No. 13-15227

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

v.

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

Defendant-Appellees.

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

APPELLANTS' REPLY BRIEF

ON PRELIMINARY INJUNCTION APPEAL

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I. INTRODUCTION

By its plain language, Section 124 authorized the Secretary to issue a special use permit (SUP) "notwithstanding" any laws that would bar Defendants from doing so. Defendants argue that Section 124 precluded judicial review of the Secretary's decision to deny the SUP. But Defendants have provided no evidence, much less the required clear and convincing evidence, that Congress intended this result. Instead, Defendants advance a construction of Section 124's notwithstanding clause that ignores both the text and the context of the law. Congress intended Section 124 to be an asymmetrical, limited-purpose statute that would benefit DBOC, override any legal impediment to continued oyster farming, and result in an extension of the SUP—the statute was not intended to harm DBOC or to insulate a permit denial from judicial review. The district court was wrong to conclude that it lacked jurisdiction.

The district court and Defendants are also wrong on the merits of this case. For example, the Secretary asserted that he could not issue the permit because doing so would "violate" the 1976 Acts, and that "[Section] 124 … in no way overrides the intent of Congress as expressed in the 1976 act" (original emphasis deleted). These statements confirm that Defendants got the law backwards: They thought that the 1976 Acts trumped Section 124, when in fact Section 124 was passed to override any restrictions to permit issuance that might have been imposed by the 1976 Acts.

When the Secretary asserted that the intent of Congress, as expressed in 1976, was "to establish wilderness at the estero," that too was wrong. Congress

designated Drakes Estero as potential wilderness (rather than actual wilderness) because *Defendants* told Congress that the State of California's reserved rights were inconsistent with a wilderness designation. Following the 1976 Acts, Defendants maintained their position that the estero could not be designated as wilderness, and they endorsed oyster farming in the estero. Although nearly fifty years have passed since California conveyed Drakes Estero to Defendants, they only recently became obsessed with eliminating the oyster farm, which resulted in illegitimate science, misrepresentations of data, incorrect interpretations of law, and violations of NEPA and their own regulations. DBOC has shown that it is likely to prevail on its claims calling these errors to account.

Finally, Defendants are wrong when they argue that "the central equitable issue in this case" is a "bargain," struck between the United States and the oyster farm in 1972, in which "[t]he shellfish business could remain in Drake's Estero for forty years, and then the Estero would return to the American people." Defendants' Response Brief (RB) 17, 49. The 40-year "bargain" could apply only to the onshore area—not the estero—because only the onshore area was covered by the 40-year Reservation of Use and Occupancy (RUO). And the RUO specifically provided for a renewable lease that could be extended beyond 40 years by a SUP. The real "bargain," which was struck when California transferred the land to the United States in 1965, allowed the State to continue leasing the estero for oyster farming in perpetuity. DBOC does not lease the estero itself from Defendants, but rather from California, whose most recent lease was issued in 2004 and runs until 2029.

In their obsession to eliminate the oyster farm, Defendants have abused the law, the facts, the science—and especially the oyster farm, its employees, and their families. This Court should reverse the district court's order and maintain the injunction.

II. ARGUMENT

A. The District Court has Jurisdiction.

Defendants do not dispute that there is a "strong presumption that Congress intends judicial review of administrative action," or that that it is their burden to prove by "clear and convincing evidence that Congress intended to dislodge this presumption." Appellants' Opening Brief (AOB) 18 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670, 671-72 (1986), and *Mejia-Hernandez v. Holder*, 633 F.3d 818, 823 (9th Cir. 2011)).

Defendants have not and cannot provide clear and convincing evidence of congressional intent to preclude review under the APA, because Congress did not intend to eliminate judicial review of a permit denial. Section 124's plain language and legislative history indicate that Congress did not intend for the "notwithstanding" clause to apply to the denial of a permit. Even if it did, Defendants have not shown that the "notwithstanding" clause eliminates jurisdiction by leaving no law to apply to Defendants' decision.

1. Defendants Cannot Provide Clear and Convincing Evidence of Congressional Intent to Eliminate Judicial Review.

Defendants rely on the concept that the presumption in favor of jurisdiction can be overcome by "specific language or specific legislative history that is a

reliable indicator of congressional intent." RB 25. But the "specific language" in the statute does not support Defendants' position. Defendants argue that the statute must be read to include words that are not present. But there is no need to add words to Section 124, which makes perfect sense—and is perfectly consistent with congressional intent—as it is written.

The plain language of Section 124 authorizes the Secretary "to issue" a permit: "notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit ...." Pub. L. No. 111-88 § 124.

Defendants argue that this Court must write into Section 124 the words "or deny"—thereby giving Defendants the authority to issue *or deny* the permit notwithstanding any other provision of law—because, they say, "[w]here Congress 'authorizes' a federal official to take an action by statute, the authority not to take that action is implicit." RB 22. But the question is whether Congress intended to allow Defendants to deny the permit *free of judicial review* and free of any requirement imposed by any other law. Congress did not. More specifically, Defendants have not provided clear and convincing evidence that Congress intended the phrase "notwithstanding any other provision of law" to apply to a denial of the permit.

Nowhere in the statute is any language specifying that the Secretary's denial of a permit would be free from judicial review. Nowhere in the legislative history is any suggestion that Congress wanted to free the Secretary from the legal requirements that would ordinarily apply to that decision. Defendants' argument depends entirely on inserting the words "or deny" into the statute, and on

interpreting the phrase "notwithstanding any other provision of law" to apply to those inserted words in the broadest possible manner.

Section 124 does not include the words "or deny" because the Secretary already had authority to deny DBOC's permit request. In 2004, before Section 124 was enacted, Defendants took the position that they were prohibited from issuing the permit. RB 8-9. Section 124, enacted in 2009, overrode that prohibition. Defendants have conceded that Section 124 expresses Congress's "intent to remove legal obstacles to the issuance of a new [permit]." Excerpts of Record (ER) 276; RB 27 ("[b]y enacting Section 124, including the 'notwithstanding' clause, Congress removed those constraints from the Secretary's discretion ...."). Section 124 is plainly a limited-purpose statute designed to provide Defendants with authority to issue a permit that (according to them) they could not legally issue. *See Holy Trinity v. United States*, 143 U.S. 457, 463 (1892) (historical context is "another guide" to statutory meaning).

Defendants argue that the difference between Section 124 as proposed (which would have required the Secretary to issue the permit) and as enacted (which authorized the Secretary to issue the permit notwithstanding any other provision of law) shows that "Congress did not put a thumb on the scale in DBOC's favor." RB 32-33. But the amendment that established the final language of Section 124 contains a clear statement of its purpose:

> Purpose: To extend a special use permit for Drake's Estero at Point Reyes National Seashore, California.

Supplemental Excerpts of Record (SER) 275. This amendment confirms that the purpose of Section 124 was to extend the permit, as does Section 124's title: "Point Reyes National Seashore, Extension of Permit." Further Excerpts Of Record (FER) 061. *See United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) (legislative intent can be discerned from titles). The statute is asymmetrical on its face, and for good reason: Congress intended to put a thumb on the scale in favor of DBOC. It did not intend to confer unreviewable authority on Defendants to deny DBOC a permit.

2. Defendants Cannot Show that Congress Intended to Sweep Away all Other Law.

Defendants argue that, "[a]s a general principle, 'statutory "notwithstanding" clauses broadly sweep aside potentially conflicting laws.'" RB 26 (quoting *United States v. Novak*, 476 F.3d 1042, 1046-47 (9th Cir. 2007)). But *Novak* explains that "the phrase 'notwithstanding any other law' is not always construed literally." 476 F.3d at 1046 (citation omitted). The effect of the phrase depends on the intent of Congress, as determined from "the whole of the statutory context in which it appears."[1] *Id.*; *accord Ness Inv. Corp. v. U.S. Dep't of Agric.*, 512 F.2d 706, 716

[1] Defendants mischaracterize the majority's opinion in *Webster v. Doe*, 486 U.S. 592, 601 (1988), which did not mention or analyze the effect of a "notwithstanding" clause. *See* RB 27. Nor does this case fall within other categories of unreviewable agency discretion, such as prosecutorial discretion, political questions, or national security. *See Pinnacle Armor v. United States*, 648 F.3d 708, 720 (9th Cir. 2011) (distinguishing *Webster*). "The fact that an agency has broad discretion in choosing whether to act does not establish that the agency

(9th Cir. 1975) ("[T]he context and purpose of the entire statute must be looked to before a court can determine whether judicial review is or is not permitted."). As described in section II.A.1, no evidence supports Defendants' construction of Section 124's "notwithstanding" clause, RB 25-31, let alone provides the "clear and convincing" evidence required to rebut the "strong presumption" of judicial review under the APA. *See Bowen*, 476 U.S. at 670; *Mejia-Hernandez*, 633 F.3d at 823. In fact, the *only* evidence of congressional intent Defendants cite on the "notwithstanding" clause demonstrates that it was intended to supersede NPS's earlier "determination" that it *could not*—not *would not*—issue a SUP. See RB 27 (Section 124 enacted to remove "constraints of existing law" on permit issuance). Defendants' bald assertion—"Section 124 stands alone, at odds with the existing statutory scheme"—cannot substitute for clear and convincing evidence of congressional intent to sweep away all law to apply. RB 28.[2]

The most natural, common-sense reading of the "notwithstanding" clause is narrow: notwithstanding any law that would *otherwise legally preclude issuance* of a SUP, the Secretary has the *authority* to issue a SUP. *See U.S. v. LKAV*, 2013 U.S.

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may justify its choice on specious grounds." *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000).

[2] Defendants imply that DBOC's letters to the Secretary endorse Defendants' position that the "notwithstanding" clause supersedes any law to apply. RB 26. But the letters say nothing about the availability of judicial review, and stand for the accepted principle that the effect of a notwithstanding clause depends on the statutory context. SER 239-41; 244-45. Finally, no letters from DBOC could deprive the federal courts of jurisdiction, or suffice as evidence to carry Defendants' burden to show congressional intent to exclude judicial review.

App. LEXIS 6573, at *18 (9th Cir. 2013) (when natural reading of statute leads to commonsense results, alteration is unnecessary and extrajudicial). Defendants' reading does violence to the statutory text and would require the Court to rewrite Section 124. To accept Defendants' construction, this Court would have to conclude that Section 124 made it easier for Defendants to deny the permit, when Defendants already had the authority to deny the permit. *See Holy Trinity*, 143 U.S. at 460 (An "act must be so construed as to avoid … absurdity. … The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed.").

The district court also had jurisdiction to consider whether the Secretary violated Section 124 when he asserted that granting the permit would "violate" the 1976 Acts. AOB 21. In overriding that interpretation of the 1976 Acts, Section 124 itself provides law to apply. It "prohibits the Secretary from relying on a violation of other law as a reason to justify a permit denial." *Id.*

Further, the district court had jurisdiction to determine whether Defendants' actions complied with other applicable law, such as NEPA and Defendants' regulations. Contrary to the district court's conclusion, ER 32, they independently supplied "sufficient meaningful standards" to render Section 701(a)(2) inapplicable.[3]

[3] Defendants recognize that NEPA and NPS regulations generally provide "law to apply." AOB 21. That is enough for jurisdiction. *See Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003) (no jurisdiction only when "there are no statutes, regulations, established agency policies, or judicial decisions" supplying meaningful standards).

Finally, the statutory context makes clear that Congress did not trust Defendants' assessment of the science. Section 124 bars Defendants from "modifying any terms and conditions of the extended authorization" without taking into consideration recommendations of the National Academy of Sciences. AOB 9. The 2011 Conference Report cited in DBOC's opening brief expresses concern about "the validity of the science" behind the DEIS, and expresses a measurable standard—a "solid scientific foundation"—for the FEIS. AOB 24. Defendants' assertion that the decision was completely "committed to the Secretary's discretion," RB 25, is therefore contradicted by statutory language and legislative history leaving no doubt that Congress wanted Defendants' decision to be based on a "solid scientific foundation."[4] AOB 24. Defendants' reading of Section 124 would effectively render much of its statutory language "surplusage or a nullity." *In re Cervantes*, 219 F.3d 955, 961 (9th Cir. 2000).

[4] Defendants incorrectly cite *Massachusetts v. EPA*, 549 U.S. 497, 529-30 (2007). RB 30. In *Massachusetts*, the Supreme Court was willing to concede that "postenactment legislative history could shed light on the meaning of an otherwise unambiguous statute," but criticized EPA for other reasons. *Id*. More recently, the Supreme Court concluded that, "'[w]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight….'" *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008) (internal quotation and citation omitted)).

3. Defendants' Other Arguments Against Jurisdiction Fail.

Defendants' other arguments against jurisdiction fail because they depend on the arguments that the "notwithstanding" clause applies to a denial and supersedes any other law—both discredited above.

First, Defendants cite *Ness*, 512 F.2d 706, and *Confederated Salish and Kootenai Tribes v. U.S. ex rel. Norton*, 343 F.3d 1193 (9th Cir. 2003), for the proposition that an agency authorized to take an action can decide not to take that action. RB 23-24. But neither of those cases stand for the proposition that when Congress uses the phrase "authorized to issue" in conjunction with "notwithstanding any other provision of law," Congress intends to eliminate judicial review of any decision to deny the permit or to displace other applicable law.

Second, Defendants argue that Section 124 is not asymmetrical, and that asymmetry creates a "process paradox." RB 31-33. But the statute can be made symmetrical only by adding words to its text and subtracting from the legislative history all evidence of Congress's intent to extend the permit. Section 124 authorized the Secretary to issue a permit, notwithstanding perceived legal barriers to issuance of a SUP. There was no paradox.

Ultimately, Defendants argue that "the plain meaning of statutory text is found in its 'most natural reading ….'" RB 32 (citation omitted). But the most natural reading of Section 124 is to take it at face value and apply the notwithstanding clause only to those laws that conflicted with the Secretary's authority to issue a permit. There is no evidence whatsoever that Congress

intended the Secretary's decision to deny the permit to be free from judicial review. Defendants' reading of the statute is therefore wholly artificial.

B. DBOC is Likely to Prevail on the Merits.

Defendants argue that their decision can survive APA review if it "clearly explained its reasons." RB 34-35. But agency action "may not stand if the agency has misconceived the law." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). Defendants' decision was based on four misinterpretations of law, any one of which is sufficient to invalidate the decision and allow DBOC to prevail.

1. Defendants Misconceived Section 124.

Although the Secretary's decision concludes on the first page that issuing the permit would "violate" the law—a conclusion that would render Section 124 a nullity—Defendants argue that this Court should ignore that statement in favor of a "fuller explanation" on the sixth page. RB 35-36. But that explanation confirms his error: it asserts that Section 124 "in no way overrides the intent of Congress as expressed in the 1976 act." As discussed above, Section 124 was specifically intended to override that perceived legal barrier to issuing the permit. *See* SER 2-3, 88. When the Secretary concluded that he could not issue the permit without violating the law, he fundamentally misconstrued his authority under Section 124.

2. Defendants Misinterpreted the 1976 Acts.

Until the mid-2000s, Defendants correctly understood that Drakes Estero could not be designated as wilderness because of the rights retained by the State of California. Defendants' subsequent interpretations of the 1976 Acts, upon which

the SUP denial was based, are not supported by either the language of the statutes or their legislative history.

In 1966, Interior wrote to the State of California confirming that California's reserved fishing rights meant the oyster farm "will continue operation under appropriate sections of California Fish and Game Code as in the past." ER 619. In 1974, Defendants again confirmed that "[c]ontrol of the lease from the California Department of Fish and Game, with presumed renewal indefinitely, is within the rights reserved by the State on these submerged lands."[5] FER 006. The California Fish and Game Commission's most recent letter to Defendants on the subject confirms that DBOC's current lease from the State allows oyster farming "through at least 2029." ER 617-18.[6]

Defendants repeatedly told Congress, both before and after passage of the 1976 Acts, that California's retained fishing and mineral rights are "inconsistent"

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[5] These statements, and the following four decades of undisputed state control over aquaculture in Drakes Estero, directly contradict Defendants' assertion that California's reserved fishing right does not include oyster farming. RB 38. Interpretations given to an instrument before a dispute arises are "one of the most reliable means" of interpreting it. *Crestview Cemetery Ass'n v. Dieden*, 54 Cal.2d 744, 753 (1960).

[6] Defendants suggest that DBOC's lease is contingent on having current federal authorizations. RB 38. But California issued DBOC a 25-year lease in 2004, contingent on having a "federal [RUO]" for the upland area in effect *as of 2004*. FER 007-08; 032. This provision cannot reasonably be interpreted as a continuing requirement, because it would be impossible for DBOC to have a *RUO* after 2012—when the lease was to be renewed by SUP rather than RUO. *See* ER 599 ¶11 ("[u]pon expiration of the [RUO], a [SUP] may be issued").

with converting Drakes Estero to wilderness—and Congress agreed. The draft legislation would have designated Drakes Estero, as well as tidelands all the way up the Pacific Coast of Point Reyes, as wilderness. ER 256-57. But Interior asked the House to remove that wilderness designation because "California retains mineral and fishing rights" and "the reservation of such rights is inconsistent with wilderness." *Id*. The Senate heard the same message in a 1976 NPS letter, which explained that Drakes Estero should not be wilderness so long as there remained the possibility, "no matter how remote," that the government "do[es] not completely control" Drakes Estero:

> [California's] reserved rights are inconsistent with the proposed wilderness classification of [Drakes Estero] ….
>
> Under California law, the owner of mineral rights in lands the surface estate of which has passed to another has the right to enter the lands to explore for and develop the mineral deposits, to build access roads and facilities for such purposes, and to make such use of the surface (including strip or open-pit mining) as is necessary and in conformance with customary mining practices, even if other reasonable uses of the surface estate are destroyed thereby ….
>
> Our position, whether it be wilderness, development, etc. should not be left with the possibility—no matter how remote—that we do not completely control the property.

FER 050 (internal citations omitted).[7] In response, Congress designated Drakes Estero as “potential wilderness” instead. SER 236; *see also* ER 237 (Senate report explaining that government must have “full title” to potential wilderness areas in Point Reyes to convert them to actual wilderness).

In 1978, Congress again considered Point Reyes legislation, and the Secretary of the Interior explained to Congress that “potential wilderness” could not be converted to wilderness until all retained rights are “terminated.” FER 055. Congress in the 1978 Act authorized the Secretary to continue leasing historically agricultural land in Point Reyes, including the oyster farm, in perpetuity. *See* section II.B.3 below. In 1998, NPS approved a major enlargement of the farm’s facilities, finding that the expansion would have “no significant impact” on the environment. FER 056.

For reasons Defendants have not explained, their position changed completely in approximately 2004, and they became “obsessed” with removing the oyster farm. FER 057-58. Defendants now argue that California’s retained fishing and mineral rights “are not inconsistent with a wilderness designation unless they result in … restricted ‘uses.’” RB 37. Defendants seem to be saying that it is perfectly fine to designate an area as wilderness today, even if California retains the right to strip-mine the area, or lease it for oyster farming, tomorrow. That

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[7] This letter is contained in the legislative history of S.1093, which is part of the legislative history of the 1976 Acts. *See* ER at 238 (listing S.1093 as part of the legislative history of H.R.13160, which became Public Law 94-567).

interpretation is plainly inconsistent with the definition of wilderness as expressed in the Wilderness Act. AOB 27.

Defendants argue that "California's mineral rights are restricted to subsurface rights." RB 39. But California's rights prohibit only surface drilling, not surface mining. 1965 Cal. Stat. Ch. 983 § 2. As with its retained fishing rights, California's retained mineral rights leave it free to dredge the estero for sand, or exploit other minerals, at any time—just as NPS's letter told Congress in 1976. FER 049-50.

Defendants also argue that NPS "regulations and policies would restrict surface operations." RB 39. But both the enabling legislation for the Point Reyes National Seashore and the Submerged Lands Act prohibit Defendants from regulating away California's property rights. *See* Pub. L. 87-657 § 3(a) (requiring California's "concurrence" before acquiring any of its "property, or interest therein," in Point Reyes); 43 U.S.C. § 1311(a) (the states have primary responsibility to "manage, administer, lease, develop, and use" submerged lands).

Defendants also argue that removing the oyster farm "is consistent with Congressional intent even if other nonconforming uses remain." RB 39. But this supposed "Congressional intent" is not found in any statute. Defendants rely on a single sentence in a House report, which asserts generally that Defendants should undertake "efforts to steadily continue" towards the eventual conversion of potential wilderness to wilderness. RB 39. The better reading is that this general proposition is trumped by the specific references to Drakes Estero in the same House report—i.e., a letter from Defendants asserting that California's retained

rights make Drakes Estero inconsistent with wilderness. ER 256-258; *see also* ER 237 (Senate report explaining that government must have "full title" to potential wilderness areas in Point Reyes to convert them to actual wilderness). Defendants have misconceived the 1976 Acts and denied DBOC a permit based on legal error.

3. Defendants Misinterpreted the 1978 Act.

Defendants misconstrue the 1978 Act to write the key terms out of the statute. The Secretary's decision directed renewal of the leases for the ranching and dairying operations surrounding Drakes Estero, but not the oyster farm, because "[the 1978 Act] does authorize the Secretary of the Interior to lease agricultural ranch and dairy lands within Point Reyes' pastoral zone … [but] does not authorize mariculture." ER 119. After DBOC pointed out that the 1978 Act authorized extensions of leases for agricultural operations other than ranching and dairying, AOB 27 n.8, Defendants argued that "there is no reason to believe that [Congress] chose the more general term 'agricultural' just to cover DBOC." RB 40. But Defendants offer no explanation for why oyster farming does not qualify as agriculture under the 1978 Act.

Defendants also argue that the authority to lease "lands" does not include "submerged lands." RB 41. But by law, Drakes Estero must be "land" to become wilderness, *see* 16 U.S.C. § 1131(c) (defining "wilderness" as "undeveloped Federal land"), or even potential wilderness, *see* Pub. L. 94-544 § 1 (designating "lands" within Point Reyes National Seashore); Pub. L. 94-567 § 1(k) (same). If Drakes Estero is not land, then it cannot be designated as wilderness; if it is land, then it can be leased under the 1978 Act. Defendants cannot have it both ways.

4. NEPA Applied to the Secretary's Decision.

Defendants contend that even if the "notwithstanding" clause does not preclude review, it must at least repeal NEPA. RB 42. But it does not, and Defendants have not carried their burden of proving otherwise, as NEPA did not conflict with the Secretary's decision.

Section 124 does not explicitly repeal NEPA, so Defendants must show it repeals NEPA by implication. *Novak*, 476 F.3d at 1052. Courts employ traditional canons of statutory interpretation to discern congressional intent, including a strong presumption against implied repeal.[8] *See id*. Thus, Section 124's "notwithstanding" clause could only repeal NEPA and NPS regulations if it either "conflicts with an earlier [statute]," or "other convincing indices of statutory intent … make manifest that there is indeed an irreconcilable conflict such that the two statutes dictate opposite results as to a particular matter." *Id*.

As described above, there is no evidence, much less "convincing indices of statutory intent," *id*., that Congress intended the Section 124's "notwithstanding" clause to repeal NEPA for a permit denial. To the contrary, the 2011 Conference Report cited in DBOC's opening brief leaves no doubt that Congress wanted Defendants' decision to be based on a FEIS with a "solid scientific foundation." AOB 24.

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[8] Implied repeals "are especially disfavored" for appropriations statutes. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992). *Cf. Hale v. Norton*, 476 F.3d 694, 698-701 (9th Cir. 2007) (en banc) (rejecting claim that analogous "notwithstanding" clause immunizes agency action from NEPA).

Moreover, Defendants did not show that Section 124, NEPA, and NPS regulations are in conflict—much less irreconcilable conflict—because NPS, by following NEPA procedures for nearly three years, including publication of a FEIS, demonstrated that it was perfectly capable of complying with NEPA.[9]

Next, Defendants argue that NEPA does not apply because "there is no [major Federal] 'action' within the meaning of NEPA …." RB 42. But the Secretary's Memorandum claimed that NEPA did not apply because of Section 124's "notwithstanding" clause—not because his decision was not a major federal action under NEPA. ER 120-22. The Secretary's "'action must be upheld, if at all, on the basis [he] articulated,'" not on "'appellate counsel's *post hoc* rationalizations.'" *Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1120 (9th Cir. 2010) (citations omitted). Appellate counsel's new argument cannot save the Secretary's decision.

Moreover, the Secretary's decision was a major federal action with adverse environmental consequences. ER 154, 163, 172 -76, 188-91, 540-42, 610-11. Interior's own NEPA regulations define "[p]roposed action" to "include[] the exercise of discretion … to issue permits …." 43 C.F.R. § 46.30. As does the FEIS: "[T]he proposed *action* … is the Secretary's *decision* whether to issue a" SUP. SER 91 (emphasis added). And CEQ NEPA regulations define "[a]ctions" to

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[9] *Cf. Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 662 (D.C. Cir. 2011) (NEPA only impliedly repealed by "'clear and unavoidable [statutory] conflict'…, such as statutory deadlines so short that it would be 'inconceivable' for an agency to prepare an" EIS).

include a "failure to act [that] is reviewable by courts or administrative tribunals under the [APA]." 40 C.F.R. § 1508.18. The district court correctly concluded that "a failure to issue a special use permit may confer jurisdiction." ER 30. Therefore, it is necessarily an "action" under NEPA.

Defendants' reliance on *State of Alaska v. Andrus*, 591 F.2d 537 (9th Cir. 1979), is misplaced. In *Andrus*, NEPA did not apply because federal involvement in the challenged program was minimal. *Id*. at 540-42. *Andrus* recognized that NEPA applies where—as here—an agency "propose[s] to take a leading role in activity affecting the environment," such as determining whether to "issue permits." *Id*. at 540.

5. The Secretary's Decision Violated NEPA and Prejudiced DBOC.

Defendants admit that the Secretary's decision was issued before publication of a notice of availability (NOA) of the FEIS (RB 43), in violation of 40 C.F.R. § 1506.10. Defendants further admit that the Secretary did not deny DBOC's SUP application "in the form of a Record of Decision," RB 43, which independently violates 40 C.F.R § 1505.2.

Yet Defendants suggest that DBOC was not prejudiced because "DBOC knew that the [FEIS] had been published, commented on that EIS, and urged the Secretary to issue his decision anyway." RB 43. Defendants are wrong. In APA cases, errors are harmless only if they "clearly had no bearing on the procedure used or the substance of decision reached." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv*., 378 F.3d 1059, 1071 (9th Cir. 2004) (citation omitted).

Here, Defendants' errors obviated standard procedure: the Secretary did not wait until 30 days after the notice, and the decision was made without a NEPA-required Record of Decision. Defendants have not complied with these regulations—period—and the ensuing decision is thus unlawful.

These errors also are not harmless because the absence of the 30-day interval did not leave enough time to identify and report important scientific errors in the FEIS. Procedural errors, as here, can be prejudicial, especially where they cause there to be insufficient time to substantively review government data for errors. *See Int'l Snowmobile Mfrs. Ass'n. v. Norton*, 304 F.Supp.2d 1278, 1291-93 (D.Wyo. 2004) (discussing importance of adequate comment period); *see also* 40 C.F.R. § 1500.1(b) (setting forth the regulations' purpose and emphasizing that the procedures "must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken").

Although DBOC sent a letter on November 27, 2012—just 7 days after Defendants made the FEIS public—that identified Defendants' invalid conclusions about the sound data, Defendants' mischaracterizations of the harbor seal data were identified only later (albeit still within 30 days after Defendants made the FEIS public). AOB 11-12; *see* ER 290-92 (December 20, 2012, DBOC expert declaration identifying FEIS "misrepresentations" of harbor seal data).

Defendants argue that the Secretary satisfied NEPA because he did not consider the "data that was asserted to be flawed" and "acknowledged controversy over some of the [FEIS's] scientific conclusions." RB 44-45. But because DBOC had not yet identified the invalid harbor seal analysis, the Secretary could not have

excluded that flawed data from his decision. He admitted to making a decision that was either uninformed on important points or informed by misrepresented data and false conclusions. But NEPA "prohibits uninformed … agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

Finally, contra Defendants, the district court did not reject DBOC's NEPA claims on their merits. The district court rejected DBOC's NEPA claims *because* it incorrectly concluded that NEPA did not apply. ER 34. As explained above, this was reversible legal error. Defendants' NEPA violations were not harmless, and DBOC is likely to prevail on these claims.

6. Defendants Published a False Federal Register Notice.

Defendants argue that DBOC lacks standing to raise a "false Federal Register notice" claim. RB 46. But it is sufficient for standing purposes that DBOC's injury is "fairly traceable to the … [Federal Register notice] and … has some likelihood of redressability." *Pub. Lands for the People, Inc. v. U.S. Dep't of Agric.*, 697 F.3d 1192, 1195-96 (9th Cir. 2012). The false Federal Register notice purports to convert Drakes Estero, which DBOC has leased from the State of California, to wilderness. AOB 13. Defendants have insisted that DBOC eliminate its oyster-farming operations in the estero. *Id*. The false notice harms DBOC by preventing it from exercising rights granted to it by California, and the district court can redress these harms by holding that the notice had no legal effect. DBOC therefore has standing.

Defendants also argue that the notice is not false, and that "all uses prohibited under the Wilderness Act have ceased." RB 46-47. The Wilderness Act

prohibits all commercial activity, subject to some exceptions. *Wilderness Soc'y v. U.S. FWS*, 353 F.3d 1051, 1061 (9th Cir. 2003). When Defendants published the notice, DBOC's commercial operations were—as they are still—ongoing. ER 632-46, 602-16. In fact, Defendants stipulated that NPS's November 29, 2012, letter had *always permitted* DBOC to continue commercial operations, including continuous planting of oyster spat and harvesting of shellfish in Drakes Estero.[10] ER 644. Either the continuing DBOC operations are commercial operations inconsistent with wilderness and the notice is false, or the continuing DBOC operations are not commercial operations inconsistent with wilderness and Defendants' rationale for denying the permit is wrong. Either way, Defendants' arguments fail.

Defendants also argue that "California's reserved rights do not negate the fact of federal ownership or prohibit a wilderness designation." RB 47. But the fact that California holds reserved rights belies the assertion that the estero is "*entirely* in Federal ownership." RB 46 (emphasis added). California's retained rights prohibit Defendants from declaring the area to be wilderness. *See* section II.B.2.

Defendants argue that the wilderness designation "did not require … a rulemaking" because it was "not a matter of … discretion." RB 48. But Defendants

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[10] Defendants argue that the stipulation "cannot render the December 4 Federal Register notice false" because it was entered 13 days after the notice. RB 47 n.11. But the stipulation, which Defendants drafted, provides that DBOC may continue commercial operations, including planting oyster spat, "under the terms of the November 29, 2102 limited authorization"—which Defendants sent five days *before* they issued the false notice. ER 644.

do not cite any law that required them to publish the FR notice; they merely cite a provision in the 1976 Acts that identifies the legal effect of the FR notice once published. *See* RB 48 (citing Pub. L. 94-567 § 3). Defendants failed to comply with the law in issuing the FR notice.

C. The District Court Erred By Not Concluding that the Balance of Equities Tipped Sharply in DBOC's Favor.

1. Standard of Review.

Under the abuse of discretion standard, mixed questions of law and fact that require consideration of legal concepts and value judgments are reviewed de novo, *United States v. Hinkson*, 585 F.3d 1247, 1260 (9th Cir. 2009), "unless the mixed question is primarily factual," *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1053 (9th Cir. 2012). Here, the district court's failure to consider the public interest as reflected in applicable statutes is a primarily legal question, not a factual question.

Defendants also argue that the merits panel should not defer to the motions panel. RB 19-20. But "motions panel decisions made in the course of the same appeal" are given deference, *In re Universal Life Church*, 128 F.3d 1294, 1300 n.7 (9th Cir. 1997), and a merits panel "does not lightly overturn a decision made by a motions panel during the course of the same appeal …." *United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986).

Here, the motions panel did not merely "identify those questions 'deserving of more deliberative investigation.'" RB 20 (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011)). On the basis of fifty pages of briefing, the motions panel determined that "the balance of hardships tips sharply

toward the plaintiff … and … the injunction is in the public interest." *Alliance for Wild Rockies*, 632 F.3d at 1135; *see* ER 126. Because this appeal considers the same arguments, and uses the same standard for injunctive relief that the motions panel employed, deference to its decision is appropriate.

2. The Balance of Equities Tips Sharply in DBOC's Favor.

As the motions panel held, the balance of equities and public interest favor issuance of an injunction. Defendants argue that "the central equitable issue in this case" is that DBOC "bought into [a] bargain," struck in 1972 between the oyster farm and the United States, under which the oyster farm would get forty years of business, and after that "the American people [would] get to enjoy Drakes Estero in its natural state." RB 49; *see* RB 17. But this argument misrepresents the two "bargains" entered into by the United States.

First, the "bargain" struck in 1972 with the oyster farm was about the 1½ acres of onshore area, not the estero. RB 9. The RUO specifically provides for renewal by SUP, thereby making clear that the onshore operations could continue beyond the forty years. ER 599 ¶11. The agreement also recognizes that the oyster farm will be leasing the estero from the State of California, and requires that any extension beyond the forty years run "concurrently" with a state lease. *Id*.

Second, the other bargain, which Defendants entered into in 1965 with the State of California, allowed California to continue leasing the estero for oyster farming in perpetuity. *See* section II.B.3. Defendants conceded California's full authority over oyster-farming operations in the estero until 2008, when Defendants

for the first time issued a SUP to DBOC authorizing it to operate in the estero. AOB 9 n.3.

Defendants argue that "[t]he public interest lies in honoring this agreement." RB 17. DBOC agrees that the public interest lies in honoring the agreements made with the United States—in particular, the agreement that the State of California would retain the right to lease out the estero for oyster farming.

The district court was simply wrong when it weighed against DBOC its "own ability and/or own failure to conduct due diligence" on the lease. RB 49-50 (quoting ER 43-44).[11] The district court was also wrong when it concluded that DBOC should have been prepared to wind up its operations by November 30. In concluding that DBOC's expectations in 2005 should have prepared it to wind up operations by November 2012, the district court ignored the fact that in 2009 Congress had opened the path to permit renewal via passage of Section 124. ER 44. This was reversible error. *See Cadence Design Sys. v. Avant! Corp.*, 125 F.3d 824, 830 (9th Cir. 1997) (reversible error for district court to consider an improper factor in balance of equities analysis).

[11] No evidence was submitted about DBOC's due diligence and the district court made no finding that "before closing the purchase" Defendants notified Mr. Lunny that they would not renew the lease. RB at 9 n.3; *see also* RB 49. In fact, the court noted that Mr. Lunny's uncontradicted testimony was that at the time of the purchase in December 2004 "he had no knowledge that the Park Service would not allow the farm to continue after 2012." ER 21 n.4.

Because the district court misinterpreted Section 124, as explained above, it necessarily failed to consider the public interest as expressed in that statute and in the statutes it believed Section 124 swept away, including NEPA, the 1978 Act, and even the 1976 Acts.[12] Defendants do not contest that a failure to consider "the public interest, as reflected in [an Act of Congress]" is "an abuse of discretion." *Motor Vessels Theresa Ann v. Kreps*, 548 F.2d 1382, 1382 (9th Cir. 1977).

In particular, the district court did not give sufficient weight to the public interest in having government make decisions based on sound science, as required by NEPA. This interest represents a third bargain: the President's promise to restore science to its rightful place in government.[13] Defendants assert that the public interest in science-based decisionmaking was served here because the Secretary "employ[ed] the NEPA process even when it was not required." RB 52. But simply performing some form of a NEPA process is insufficient—"[a]ccurate scientific analysis" is "essential to implementing NEPA." AOB 31 (quoting *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011)). "[T]he public interest requires careful consideration of environmental impacts" before a

[12] Defendants assert that the district court gave "particular weight" to "'Congress' long-standing intention' that [NPS] would steadily remove all obstacles to Drakes Estero's eventual designation as wilderness." RB 49-50. But, as explained above, Congress had no such intention. Giving "particular weight" to this misinterpretation of law was an abuse of discretion.

[13] President Barack Obama's April 27, 2009, Remarks at NAS Annual Meeting, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-National-Academy-of-Sciences-Annual-Meeting.

decision is made. *S. Fork Band Council of W. Shoshone v. DOI*, 588 F.3d 718, 728 (9th Cir 2009). The Secretary could not have carefully considered environmental impacts because he intentionally did not consider "data [in the FEIS] that was asserted to be flawed," ER 122, and was unaware that the harbor seal data were invalid.

Although their scientific analysis of the oyster farm has for many years been criticized by Congress, the National Academy of Sciences, and even Defendants' own Solicitor's Office and Inspector General, Defendants continue to field flawed science to support their attempts to shutter DBOC. In pursuit of this obsession, they have violated the law, and this Court should issue the injunctive relief necessary to shield DBOC until its claims are ultimately vindicated.

III. CONCLUSION

The district court's Order should be reversed and the injunction issued by this Court should remain in effect pending resolution of this case on the merits.

DATED: April 22, 2013

Respectfully submitted,

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DATED: April 22, 2013

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