letter of Nov. 1, 2012 at 1 (SER 244). DBOC therefore urged the Secretary *not* to complete the NEPA process and instead to make a decision before its existing authorizations expired. "Because Section 124 allows you to issue a SUP 'notwithstanding any other law,' . . . you may make your decision" without an EIS. Letter of September 17, 2012, at 1 (SER 237). Later, DBOC posed the question: "What effect does the NPS's failure to provide you with a legally adequate FEIS have on your discretion under [Section 124]?" DBOC asked. Its answer was: "In fact, none, because Section 124 includes a 'general repealing clause' that allows you to override conflicting provisions in other laws." Letter of November 1, 2012, at 1-2 (SER 244-45).

Although it agreed with DBOC that a final EIS was not required, the Park Service released one in November 2012. The EIS benefited from extensive public participation, although it continued to acknowledge that "the Secretary's authority under Section 124 is 'notwithstanding any other provision of law.'" *Id.* at lxxvii-lxxix, 2, 53 (SER 76-78, 88, 120). In the EIS, the Park Service laid out for the Secretary the various environmental considerations that would be relevant to four different alternatives, including the cessation of DBOC operations upon expiration of DBOC's Reservation and 2008 Permit ("Alternative A"), and the issuance of a new permit that would authorize DBOC's existing operations ("Alternative B"). *See id.* at xxix, xxxii-

xxxvi (SER 28, 31-35) (describing alternatives); *see id.* at li-lxxvi (SER 50-75) (executive summary of environmental consequences).[4]

Secretary Salazar issued his Decision Memorandum on DBOC's permit request on November 29, 2012. The Secretary stated his decision not to issue the permit that DBOC had requested, and he directed the Park Service to allow the existing Reservation and 2008 Permit to expire without taking any further action. *See* Decision Memorandum at 1-2 (ER 118-19). He also directed the Park Service to inform DBOC that it would have an additional 90 days to remove its property from Drakes Estero. *Id.* at 2 (ER 119). (The Reservation had included a similar provision for the reserved 1.5-acre upland parcel, but DBOC needed Park Service authorization for activities after November 30 in the areas covered by the 2008 Permit.)

In his Decision Memorandum, the Secretary recognized that Section 124 authorized him to grant a new permit to DBOC, but "does not prescribe the factors on which I must base my decision." *Id.* at 5 (ER 122). The Secretary was not constrained by the Point Reyes Wilderness Act, but he gave "great weight" to the policy underlying that Act, including Congress's "clearly expressed . . . intention" that

[4] Because it is outside the administrative record for the Secretary's decision, the Court should not consider the *New York Times* blog post that DBOC cites to cast doubt on the scientific analysis in the EIS. If it chooses to consider that blog post, however, the Court should also consider the recent investigation by the Inspector General of the Department of the Interior. That investigation found "no evidence, documents, [draft EIS] revisions, or witnesses" that supported any allegations of scientific misconduct. *See* Inspector General Report at 1, *available at:* http://www.doi.gov/oig/news/drakes-bay.cfm .

the Park Service would "steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status." *Id.* at 5-7 (ER 122-24). The Secretary also acknowledged "a level of debate" about the environmental impacts of DBOC's operations within Drakes Estero. *Id.* at 5 (ER 122). He responded by stating that he found the EIS helpful, but that it was "not material to the legal and policy factors that provide the central basis for my decision," and that his Decision was "not [based] on the data that was asserted to be flawed." *Id.* at 5 & n.5 (ER 122).

The Secretary also directed the Park Service to "[e]ffectuate the conversion of Drakes Estero from potential to designated wilderness." *Id.* at 2 (ER 119). The Park Service published the Federal Register notice necessary to accomplish this conversion on December 4, 2012, noting that when DBOC's existing authorizations to conduct commercial operations in Drakes Estero had expired on November 30, "all uses prohibited under the Wilderness Act within Drakes Estero have ceased." *See* "Designation of Potential Wilderness as Wilderness," 77 Fed. Reg. 71,826 (Dec. 4, 2012).

E. Judicial proceedings

DBOC challenged the Secretary's Decision in district court. As relevant here, DBOC's First Amended Complaint alleges that Secretary Salazar relied upon an EIS that fell short of the requirements of NEPA, and that his decision was arbitrary and capricious. *See* Compl. at 25-27 (ER 321-23). DBOC sought unorthodox equitable remedies: Among other relief, it asked the district court to *order* the Park Service to

issue a new, 10-year permit, even though Congress had left that issue to the Secretary's discretion. *Id.* at 32 (ER 328). Most relevant to this appeal, it also requested a preliminary injunction that would allow DBOC to continue operating in the Drakes Estero wilderness area, despite the lack of a valid permit, while the court considered the merits of its claims. *Id.* at 33 (ER 329).

After full briefing and argument, the district court denied DBOC's request for an injunction. The primary basis for the court's decision was lack of subject matter jurisdiction under the APA: The court held that Congress had authorized the Secretary to issue a permit, or to choose not to issue a permit, "notwithstanding any other provision of law." Considering Section 124, the court found that it allowed the Secretary either to issue or deny a new special use permit, but provided "no meaningful standard" for the court to apply in reviewing that decision. *Id.* at 19 (ER 33). The Secretary's response to DBOC's permit request was thus "committed to agency discretion by law," and not reviewable under the APA. *See id.* at 16-21 (ER 30-35). As the argument below will demonstrate, this analysis was correct.

The district court also held that, even if the APA allowed it to review the Decision Memorandum, DBOC would not meet the standards for injunctive relief. On the merits, the court held that "the Secretary's rationale, though controversial, had a basis in law and policy" and "showed a 'rational connection' between the choices made." *Id.* at 22 (ER 36). The court credited the Secretary's own statement that his

decision was based on those "legal and policy factors," and not on allegedly flawed science. *Id.* at 23 (ER 37). The court also stated that Congress's use of the term "'potential wilderness' suggests on its face the appropriateness of full wilderness as the ultimate goal." *Id.* at 24 (ER 38). DBOC therefore could not show a likelihood of success on the merits. *Id.* at 24-25 (ER 38-39).

Although the court believed that potential damage to DBOC's business would constitute irreparable harm, it also found the balance of equities did not favor an injunction. *Id.* at 27-30. The court weighed the equitable factors that both sides raised, including Congress's "express goal" of a wilderness designation for Drakes Estero and the potential positive and negative environmental consequences of DBOC's operations. *Id.* at 28-29 (ER 42-43). Ultimately, the court concluded that none of these factors sharply outweighed the others, and that DBOC had therefore not met its burden of showing that "these elements weigh in favor of granting a preliminary injunction." *Id.* at 30 (ER 44).

SUMMARY OF ARGUMENT

The district court denied DBOC's motion for a preliminary injunction on three separate grounds: (1) lack of APA jurisdiction; (2) no likelihood of success on the merits; and (3) unfavorable balance of equities. In order to prevail in this appeal, DBOC must demonstrate error in *all three* of these holdings. DBOC cannot, however, demonstrate error in any of them.

First, the district court correctly determined that the APA does not grant jurisdiction to review the Secretary's decision. Section 124 "authorized," but did not require, the Secretary to issue a new permit to DBOC. That "authorization" encompassed the discretion to issue or not to issue a new permit, and under Section 124, the Secretary could exercise that discretion "notwithstanding any other provision of law." By employing this language, Congress cleared away any "law to apply" to the Secretary's decision, committing it to agency discretion by law and therefore placing it beyond APA review. *See* 5 U.S.C. § 701(a)(2).

Second, even if the APA applied here, the district court correctly concluded that DBOC cannot succeed on the merits of its claims. The Secretary correctly interpreted the scope of his own authority, as well as the statutes that informed the policy judgments underlying his decision. He adequately explained a reasonable basis for choosing not to issue DBOC a new permit, and the district court correctly concluded that NEPA did not apply to that decision.

Finally, the district court did not abuse its discretion when it weighed the equities. It recognized the bargain that the United States struck with Johnson in 1972: The shellfish business could remain in Drakes Estero for forty years, and then the Estero would return to the American people. The public interest lies in honoring this agreement for the use of public resources. This is particularly true given the policy established in the Point Reyes Wilderness Act, in which Congress expressed its belief

that the public interest favored wilderness in Drakes Estero. The district court correctly found that in 2005, when it acquired the business, DBOC had no reason to hope that it might operate beyond 2012. Its denial of a preliminary injunction should therefore be affirmed.

STANDARDS OF REVIEW

This Court reviews *de novo* the district court's determination of the scope of its own subject matter jurisdiction under the APA. *See Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 979 n.1 (9th Cir. 2006).

This Court reviews the denial of a preliminary injunction for abuse of discretion. *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc). This is a "limited and deferential" standard of review. *Id.* An error of law constitutes an abuse of discretion, and this Court considers the district court's legal conclusions *de novo*. *Id.* at 986-87. DBOC offers the novel contention that this Court should also review the district court's balance of the equities *de novo*, because that is a judgment that "turns on . . . its application of the values that animate legal principles." DBOC Br. at 16. The case that DBOC offers to support this proposition, *United States v. Hinkson*, simply states that this Court must examine the district court's reasoning to determine whether it made an error of law. 585 F.3d 1247, 1262 (9th Cir. 2009). If the district court's legal conclusions are correct, however, this Court will not reverse "simply because [this Court] would have arrived at a different result if it had applied the law to the facts of the case." *Id.*; *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th

Cir. 2010). Stated more plainly, "[t]he assignment of weight to particular harms is a matter for district courts to decide." *Earth Island Inst.*, 626 F.3d at 475.

To justify a preliminary injunction here, DBOC was required to show each of four factors: (1) that it had a "likelihood of success on the merits," (2) that it would be irreparably harmed in the absence of an injunction, (3) that the balance of the equities favored an injunction; and (4) that an injunction was in the public interest. *See* Order at 12 (ER 26) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)). Because the United States is a party, the third and fourth factors are considered together in this case. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). "Serious questions going to the merits" may warrant an injunction only if the balance of hardships "tips sharply toward the plaintiff" *and* the plaintiff can separately demonstrate that "the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

Finally, DBOC argues that this Court should defer to its motions panel's evaluation of the four injunctive relief factors. *See* DBOC Br. at 16, 34. A merits panel of this Court is not bound, in considering the merits of the appeal, by the motion panel's grant of an injunction pending appeal. In the case that DBOC cites, *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1032 n.3 (9th Cir. 1990), the merits panel showed some deference because it was faced with the very same jurisdictional question that a motions panel had already considered on a motion to dismiss. Here,

in contrast, the motions panel decided a different question than this panel faces. The "serious questions" test allowed the motions panel to identify those questions "deserving of more deliberate investigation," and to "preserve the status quo . . . until the merits could be sorted out." *Alliance for the Wild Rockies*, 632 F.3d at 1134 (internal quotations omitted). The motions panel did so, during the short pendency of this expedited appeal, based on the parties' short submissions. It is this panel's role to provide that more "deliberate investigation," applying an abuse-of-discretion standard to the district court's decision based on the entire record.[5] This panel's decision will also apply during the longer time frame that will be needed to litigate DBOC's claims to final judgment in the district court. Under these circumstances, this panel of the Court has the authority to undertake its own review of the district court's decision.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE APA DOES NOT GRANT JURISDICTION OVER DBOC'S CLAIMS.

The district court held that the APA does not grant jurisdiction to review the Secretary's decision, which is "committed to agency discretion by law." *See* Order at 16 (ER 30) (citing 5 U.S.C. § 701(a)(2)). This ruling was correct.

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[5] Even if the motions panel had already decided a relevant issue, the abbreviated nature of preliminary motions practice makes it appropriate for the merits panel to consider that issue anew, with the benefit of briefing and argument. *See United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986).

The Secretary and DBOC have fundamentally different interpretations of Section 124. Like the district court, the Secretary understood Section 124 to contain his sole authority either to issue a new permit to DBOC, or not to issue one, when its existing authorizations expired. That statute also sweeps aside any legal requirements that might otherwise have bound the Secretary in exercising that authority. DBOC incorrectly argues that Section 124 gave the Secretary unreviewable authority *only to issue* a permit, and not to deny one. *See* DBOC Br. at 19. In DBOC's view, the Secretary could not rely on any other legal authority for his substantive decision to deny a permit, *id.* at 25-28, but he was nonetheless subject to the procedural requirements of other laws, *id.* at 29-31.

The Park Service's interpretation of Section 124 is the most natural reading of the statute, and the district court correctly adopted it. It depends on two questions that this section will answer: First, what authority did Section 124 grant to the Secretary? And second, what effect does Section 124, and in particular its "notwithstanding" clause, have on judicial review of the decision the Secretary made using that authority?

A. Section 124 contains the Secretary's entire authority to issue or deny the permit.

DBOC argues that the plain language of Section 124 provides only that the Secretary "is authorized *to issue* a special use permit with the same terms and conditions as the existing authorization." DBOC Br. at 19. This is too narrow a

construction of the statute, which, read as a whole, confers upon the Secretary all necessary authority either to issue a permit on the same terms as DBOC's prior authorizations, to issue a permit on different terms, or not to issue a permit. In Section 124, Congress created a special authorization for the Secretary to consider whether to issue a permit for DBOC, supplanting any existing procedures that DBOC might invoke to apply for a permit and the existing rules that constrained the Park Service in considering such an application.

Section 124 contains only one "authorized" clause, which provides that the Secretary "is authorized to issue a special use permit with the same terms and conditions as the existing authorization." But the fact that Section 124 "does not say that the Secretary may 'issue *or deny*,'" DBOC Br. at 19, does not establish an unambiguous limit on the scope of the authority that Section 124 grants to the Secretary. Rather, the "authorized" clause contains implicit authority to act on DBOC's permit request in a way other than issuing a permit. This interpretation is evident from other statutes, from this Court's cases, and from the legislative history of Section 124 itself.

Where Congress "authorizes" a federal official to take an action by statute, the authority not to take that action is implicit. Out of many possible examples, consider 16 U.S.C. § 1a-2, which provides that "the Secretary of the Interior is authorized" to "carry out" activities such as providing recreation facilities, establishing advisory

committees, purchasing equipment, and leasing Park property to private parties. There can be no question that this express statutory authority implies that the Secretary would also have the authority to deny a petition requesting that he exercise these powers.

This Court's cases bear out the principle that the statutory authority to issue a permit encompasses the authority not to issue it. In *Ness Inv. Corp. v. U.S. Dep't of Agriculture*, 512 F.2d 706, 708 & n.2 (9th Cir. 1975), the statute at issue provided that the "Secretary of Agriculture is authorized . . . to permit the use and occupancy of suitable areas of land within the national forests" for special uses. Plaintiffs claimed that the Forest Service had unreasonably denied an application for a special use permit under this statute. *Id.* at 711. This Court assumed that if any standards existed "by which acceptance *or rejection* of a particular applicant could be tested," those standards would be contained within the statute itself. *Id.* at 716 (emphasis added).

Similarly, in *Confederated Salish and Kootenai Tribes v. United States ex rel. Norton*, 343 F.3d 1193, 1194 (9th Cir. 2003), the Court considered a statute providing that "the Secretary of the Interior is authorized to acquire" certain lands and take them into trust for tribal members. The case turned on whether this "authorization" language established discretion either to grant or deny a petition to take lands into trust or, in the alternative, whether it was a "mandatory" fee-to-trust statute. Parsing the word "authorized," the Court held that Congress intended, in this statute, to

confer power upon the Secretary to grant or to deny a request to take land into trust. *Id.* at 1196-97.

The legislative history of Section 124 shows that Congress intended the same result here. Congress rejected a proposal that provided that the Secretary "shall extend" DBOC's existing authorization, and instead adopted a compromise that "authorized" him to issue a permit. *See supra* pp. 10-11; Order at 4 n.2, 18 (ER 18, 32). The only reasonable conclusion to draw from this legislative sequence is that the Secretary's authority under Section 124 includes the authority to issue or not to issue a permit. *See* H.R. Rep. No. 111-316, at 107 (2009) (Conf. Rep.) (changing Section 124 to "provid[e] the Secretary discretion" that the committee's proposed language would not have provided).

Finally, DBOC's own actions show that it has, in the past, interpreted Section 124 entirely to replace the ordinary procedures for obtaining a special use permit. The Reservation had contemplated that DBOC could seek a new special use permit from the Park Service for operations after November 30, 2012, if such a permit could be "issued in accordance with National Park Service regulations in effect at the time." *See* Reservation ¶ 11 (ER 599). Those regulations would not have allowed the Park Service to grant DBOC a new permit. *See* EIS at F-18 to F-19 (SER 219-20); Solicitor Memo at 3 (ER 230). As a result, both DBOC and the Park Service understood Section 124 to supplant the background substantive rules and procedural rules that

apply to typical permit applications. DBOC transmitted its permit request directly to the Secretary under the authority of Section 124, and the Secretary accepted and considered DBOC's request on that basis. If the "authorized" clause of Section 124 established this entire process, then it must also be the authority for any decision the Secretary may make at the end of the process.

B. The APA does not allow review of the Decision because it was committed to the Secretary's discretion by statute.

Given that Section 124 allows the Secretary to choose from a range of possible responses to DBOC's permit request, the next question is whether the APA allows review of that choice. The answer is no: The entire "authorization" that Congress granted to the Secretary in Section 124 is "notwithstanding any other provision of law," a phrase by which Congress committed the Secretary's decision to agency discretion by law.

The APA does not provide jurisdiction to review actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Although there is a presumption that administrative action is subject to judicial review, that presumption can be overcome by "specific language or specific legislative history that is a reliable indicator of congressional intent." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672-73. The court may not review an agency's exercise of its discretion when a statute is "drawn in such broad terms that in a given case there is no law to apply," that is, "if the statute is drawn so that a court would have no meaningful standard against which

to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830-31 (1985) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)). Examples of unreviewable agency discretion include the discretion not to take enforcement action, *see Heckler*, 470 U.S. at 831-32; the CIA Director's discretion to terminate employees, *see Webster v. Doe*, 486 U.S. 592, 601 (1988); the U.S. Trade Representative's authority to compose a "fairly balanced" advisory committee, *see Ctr. for Policy Analysis on Trade and Health (CPATH) v. U.S. Trade Representative*, 540 F.3d 940, 944-45 (9th Cir. 2008); and the Secretary of the Interior's decision to make or not make a loan authorized by statute, *see Helgeson v. BIA*, 153 F.3d 1000, 1003-04 (9th Cir. 1998).

Section 124 overcomes the presumption favoring APA review. As a general principle, "statutory 'notwithstanding' clauses broadly sweep aside potentially conflicting laws." *United States v. Novak*, 476 F.3d 1041, 1046-47 (9th Cir. 2007) (en banc); *see Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993). In Section 124, the phrase "notwithstanding any other provision of law" therefore supersedes any "law to apply" to the Secretary's decision. DBOC itself has twice described it as a "general repealing clause." Letter of September 17, 2012, at 3-4 (SER 239-40); Letter of Nov. 1, 2012 at 1-2 (SER 244-45). Any constraints that may exist upon the Secretary's discretion, and that may provide a basis for judicial review, must be found within Section 124 itself. Thus, in *Webster v. Doe*, the Supreme Court considered the

authority of the Director of Central Intelligence to terminate personnel "[n]otwithstanding . . . the provisions of any other law." *Webster*, 486 U.S. at 615 (Scalia, J., dissenting) (quoting statutory language). In part due to this language, and its general understanding that Congress intended to defer to the Director's discretion, the Court held that such decisions were unreviewable under Section 706(a)(2) of the APA. *Id.* at 601 (majority opinion).

Here, the Park Service had advised DBOC that the constraints of existing law would preclude a new special use permit in the potential wilderness of Drakes Estero. *See* Letters of Jan. 25 and March 28, 2005 (ER 227, SER 228). By enacting Section 124, including the "notwithstanding" clause, Congress removed those constraints from the Secretary's discretion without prescribing any other governing standard.

DBOC argues that the phrase "notwithstanding any other provision of law" is not so sweeping. *See* DBOC Br. at 23. According to the cases that DBOC cites, however, a "notwithstanding" clause is given a limited interpretation only if such limits are required by "the whole of the statutory context in which it appears." *Novak*, 476 F.3d at 1046-47. For example, in *Oregon Nat. Res. Council v. Thomas*, 92 F.3d 792 (9th Cir. 1996), this Court held that, in light of related provisions in the same statute, the "notwithstanding" clause was limited to precluding review under "federal environmental and natural resource laws," and that those laws did not constitute "law to apply" for purposes of APA jurisdiction. *Id.* at 796-98. Similarly, the Court in *In re*

Glacier Bay considered a "notwithstanding" clause based upon its relationship to other provisions of the statute. 944 F.2d 577, 582 (9th Cir. 1991). Here, in contrast, Section 124 stands alone, at odds with the existing statutory scheme. As the district court aptly stated, Section 124 "was created as part of an appropriations measure for a single permit to a single company at a single location." Order at 18 (ER 32).

Because the "notwithstanding" clause clears away the statutes and regulations that might apply to a typical permit application, the question of APA jurisdiction is controlled by *Ness Investment Corp.* In *Ness*, the plaintiffs claimed that the Forest Service had "unreasonably, arbitrarily and capriciously denied" a special use permit. 512 F.2d at 711-12. The applicable statute "authorized" the Secretary "to issue permits," and to set regulations, terms and conditions for permits "as he may deem proper." *Id.* at 715. The Court found this language so broad that "there is no law to apply," and held that the permit denial was therefore not reviewable under the APA. *Id.* at 715. Instead, the question whether to grant a particular permit was "best answered by the forest service, which is involved on a daily basis with the management and use of the national forests." *Id.* at 716; *see also CPATH*, 540 F.3d at 944 (noting that the APA does not allow review of decisions that are "peculiarly within the agency's expertise, including . . . compatibility with the agency's overall policies").

Likewise here, Section 124 authorizes the Secretary to issue a special use permit for DBOC, but does not require it. Instead, there is *no* "law to apply," and the decision on DBOC's permit request is committed to the Secretary's discretion. The judgment whether a particular use is appropriate on national park land is uniquely within the Secretary's expertise, and Section 124 does not provide any standard by which he should make the decision (or by which the court could review it).

DBOC claims that courts often review agency actions within the scope of a discretionary authority, and that this case should be no different. *See* DBOC Br. at 20. But in most such cases, there is "law to apply" in the form of a statute, such as NEPA, or agency regulations, such as 36 C.F.R. § 1.6; *see* DBOC Br. at 23. This case is different due to the "notwithstanding" clause, the key distinguishing feature of Section 124. The cases that DBOC cites on pp. 21-22 of its brief are therefore inapposite, as the district court found. *See* Order at 17 (ER 31) (distinguishing *KOLA, Inc. v. United States*, 882 F.2d 361 (9th Cir. 1989)).

DBOC also claims that Section 124 itself contains "law to apply," *see* DBOC Br. at 23. Section 124 does provide some constraints on the Secretary's authority to grant or modify a permit: The Secretary's authority lasted only until November 30, 2012; he was required to charge DBOC a fair market rent for any permit; and he was required to consider the National Academy of Sciences report before modifying the terms of the permit. This Court may enforce such specific statutory criteria that set

bounds on the agency's discretion, even if there are no standards by which to review a decision that falls within those bounds. *See Helgeson*, 153 F.3d at 1004. But Section 124 does not place any restrictions on the Secretary's discretion not to issue a permit, nor does it provide any governing standard that constrains the Secretary's discretion.

Finally, DBOC attempts to find support for its interpretation of Section 124 in a conference report for an unrelated appropriations bill before a different Congress. *See* DBOC Br. at 24. The Supreme Court has recently expressed doubts that "postenactment legislative history could shed light on the meaning of an otherwise unambiguous statute," and warned that the views of subsequent Congresses are irrelevant. *Massachusetts v. EPA*, 549 U.S. 497, 529-30 (2007). Even if this Court were inclined to use post-enactment legislative history, the cases that DBOC cites are not on point, because in those cases "it [was] clear that the conferees had carefully considered the issue." *Montana Wilderness Ass'n v. U.S. Forest Serv.*, 655 F.2d 951, 957 (9th Cir. 1981); *see Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). Here, the conferees said nothing about the issue of reviewability, and did not even purport to interpret statutory language that Congress enacted. They merely acknowledged that the Secretary had initiated an EIS process to inform the exercise of

his own discretion, and they directed the National Academy of Sciences to provide information relevant to that process.[6]

C. The availability of judicial review does not depend upon the content of the Secretary's decision.

DBOC acknowledges the power of the "notwithstanding" clause, calling it a "general repealing clause" that would effectively insulate the Secretary's decision to issue a permit from judicial review. Letter of Nov. 1, 2012 at 1-2 (SER 244-45). DBOC's claim of error in the district court's jurisdictional analysis, therefore, depends upon its contention that Section 124 is an "asymmetric statute enacted for DBOC's benefit," and that the "notwithstanding" clause does not apply "in the event the permit is denied." DBOC Br. at 23. This interpretation is fundamentally at odds with the "authorized" clause of Section 124, which gives the Secretary authority to choose among different outcomes, and the "notwithstanding" clause, which applies to any exercise of that authority. Of these two readings of Section 124, the Park Service's is the most logical.

It is true that a "preference for symmetry cannot trump an asymmetrical statute." *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1114 (2011) (cited in DBOC Br. at 20). But this case is not like *CSX*, in which the Supreme Court found that differences in the text of two statutory sections required differences in the

[6] Under 5 U.S.C. § 2(b)(6), the function of the National Academy of Sciences is "advisory only," and "all matters under their consideration" are finally determined "by the official, agency, or officer involved."

treatment of two kinds of taxes. *Id.* at 1114. Here, there is only one statutory provision, and DBOC asserts that the *same language* – "notwithstanding any provision of law" – can mean two different things depending only upon the way the Secretary exercises his discretion. This case is therefore governed by the more general rule that the plain meaning of statutory text is found in its "most natural reading," even if "Congress might have expressed itself more clearly." *Jimenez v. Franklin*, 680 F.3d 1096, 1100 (9th Cir. 2012) (quoting *Shepherd v. Goord*, 662 F.3d 603, 607 (2d Cir. 2011)). "A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotations and citations omitted).

DBOC relies heavily on its belief that Congress intended to "make it easy" for the Secretary to issue the permit, DBOC Br. at 20, but the text and legislative history of Section 124 are not so one-sided. By clearing away the rules that would have prohibited DBOC from operating its commercial business in a potential wilderness area, Congress made it *possible* for the Secretary to issue a permit. But Congress simultaneously rejected a proposal that would have *required* the Secretary to issue a permit, substituting more neutral, discretionary language in the final text of Section 124. *See supra* pp. 10-11. That text does not "encourage[] the Secretary to issue the permit," or "envisage[] that the permit would be issued," DBOC Br. at 19-20.

Congress did not put a thumb on the scale in DBOC's favor. Rather, it balanced the scale, allowing the Secretary to weigh the factors he deemed relevant and choose among several possible outcomes.

DBOC's asymmetrical interpretation of Section 124 also creates a process paradox. DBOC contends that Section 124 replaces other procedural requirements (such as 36 C.F.R. § 1.6 and the procedural requirements of NEPA) if the Secretary decides to grant DBOC's permit request, but that those requirements continue to apply if the Secretary chooses not to grant that request. *See* DBOC Br. at 22. That approach to Section 124 would require the Secretary to make a permit decision in order to know what procedural requirements he must observe to reach that decision. For example, did DBOC's letter request meet the requirement that a permit must be "properly applied for," *see* 36 C.F.R. § 1.6(d)? Must the Superintendent consider whether DBOC's shellfish operation would adversely impact park resources and values, *see id.* § 1.6(a)? Was the Park Service required to prepare an environmental impact statement, as DBOC (incorrectly) claims it must do if the Secretary chooses not to issue a permit? If the Court adopts DBOC's theory, the answers to these questions depend entirely on whether the permit is ultimately granted or denied.

DBOC's interpretation would also create asymmetry in judicial review. DBOC relies on a presumption of judicial review of agency action to support its legal challenge to the Secretary's decision not to issue a permit. At the same time, if the

Secretary issues a permit, DBOC interprets the "notwithstanding" clause to apply, leaving any party that wishes to advocate for wilderness at Point Reyes with no legal recourse.

The Secretary's reading of Section 124 resolves these dilemmas. The "notwithstanding" clause operates without reference to the content of the Secretary's decision, creating a new statutory authority and displacing any procedural or substantive constraints that previously existed. This reading is also consistent with DBOC's decision to seek a permit directly from the Secretary under the authority of Section 124, and with DBOC's own statement that the lack of an adequate EIS has *no effect* on the Secretary's discretion under Section 124. *See* Letter of November 1, 2012 at 1-2 (SER 244-45). Based upon this interpretation, the district court correctly concluded that there is no APA jurisdiction to review the Secretary's decision. That holding should be affirmed.

II. DBOC DID NOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The Secretary's decision was not arbitrary or capricious.

Assuming for the sake of argument that the district court has jurisdiction to review DBOC's claims under the APA, DBOC cannot obtain an injunction because it cannot show that it is likely to succeed on the merits of those claims. The deferential APA standard of review requires a court to uphold the agency's action if the agency "articulate[s] a satisfactory explanation for its action." *McFarland v. Kempthorne*, 545

F.3d 1106, 1113 (9th Cir. 2008) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Using that standard, this Court has upheld the denial of a special use permit where the agency "clearly explained its reasons" for denying the permit and it "acted within the sphere of its expertise." *McFarland v. Kempthorne*, 545 F.3d at 1112-13.

DBOC claims that the Secretary's decision was arbitrary or capricious because it was based on "fundamental misconceptions of federal law." DBOC Br. at 29. To the contrary, the Secretary properly understood that he had authority to issue DBOC's permit "notwithstanding any other provision of law," including the Wilderness Act and the Point Reyes Wilderness Act. But he also believed that the policies behind those statutes – including an explicit Congressional goal of phasing out nonconforming uses in Drakes Estero – outweighed the benefits of granting a new permit to DBOC. Assuming it can be reviewed at all, this rational decision would be upheld at the merits stage.

1. The Secretary did not misinterpret Section 124.

First, DBOC contends that the Secretary "misinterpreted Section 124" by concluding that issuing a new permit would violate the Point Reyes Wilderness Act. *See* DBOC Br. at 25-26 (citing Decision Memorandum at 1 (ER 118)). As DBOC acknowledges, the Secretary agreed with DBOC that he had authority to issue a new permit "notwithstanding any other provision of law." *See* DBOC Br. at 26 n.7 (citing Decision Memorandum at 6 (ER 123)). Although the Secretary summarized his

reasoning by stating that a new permit would "violate" the Point Reyes Wilderness Act, *see* Decision Memorandum at 1 (ER 118), the fuller explanation of his reasoning in the body of the Memorandum states that:

> Although [Section] 124 grants me the authority to issue a new SUP . . . it in no way overrides *the intent of Congress* as expressed in the 1976 act to establish wilderness at the estero.

Id. at 6 (ER 123) (emphasis added). This variation in wording does not show that the Secretary's decision was based upon two "internally inconsistent" views. DBOC Br. at 23 n.7. It is apparent from the Memorandum that the Secretary had only one view of his own authority – that the "notwithstanding" clause of Section 124 trumps any legal limitations that the Point Reyes Wilderness Act might impose on his discretion. This is sufficient to pass APA review. *See, e.g.*, *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 945 (9th Cir. 2010) (reaffirming that the Court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned").

Furthermore, even as Section 124 freed the Secretary from the legal constraints of other statutes, the Secretary was fully justified in considering the policies behind those statutes. The decision whether to issue a new permit requires the balancing of competing interests in, for example, wilderness preservation and the promotion of aquaculture. Congress considered making its own judgment about that balance, but ultimately committed it to the Secretary's informed expertise in such matters. If the Secretary could not consider the relevant policy interests on both sides of the question, the discretion that Congress granted would be meaningless.

2. The Secretary did not misinterpret Congressional intent, as reflected in other statutes.

In deciding not to issue the permit, the Secretary relied on statutory language providing that potential wilderness would be converted to wilderness when "all *uses* thereon prohibited by the Wilderness Act have ceased," and on legislative history endorsing the steady removal of "all obstacles to the *eventual* conversion of these lands to wilderness status." Decision Memorandum at 3 (ER 120) (emphasis added). DBOC claims this was legal error, because Congress did not intend Drakes Estero to become wilderness while California still retained mineral and fishing rights there. DBOC Br. at 26-27. There are several reasons this argument would fail at the merits stage.

First, DBOC misunderstands the intent of Congress. In the Point Reyes Wilderness Act, Congress specified only that "uses . . . prohibited by the Wilderness Act" would prevent a full wilderness designation. Those "uses" are primarily defined in 16 U.S.C. § 1133(c), which provides that "there shall be no commercial enterprise and no permanent road within any wilderness area," and no "temporary road, no use of motor vehicles," and "no structure or installation." To the extent California has legal rights, those rights are not inconsistent with a wilderness designation unless they result in one of these restricted "uses." Lands may be eligible for a full wilderness designation despite the reservation of "existing rights or privileges," including rights for "mineral exploration." Management Policies § 6.2.1.2 (SER 267). The Park

Service has designated Estero de Limantour and other waters in Point Reyes as full wilderness, even though they are subject to the same retained state rights as Drakes Estero. *See* 64 Fed. Reg. 63,057. The difference between Drakes Estero and those other waters was not California's retained rights, but rather the commercial shellfish "use" within Drakes Estero.

Second, DBOC, *see* Br. at 26, and Amici, *see* Br. at 5-6, overstate the scope of the rights that California claims in the Estero. The California State Lands Commission studied the State's interest in Drakes Estero and concluded that the State had "conveyed out all of the State's real property interest except the mineral estate," adding that the constitutional "right to fish" does not cover aquaculture. *See* Letter of July 26, 2007 (SER 231); *see also* Letters of May 15, 2007 and March 25, 2008 (SER 229, 232-34) (same conclusion from California state agencies).[7] And although California stated that it will authorize shellfish cultivation through 2029, based upon the 25-year lease that it granted in 2004, it also recognizes that the *use* of that lease depends upon Park Service permits. *See* Letter of May 15, 2007 at 2 (SER 230) ("[T]he 2004 lease renewal is expressly contingent upon the aquaculture facility's compliance with . . . any special use permit that [Point Reyes] may issue in its discretion"); *see also* Letter of March 25, 2008 (SER 232). California's clear position is

[7] As Amici point out, the public "right to fish" is guaranteed by the California Constitution and cannot be conveyed by the State. *See* Amici Br. at 4. Fishing for wild fish is allowed for this reason in the bays, rivers, lakes and streams of California wilderness areas, including areas that Congress itself designated as full wilderness.

that DBOC's shellfish operation "is properly within the primary management authority of [Point Reyes]," not California. Letter of May 15, 2007 at 1 (SER 229). California's mineral rights are restricted to subsurface rights, and both its conveyance statute and Park Service regulations and policies would restrict surface operations. *See* 1965 Cal. Stat. 2605, § 2 (ER 622); Management Policies § 6.4.9 (SER 270).

Finally, the removal of particular nonconforming uses (such as DBOC's commercial operation) is consistent with Congressional intent even if other nonconforming uses remain. DBOC's arguments are in tension with one another: The Secretary can't convert Drakes Estero to full wilderness until all nonconforming uses cease, but the Secretary can't remove nonconforming uses until Drakes Estero meets all the criteria for full wilderness. *See* DBOC Br. at 26-27. According to Congress, this latter proposition is incorrect, because it was "well established" at the time of the Point Reyes Wilderness Act that the Park Service would undertake "efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status." H.R. Rep. No. 94-1680, at 3 (1976) (ER 254).

3. The Secretary did not misinterpret the 1978 amendments to the Point Reyes enabling legislation.

DBOC next argues that the Secretary erred by misinterpreting a statute, the "1978 Act," Pub. L. 95-625, § 318(b), 92 Stat. 3487, that amended the 1962 Point

Reyes enabling legislation.[8] In the Secretary's view, that Act, codified as part of the Point Reyes enabling legislation at 16 U.S.C. § 459c *et seq.*, authorizes him to lease Point Reyes lands for ranching and dairying but not for aquaculture. The Secretary took this policy distinction into account when exercising his discretion under Section 124. *See* Decision Memorandum at 2 (ER 119). DBOC believes that the Secretary misunderstood the 1978 Act, and that by listing "agriculture" separate from "ranching and dairying," Congress must have been referring to shellfish aquaculture. DBOC Br. at 28.

Congressional intent is a poor foundation for DBOC's argument. Where Congress intended to cover ranching and dairying in the 1978 Act, it used specific terms, and there is no reason to believe that it chose the more general term "agricultural" just to cover DBOC. The California statute that DBOC cites, defining aquaculture as a form of agriculture, was enacted in 1982, and could not have informed Congress's intent in 1978. *See* Cal. Pub. Res. Code § 30100.2 (1982). The House Report can also be read to use the phrase "agricultural property" as inclusive of, rather than distinct from, the ranching and dairying purposes that already existed in the pastoral zone. *See* H.R. Rep. No. 95-1165, at 71 (1978) (SER 262) (use of "agricultural leasebacks" is intended to "protect the pastoral character" of newly-added areas within the National Seashore).

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[8] DBOC's claim that the 1978 Act amended the 1964 Wilderness Act is incorrect. *See* DBOC Br. at 27.

That more limited sense of the term "agricultural" is also the only interpretation that is consistent with the rest of the Point Reyes enabling legislation. The 1978 Act allows the Secretary to lease "agricultural property," that is, *"lands* which were in regular use" for agricultural purposes as of May 1, 1978. 16 U.S.C. § 459c-5(a) (emphasis added). Elsewhere in the Point Reyes enabling legislation, both in 1962 and in 1978, Congress distinguished the "lands" in the area from its "waters" and "submerged lands." *See, e.g.*, Pub. L. No. 87-657, § 2(a), 76 Stat. at 538 (1962) (defining Point Reyes as "that portion of the land and waters" described in the statute); *Id.* § 3 (empowering the Secretary to acquire "lands, waters, and other property" at Point Reyes); Pub. L. 95-625, § 318(a), 92 Stat. at 3487 (1978) (changing the phrase "land and waters" to "lands, waters, and submerged lands"). Congress's choice to limit the Secretary's leasing authority to "lands" in Section 318(b) of the 1978 Act – and not the "lands, water, and submerged lands" described in Section 318(a) of the same statute – must be presumed intentionally to refer *only* to lands. Indeed, if the Secretary was already authorized to lease the submerged lands of Drakes Estero to DBOC under the 1978 Act, there would have been no need for Congress to make a separate, similar authorization in Section 124. The Secretary's interpretation of the 1978 Act was therefore at least reasonable, and DBOC is not likely to show at the merits stage that it was arbitrary or capricious.

B. NEPA did not apply to the Secretary's decision.

DBOC also cannot succeed on the merits of its claim that the Secretary's Decision violated NEPA. Even if the "notwithstanding" clause of Section 124 is not so strong as to overcome the presumption of APA review, it must still have some effect. Thus, assuming for purposes of argument that judicial review is available, Section 124 still exempts the Secretary's decision from other provisions of law, including NEPA. *See supra* pp. 25-28. The district court, considering the merits of DBOC's claim under NEPA, reached this conclusion, noting that DBOC itself had urged the Secretary to issue a permit regardless of the requirements of NEPA. *See* Order at 23 (ER 37).

The district court could have rejected DBOC's NEPA claims even without relying on Section 124. An agency need only prepare an EIS when it proposes a "major Federal *action* significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (emphasis added). Here, there is no "action" within the meaning of NEPA: Section 124 gave the Secretary the authority to issue a new permit, and he declined to exercise that authority. This Court has held that "the nonexercise of power by an executive-branch office does not call for compliance with NEPA," even with respect to "authorities and duties [the Secretary] may possess." *State of Alaska v. Andrus*, 591 F.2d 537, 538, 541 (9th Cir. 1979). In particular, this Court "has not been receptive to arguments that impact statements must accompany inaction." *Id.* at 542; *see also Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1246 (D.C. Cir. 1980) ("No agency

could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so."). The Park Service did prepare an EIS here, solely to gather information and solicit public input through that time-tested process, but it should not be penalized for doing *more* than the law requires. In any event, the Court need not consider whether the Secretary's decision is "action" or "inaction" for NEPA purposes, because, as the district court held, the "notwithstanding" clause of Section 124 sweeps away any requirements that NEPA might otherwise impose.

As DBOC points out, *see* DBOC Br. at 29 n.10, the Park Service did not publish the EIS more than thirty days before the Secretary made his decision, and the Decision Memorandum was not framed in the form of a Record of Decision. *See* 40 C.F.R §§ 1505.2, 1506.10. Assuming for the sake of argument that these requirements applied, however, they would not provide DBOC a successful NEPA claim here. NEPA and the APA provide relief only for "prejudicial error." 5 U.S.C. § 706; *see also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004) ("Where the agency's error consisted of a failure to comply with regulations in a timely fashion, we have required plaintiffs to identify the prejudice they have suffered."). Here, DBOC suffered no prejudice from the lack of publication or notice. DBOC knew that the final EIS had been published, commented on that EIS, and urged the Secretary to issue his decision anyway. *See* Letter of November 27, 2012 (ER 330, 333); *see also*

Letter of Nov. 1, 2012 at 4 (SER 247). As the district court found, it "strain[s] credulity" for DBOC now to argue that it is entitled to a remand for that very action. Order at 23 (ER 37).[9]

DBOC also cannot prevail on its arguments that the EIS was not based on the best available science. DBOC Br. at 30. The Park Service did not directly answer DBOC's scientific allegations before the district court because the Secretary stated that he did not consider the "data that was asserted to be flawed." Decision Memorandum at 5 & n.5 (ER 122). DBOC contests this assertion, claiming that the Secretary did not provide sufficient detail about how he used the EIS to inform his discretion. *See* DBOC Br. at 26 n.7. The context of the Decision Memorandum makes clear that the data "asserted to be flawed" was the data that DBOC itself described in its letter of November 27, 2012 (ER 331-32), alleging flaws only in the "Soundscapes analysis." *See* Decision Memorandum at 5 n.5 (ER 122). Other substantial data in the record generally "support[ed] the proposition that the removal of DBOC's commercial operations in the estero would result in long-term beneficial

[9] For the same reason, the Court should give no credence to the Amici Curiae's irresponsible speculation that the Park Service began a NEPA process, and then claimed it was not necessary, to "wear down the owners of DBOC emotionally and financially" or to show disdain for those who participated in that process. Amici Br. at 23. Even before soliciting comment on the draft EIS, the Park Service noted that the Secretary was not required to follow the procedures of NEPA. *See* 76 Fed. Reg. 59,423 (Sept. 26, 2011). The Secretary's decision indicates that he took his authority seriously and personally devoted significant time to hearing and considering a variety of views. *See* Decision Memorandum at 2 (ER 119).

impacts to the estero's natural environment." *Id.* at 5 (ER 122); *see generally* EIS at li-lxxvi (SER 50-75) (summary comparing the environmental impacts of "Alternative A," no action to issue a permit, and "Alternative B," a new permit for existing operations). The Secretary acknowledged that there was controversy over some of the scientific conclusions in the EIS, *see* Decision Memorandum at 5 (ER 122), but that controversy was well documented in the record, and the Secretary had adequate information to avoid those disputed matters. Given that the scientific conclusions in the EIS were "not material" to the "central basis" for his decision, *id.*, the Secretary sufficiently explained how it informed him. *See Lands Council*, 537 F.3d at 988, 993 (declining to "choose[] among scientific studies" or "order[] the agency to explain every possible scientific uncertainty").

In any event, DBOC does not argue any scientific error to this Court, but only refers to the factual arguments that it already presented to the district court. *See* DBOC Br. at 31.[10] The district court has already rejected those arguments, *see* Order at 24-25 (ER 38-39), and DBOC does not show that it was legal error to do so.

[10] Comments on the draft EIS raised similar points about the use of scientific evidence. The Park Service's response to those comments, incorporated into the final EIS, demonstrate how the Park Service would answer DBOC's arguments at the merits stage, if they were properly raised. *See* EIS at F-77 to F-78 (SER 223-24) (citing the results of a Marine Mammal Commission study on the effects of DBOC operations on harbor seals); *id.* at F-88 to F-89 (SER 225-26) (discussing methods used for estimating noise from DBOC operations).

C. The Park Service did not publish a false Federal Register notice.

DBOC argues that it will also succeed on the merits of its claim that the Park Service published a "false Federal Register notice" that converted Drakes Estero from potential wilderness to full wilderness. This claim must first fail for jurisdictional reasons, because DBOC lacks standing to make it. To establish standing to challenge an agency action, a plaintiff must show that he is injured, that the agency action causes the injury, and that a favorable decision will redress that injury. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, the injuries that DBOC alleges flow only from the Secretary's decision not to issue a special use permit. Without a permit, DBOC cannot operate commercially within the National Seashore, regardless of whether Drakes Estero is "wilderness" or only "potential wilderness." DBOC claims that it has standing because "it will be necessary to vacate the unlawful notice in order for DBOC's injuries to be ultimately redressed," DBOC Br. at 32 n.11, but this is not correct. The bar to DBOC's operations is simply the absence of a permit, and the Secretary had authority under Section 124 to issue a permit "notwithstanding" the legal status of Drakes Estero. Thus, leaving the Federal Register notice in place would not deprive DBOC of the relief that it seeks.

This claim must also fail on its merits, as both of the statements that DBOC cites may be rationally explained based on evidence in the record. First, the Federal Register correctly stated that "Drakes Estero is entirely in Federal ownership," as the United States holds title to "all of the tide and submerged lands." *See* 1965 Cal. Stat.

2604, §1 (ER 621); *see also* EIS at 7 (SER 93). California's reserved rights do not negate the fact of federal ownership or prohibit a wilderness designation. *See supra* pp. 37-39.

The statement that "all uses prohibited under the Wilderness Act have ceased" is also supported by the evidence. After November 30, 2012, the only authorization that DBOC had to conduct any activities in Drakes Estero was the Park Service's November 29 letter, which contained a 90-day "limited authorization" to "remove your personal property from the Park and close out your operations." Letter of November 29, 2012 (SER 248). The Park Service allowed DBOC to continue processing oysters in its existing onshore location, which is not a wilderness area, during that time. However, it provided that "DBOC may not plant or place any additional larvae or shellfish within Drakes Estero." *Id.*[11] An area is eligible for a wilderness designation even if there are temporary non-wilderness conditions, but wilderness qualities "could be maintained or restored through appropriate management actions." Management Policies § 6.2.1.2 (SER 267). A temporary authorization that directs DBOC to remove its property from the Estero is fully consistent with this policy, because the removal of man-made structures and non-native species is necessary to restore the Estero's wilderness qualities. DBOC may

[11] The Secretary later stipulated that DBOC could take oyster spat from the waters of Drakes Estero and re-plant it on racks. That stipulation, pending a ruling on DBOC's preliminary injunction motion, was entered on December 17, 2012, *see* ER 646, and therefore cannot render the December 4 Federal Register notice false.

dispute the Park Service's legal conclusion that Drakes Estero was eligible for full wilderness, but that conclusion was not based on false statements of fact.

Finally, the Park Service was not required to conduct a formal rulemaking before publishing the Federal Register notice. *See* DBOC Br. at 32-33. The general procedures of 36 C.F.R. § 1.5(b) for imposing closures and public use limits are inapplicable to such an action. In any event, a more specific statute provides the only procedure necessary: When it designated part of Point Reyes as potential wilderness, Congress provided that conversion to wilderness would be automatic "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, 90 Stat. 2693 (1976) (ER 261). Because this change in legal status is not a matter of the Secretary's discretion, Congress did not require the Park Service to conduct a rulemaking.

III. THE DISTRICT COURT CORRECTLY FOUND THAT THE EQUITIES DO NOT FAVOR DBOC.

The district court found that DBOC had demonstrated that, in the absence of an injunction, the closure of DBOC's operations at Drakes Estero would cause irreparable harm. *See* Order at 25-27 (ER 39-41). The Secretary believes that denying the injunction would leave DBOC no worse off than it could reasonably have expected upon the expiration of the Reservation and 2008 Permit, and that this factor was relevant to the irreparable harm analysis. The district court, however, chose to

consider this factor as relevant to the overall balance of the equities, rather than as relevant to irreparable harm. *Id.* at 27 (ER 41). The Secretary does not claim that this was an abuse of discretion, because the district court ultimately reached the correct conclusion about the balance of the equities.

The district court correctly grasped that the central equitable issue in this case is DBOC's reasonable expectation at the time it purchased the Johnson property. In 1972, Johnson struck a bargain with the United States: Johnson would be paid $79,200 up front and would have forty years to run his business in a National Seashore, and only after that would the American people get to enjoy Drakes Estero in its natural state. In 2005, DBOC bought into that bargain, negotiating its price against the background of the Park Service's clearly stated intent that the business could continue only for seven more years. Both Johnson and DBOC have enjoyed the full benefits of their bargains. After forty years, it is not inequitable – rather, it is the essence of fairness – for the United States finally to gain control over the land that it purchased, enabling the American people to enjoy wilderness in Drakes Estero.

This view of the equitable factors at stake was an essential element of the district court's decision. *See* Order at 29-30 (ER 43-44). The court gave particular weight to three points concerning harm to the parties and the public interest: (1) the court acknowledged harm to DBOC and its employees; (2) it "weigh[ed] this consideration against [DBOC's] own ability and/or own failure to conduct due

diligence prior to its purchase from Johnson"; and (3) it "weigh[ed] Congress' long-standing intention" that the Park Service would steadily remove all obstacles to Drakes Estero's eventual designation as wilderness. *Id.* The court found little support in the record, and therefore did not give significant weight, to the potential environmental consequences that each side alleged or to the public interest in "access to local oysters" as compared to "unencumbered wilderness." *Id.* at 30 (ER 44).

DBOC does not claim on appeal that the district court gave too little weight to the hardship to DBOC's own business in the absence of an injunction. Instead, it makes two arguments that the district court gave too much weight to other factors.[12]

First, DBOC relies on the "game-changing" effect of Section 124, which in its view made it unreasonable for the court to consider the 2005 letters in which the Park Service advised DBOC not to expect its permit to be renewed. *See* DBOC Br. at 36-37. But the district court considered those letters as part of the reasonable expectations that DBOC might have for its business "prior to its purchase from Johnson" and "at the outset" of its investment. *See* Order at 30 (ER 44). Section 124, which was enacted in 2009, could not have formed DBOC's expectations in 2005. The district court also found, as a factual matter, that Section 124 did not subsequently give DBOC "every reason to hope" for a new permit: Although that

[12] DBOC's arguments before the district court concerning the public interest went beyond the two points of error it claims here. However, DBOC may not introduce those arguments before this Court for the first time in its reply brief. *See, e.g.*, *Jachetta v. United States*, 653 F.3d 898, 912 (9th Cir. 2011).

statute gave the Secretary authority he did not otherwise have to issue a permit, "the record does not reflect that [DBOC's] hope was based on any assurances by the decisionmakers themselves." *Id.* Preserving DBOC's unfounded hopes, moreover, is not a factor that weighs in favor of the *public's* interest in an injunction.

The other abuse of discretion that DBOC alleges is the district court's failure to consider the public interest as expressed in four separate acts of Congress. *See* DBOC Br. at 35. Although it cited the National Aquaculture Act of 1980, the 1978 Act amending the Point Reyes enabling legislation, and Section 124 in contesting the merits of the Secretary's decision, DBOC did not ask the district court to consider *any* of those statutes as relevant to the equities in its original motion, its reply, or at oral argument. *See* DBOC PI Mot. at 22-23 (SER 254-55); DBOC PI Reply at 14-15 (SER 257-58); Transcript at ER 102-06. It was therefore not abuse of discretion for the district court to omit consideration of the public interest as expressed in these statutes. DBOC did claim before the district court that the public interest requires "compliance with NEPA." But this claim rings hollow when DBOC itself exhorted the Secretary to disregard the requirements of NEPA. Specifically, DBOC asked the Secretary *not* to revise and republish the EIS to correct its alleged legal inadequacies, *not* to provide a 30-day waiting period after the final EIS, and instead to issue a permit. Letter of November 1, 2012 at 4 (SER 247); *see also* Letter of November 27,

2012 at 4 (ER 333). In doing so, DBOC acted against the same public interest that it now seeks to invoke in its favor.

The statutes that DBOC cites would not change the balancing of the public interest here, even if DBOC had raised them before the district court. The Aquaculture Act generally encourages "the development of aquaculture" in the United States, *see* 16 U.S.C. § 2801, but that does not demonstrate that the public interest is advanced by allowing aquaculture in every specific place and time, including in a potential wilderness area of a publicly owned National Seashore. *See* EIS at F-25 to F-26 (SER 221-22). As to NEPA, its purpose is to "foster both informed decision-making and informed public participation." *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.,* 123 F.3d 1142, 1151 (9th Cir. 1997). The Secretary served those public interests by employing the NEPA process even when it was not required. In preparing the EIS, the Park Service fostered extensive public participation, including detailed comments from DBOC and other parties on the quality of its scientific conclusions. That process – and the extensive public participation and scientific review that it engendered – shows that the public interest behind NEPA was served here.

This leaves DBOC with two statutes, the 1978 Act and Section 124, and an issue that is at the heart of this case. Those statutes do not state that it is in the public interest to allow commercial activity in Point Reyes; they authorize the Secretary, in

his discretion, to allow certain activities in particular locations. Particularly in Section 124, Congress directly delegated to the Secretary the decision whether to allow DBOC to continue operating its business in Drakes Estero. It is true that there is "no single voice" that expresses that public interest. *See* Amicus Br. at 1. But the reason that, when the government is a party, its interest and the interest of the public "merge" is that the government has already made an informed judgment about the public interest. *See Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (citing *Nken*, 556 U.S. at 435). When Congress delegates to an agency the authority to act in particular cases, it recognizes that agency's ability to listen to opposing viewpoints, take into account the relevant factors, and apply its expertise for the benefit of the public.

That is what the Secretary did here. All of the perspectives that Amici Curiae place before this Court were also in the extensive administrative record before him.[13] *See* Amici Br. at 2. He "personally traveled to Point Reyes National Seashore, visited DBOC, met with a wide variety of interested parties on all sides of the issue, and considered many letters, scientific reports, and other documents." Decision Memorandum at 2 (ER 119). It is beyond the institutional capacity of the district court, or of this Court, to do the same. Section 124 therefore does not establish a

[13] Although the Amici draw their arguments from comments in the administrative record, which the Secretary considered, DBOC generally did not present those arguments to the district court. *See supra* p. 51 (citing DBOC's district court filings). They cannot show, therefore, that the district court abused its discretion in weighing the equities.

public interest that runs counter to the Secretary's decision; it rather supports the principle that the Secretary's judgment of the public interest is entitled to substantial weight.

The district court found that, on the information before it, DBOC had not demonstrated that the public interest in a preliminary injunction outweighed the Secretary's own explanation of the public interest in wilderness at Point Reyes. *See* Order at 30 (ER 44). That judgment was not an abuse of the district court's discretion to weigh the relevant factors.

CONCLUSION

DBOC can only prevail in this appeal if it shows that the district court committed three separate errors in analyzing the scope of APA jurisdiction, the likelihood that DBOC will succeed on the merits, and the balance of equities. Because DBOC cannot show reversible error on any of these questions, this Court should affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

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Dated: April 3, 2013
DJ # 90-1-1-13861

STATEMENT OF RELATED CASES

To the knowledge of the Department of the Interior, this case is not related to any other case before this Court.

CERTIFICATES

I certify that this brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) and (C).

This brief contains 13,949 words, excluding the portion exempted by Federal Rule of Appellate Procedure 32(a)(7)(b)(iii). It has been prepared in a 14-point Garamond font that meets the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6).

/s / J. David Gunter II

9th Circuit Case Number(s) 13-15227

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