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For Immediate Release
August 29, 2013

Contact: Diana Rubio 213.977.5252

Federal Judge Rules Department of Veterans Affairs Misused Land Designated for Homeless Veterans in West Los Angeles

(Los Angeles)—Federal Judge S. James Otero ruled today that the Department of Veterans Affairs (DVA) violated federal law when it leased portions of its sprawling West L.A. campus to 11 businesses and organizations for purposes unrelated to providing medical care or treatment for homeless and disabled veterans. The ruling comes more than two years after the ACLU Foundation of Southern California, the Inner City Law Center, Arnold & Porter LLP and Munger, Tolles & Olson LLP, and law professors Laurence Tribe and Gary Blasi, filed suit against the DVA on behalf of homeless and disabled veterans, who were often sleeping outside the gates of the campus.

Today's order found that federal statutes governing the use of DVA property unambiguously prohibit the DVA from entering into land-use agreements with private parties on the West L.A. campus unless the agreements are directly related to providing medical care or related services to veterans. The leases voided by the order cover nearly one quarter of the 400-acre property, which was originally deeded in 1888 to the predecessor to the VA for the exclusive purpose of providing a home for disabled vets. The order did not affect two land-use agreements challenged in the suit that had expired or lapsed.

"This is a victory for homeless and disabled veterans who served our nation in its time of need only to find that the VA deserted them in theirs," said Mark Rosenbaum, chief counsel for the ACLU Foundation of Southern California. "From today forward, the only leases on the VA campus will be devoted, as Congress mandated, to the delivery of health care, not tennis courts for private school students or laundry facilities for luxury hotels. And maybe it hasten the day when it is no longer true that in the home of the brave, the brave have no home."

"With thousands of veterans homeless in L.A. County, we hope this ruling will encourage the VA to use more of its West L.A. campus to directly benefit veterans," said Adam Murray, executive director of the Inner City Law Center.

"Today's order moves us closer to a solution that provides our homeless veterans the services they desperately need," said Ron Olson of Munger, Tolles & Olson. "We look forward to working with all interested parties to reach that solution."

The nine voided agreements provided for the following uses of the property: a 20-acre parcel for Brentwood private school's athletic complex; a laundry processing facility for nearby luxury hotels; the UCLA baseball stadium and facilities; Fox studio production storage facilities; exclusive rights for a community group to host events on a 15-acre parcel; practice fields for a private soccer club; parking lots for surrounding businesses; and a farmer's market. Click here to view image of the campus: http://www.aclusocal.org/va-map/.

“Today’s Order is a huge victory, but only the first step. Now, the VA must actually use the land to provide the services our military heroes so desperately need,” said John Ulin, a partner at Arnold & Porter. “We are past the 50-yard line, but will continue our efforts until our chronically homeless veterans get the housing and services they have earned.”

“Judge Otero has begun the inevitable unwinding of the government’s shameful and lawless treatment of our heroic veterans,” said Professor Laurence Tribe. “Justice, long overdue, is finally being realized.”

“The vets finally won one,” said Bobby Shriver, former mayor of Santa Monica. “Instead of wasting more time appealing Judge Otero’s excellent decision, the government should immediately spend their energy creating housing and services for the men and women suffering from severe PTSD who, today and tonight, are living in dumpsters all over Los Angeles.”

The suit, *Valentini v. Shinseki*, was filed in June of 2011. According to data released by the federal government earlier this year, there are more than 6,000 homeless vets in Los Angeles on any given night, more than any other city or county in the U.S.

For a history of *Valentini v. Shinseki* click here: http://www.aclusocal.org/?s=Shinseki.

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JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORY VALENTINI, *et al.*,

Plaintiffs,

v.

ERIC SHINSEKI, *et al.*,

Defendants.

Case No. 11-CV-04846-SJO (MRWx)

The Honorable S. James Otero

JUDGMENT

JUDGMENT

The Court, having considered Plaintiffs' and Defendants' respective Motions for Summary Judgment, the Administrative Record filed in connection therewith, any responses and replies thereto, and any oral argument thereon, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the following agreements entered into by the Department of Veterans Affairs ("DVA") concerning parcels of land and facilities located on the DVA's West Los Angeles Campus are unauthorized by law and therefore void:

- The March 1, 2010 agreement with Brentwood Schools, and any amendments thereto;
- The March 17, 2000 agreement for laundry services, which was assigned to Sodexho Marriot Laundry Services on May 10, 2001, and any amendments thereto;
- The May 1, 2001 agreement with UC Regents, and any amendments thereto;
- The August 10, 2006 agreement with Twentieth Century Fox Television, and any amendments thereto;
- The August 24, 2007 agreement with Veterans Park Conservancy, and any amendments thereto;
- The August 6, 2010 agreement with Westside Breakers Soccer Club, and any amendments thereto;
- The July 15, 2002 agreement with Westside Services, LLC, and any amendments thereto;
- The July 6, 2006 agreement with TCM, LLC, and any amendments thereto;
- The filming agreements which the DVA has entered into with various third parties at various times;

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The Court STAYS the enforcement of this Judgment with respect to these existing agreements pending the resolution of any appeal from this Judgment, or, if no party appeals this Judgment, for 180 days from the issuance of this Judgment.

IT IS SO ORDERED, ADJUDGED, AND DECREED.

Dated: August 29, 2013.

By: S. James Otero
THE HONORABLE S. JAMES OTERO

CASE NO.: **CV 11-04846 SJO (MRWx)** **DATE:** **August 29, 2013**

TITLE: **Gregory Valentini, et al. v. Eric Shinseki, et al.**

==========

PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFFS:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

==========

PROCEEDINGS (in chambers): ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [Docket No. 116]; **GRANTING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** [Docket No. 124]

This matter is before the Court on Defendants Eric Shinseki and Donna M. Beiter's (collectively, "Defendants" or the "Government") Motion for Summary Judgment ("Defendants' Motion"), filed April 10, 2013, and Plaintiffs Gregory Valentini, Adrian Moraru, Jane Doe, Leroy Smith, Jr., Leslie Richardson, Wayne Early, Willie Floyd, Demetrious Kassitas, Zachary Isaac, Lawrence Green, and the Vietnam Veterans of America's (collectively, "Plaintiffs") Motion for Summary Judgment ("Plaintiffs' Motion"), filed May 10, 2013. Plaintiffs and Defendants filed their respective Oppositions on May 10, 2013, and June 12, 2013, and their respective Replies on June 12, 2013, and June 21, 2013. The Court heard oral argument on the matter on August 16, 2013. For the following reasons, the Court **DENIES** Defendants' Motion and **GRANTS IN PART** Plaintiffs' Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The individual Plaintiffs in this case are severely disabled veterans with mental disabilities, brain injuries, or both.[1] (*See* First Am. Compl. for Injunctive, Declaratory, Mandamus, and Accounting Relif ("FAC") ¶¶ 8-17, ECF No. 24.) As a result of their disabilities, they are homeless and cannot access necessary medical and mental health treatment. (FAC ¶¶ 8-17; *see also* Decl. of Floyd Summers ("Summers Decl."), ECF No. 64; Decl. of Gregory Valentini ("Valentini Decl."), ECF No. 65; Decl. of Leslie Richardson ("Richardson Decl."), ECF No. 66.)

On June 8, 2011, Plaintiffs filed a lawsuit against the Government. Defendant Eric Shinseki ("Shinseki") is the Secretary of the United States Department of Veterans Affairs ("DVA"), whose

[1] The individual Plaintiffs are joined by the Vietnam Veterans of America, which asserts associational standing on behalf of its members. (FAC ¶ 45.)

official duties include execution and administration of all laws and programs governed by the DVA. (FAC ¶¶ 47, 48.) Shinseki is responsible for ensuring that the DVA complies with contracts and land grants. (FAC ¶ 48.) Defendant Donna M. Beiter is the Director of the Veterans Affairs Greater Los Angeles ("VA GLA") Healthcare System, whose official duties include supervising daily operations and services of all programs operated by the West Los Angeles Campus ("WLA Campus"). (FAC ¶¶ 49, 50.)

Plaintiffs challenge a number of agreements that the DVA has entered into with third parties for the use of portions of the WLA Campus (the "Disputed Agreements") pursuant to its Health Care Resources Sharing Authority, 38 U.S.C. §§ 8151-8153. Specifically, Plaintiffs challenge the DVA's authority to enter into the following agreements: (1) an agreement with the Brentwood School under which the school has the right to use a 20-acre parcel of the WLA Campus as an athletic complex; (2) an agreement with Sodexho Marriott Laundry Services for use of a building "for processing hospitality linen"; (3) an agreement with the University of California Regents for the use of Jackie Robinson Stadium by the UCLA baseball team; (4) an agreement with Twentieth Century Fox Television for the use of a parcel of land on the WLA Campus for "parking, storage and maintenance of production sets"; (5) an agreement with the non-profit organization Veterans Park Conservancy for the use of sixteen acres of land as a park; (6) an agreement with the Westside Breakers Soccer Club for the use of MacArthur Field and an adjacent lot on the WLA Campus for soccer practices and matches; (7) an agreement with Westside Services, LLC for the "control and operation" of all vehicular parking areas on the WLA Campus; (8) an agreement with TCM, LLC for use of land on the WLA Campus for a farmer’s market; (9) an agreement with Richmark Entertainment for "booking services and theatre management services" for theatrical productions in the theaters on the WLA Campus; (10) eleven separate filming agreements with various film production companies which allowed these companies to film on the WLA Campus; and (11) an agreement with the City of Los Angeles for the use of twelve acres as a public recreational area known as Barrington Park. (Pls.' Mot. 16-21.)

A. Statutory Framework

There are a number of Congressionally-authorized types of agreement by which the DVA may use or dispose of land and resources under its control. At issue in this case are Enhanced Sharing Agreements ("ESAs") under 38 U.S.C. §§ 8151-8153, and Enhanced Use Leases ("EULs") pursuant to 38 U.S.C. §§ 8161-8169.

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1. The DVA's Health Care Resources Sharing Authority

In 1996 Congress enacted legislation expanding the DVA's authority to enter into ESAs under 38 U.S.C. §§ 8151-8153.[2] Section 8151, entitled "Statement of congressional purpose," provides:

> It is the purpose of this subchapter to strengthen the medical programs at Department facilities and improve the quality of health care provided veterans under this title by authorizing the Secretary to enter into agreements with health-care providers in order to share health-care resources with, and receive health-care resources from, such providers while ensuring no diminution of services to veterans.

38 U.S.C. § 8151. Section 8152 sets forth definitions of certain terms used in 38 U.S.C. §§ 8151-8153, providing as follows:

> (1) The term "health-care resource" includes hospital care and medical services (as those terms are defined in section 1701 of this title), services under sections 1782 and 1783 of this title, any other health-care service, and any health-care support or administrative resource.
>
> (2) The term "health-care providers" includes health-care plans and insurers and any organizations, institutions, or other entities or individuals who furnish health-care resources.
>
> (3) The term "hospital", unless otherwise specified, includes any Federal, State, local, or other public or private hospital.

38 U.S.C. § 8152. Section 1701, in turn, defines "hospital care" as including services such as "medical services rendered in the course of the hospitalization of any veteran," and "mental health services . . . for the immediate family" of a veteran "for the effective treatment and rehabilitation of a veteran." 38 U.S.C. § 1701(5). "Medical services" is defined as including surgical, dental, optometric, podiatric, preventive health, and related services. 38 U.S.C. § 1701(6). Section 1782 provides for the counseling of family members and caregivers of veterans, and § 1783 provides for bereavement counseling. 38 U.S.C. §§ 1782, 1783.

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[2] Previously, the DVA was only authorized to enter into ESAs with "medical schools, health-care facilities, and research centers." 38 U.S.C. § 8151 (1993), *amended by* The Veterans Health Care Eligibility Reform Act of 1996, Pub L. N. 104-262, 110 Stat. 3177 (1996).

Section 8153, entitled "Sharing of health-care resources," provides in relevant part as follows:

> To secure **health-care resources** which otherwise might not be feasibly available, or to effectively utilize certain other health-care resources, the Secretary may, when the Secretary determines it to be in the best interest of the prevailing standards of the Department medical care program, make arrangements, by contract or other form of agreement for the mutual use, or exchange of use, of **health-care resources** between Department health-care facilities and any health-care provider, or other entity or individual.

38 U.S.C. § 8153(a)(1) (emphasis added).

2. The DVA's Enhanced Use Lease Authority

At the time it entered into the Disputed Agreements,[3] the DVA was authorized to lease land under an EUL if the Secretary of the DVA determined that:

> (i) at least part of the use of the property under the lease will be to provide appropriate space for an activity contributing to the mission of the Department;
>
> (ii) the lease will not be inconsistent with and will not adversely affect the mission of the Department; and
>
> (iii) the lease will enhance the use of the property.

[3] In 2008, the DVA was stripped of its authority to enter into EULs on the WLA Campus unless specifically authorized by statute. *See* 38 U.S.C. § 8162(c)(1). ("[T]he entering into an [EUL] covering any land or improvement described in . . . section 224(a) of the Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2008 shall be considered to be prohibited by such sections unless specifically authorized by law."). Under section 224(a), "[t]he Secretary of Veterans Affairs may not declare as excess to the needs to the Department of Veterans Affairs, or otherwise take any action to exchange, trade, auction, transfer, or otherwise dispose of, or reduce the acreage of, Federal land and improvements at the Department of Veterans Affairs [WLA Campus]." Act of Dec. 26, 2007, Pub. L. No. 110-161, 121 Stat. 1844. Further, in 2012, Congress enacted the Honoring America's Veterans and Caring for Camp LeJeune Families Act of 2012 ("2012 Act"), Pub. L. No. 112-154, 126 Stat. 1165 (2012), which limited the use of EULs "only for the provision of supportive housing." 38 U.S.C. § 8162(2) (2012).

38 U.S.C. § 8162(2)(A) (2007), *repealed by* 2012 Act, Pub. L. No. 112-154, 126 Stat. 1165 (2012). The Secretary could also authorize an EUL if "applying the consideration under such a lease to the provision of medical care and services would result in a demonstrable improvement of services to eligible veterans in the geographic service-delivery area within which the property is located." 38 U.S.C. § 8162(2)(B), *repealed by* 2012 Act, Pub. L. No. 112-154, 126 Stat. 1165 (2012).

EULs entered into under these provisions are subject to procedural safeguards, including a public hearing and notice-and-comment requirements. 38 U.S.C. § 8163. The DVA must also notify the "congressional veterans' affairs committees" before entering into EULs. 38 U.S.C. § 8163(c)(1).

B. Procedural Background

Plaintiffs asserted six causes of action against Defendants in their FAC: one claim for violation of the Administrative Procedure Act ("APA"), two claims for violations of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and three claims for violations of the Government's duties as trustee of a charitable trust. (*See generally* FAC.) Defendants filed a Motion to Dismiss, which the Court granted in part and denied in part, permitting Plaintiffs' APA claim and one of Plaintiffs' Rehabilitation Act claims to proceed. (*See generally* Order Granting in Part and Den. in Part Defs.' Mot. to Dismiss ("MTD Order"), ECF No. 70.) On May 25, 2012, Defendants filed a Motion for Reconsideration based on the Ninth Circuit's *en banc* decision in *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012). The Court granted in part and denied in part this Motion for Reconsideration. (*See generally* Order Granting in Part and Den. in Part Defs.' Mot. for Reconsideration, ECF No. 87.) As a result, only Plaintiffs' APA claim remains.

II. DISCUSSION

At issue is whether the Government exceeded its statutory authority under 38 U.S.C. §§ 8151-8153 by entering into the Disputed Agreements. The APA governs judicial review of agency action. *See Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059 (9th Cir. 2003) (en banc), *amended on reh'g en banc on other grounds*, 360 F.3d 1374 (9th Cir. 2004). Under the APA, agency action may only be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).[4]

[4] Defendants invoke the standard of review applicable when a plaintiff seeks to have agency action set aside as arbitrary and capricious, arguing that the Disputed Agreements must be upheld unless the DVA did not "rely on factors which Congress has not intended it to consider, entirely fail to consider an important aspect of the problem, or offer an explanation for its decision that either runs counter to the evidence before [it] or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." (Defs.' Mot. 12 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court set forth a two-step test for judicial review of agency actions. First, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Wilderness Soc'y*, 353 F.3d at 1059 (quoting *Chevron*, 467 U.S. at 842-43.) Second, "if a statute is silent or ambiguous with respect to the issue at hand, then the reviewing court must defer to the agency so long as 'the agency's answer is based on a permissible construction of the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9).

Under the APA, judicial review of agency decision-making is based on the administrative record compiled by the agency and submitted to the court. *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). The administrative record consists of all materials considered "either directly or indirectly" by an agency when making the decision in question. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989); *see also Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (finding that the administrative record "includes everything that was before the agency pertaining to the merits of its decision").

Plaintiffs contend that (1) Congress's unambiguous intent was that ESAs may only be entered into to share "health-care resources," and because the Disputed Agreements do not provide for the sharing of health-care resources, they are in excess of the DVA's statutory authority and thus void; and (2) even if 38 U.S.C. §§ 8151-8153 were ambiguous, the DVA's interpretation of its authority to enter into ESAs is unreasonable and due no deference. (*See generally* Pls.' Mot.) For its part, the Government argues that (1) Plaintiffs have failed to establish that they have standing to challenge the Disputed Agreements; (2) the DVA's decisions to enter into the Disputed Agreements are committed to agency discretion and thus not subject to judicial review; and (3) 38 U.S.C. §§ 8151-8153 are ambiguous as to the meaning of "health-care resources" and thus the DVA's reasonable interpretation thereof is permissible. (*See generally* Defs.' Mot.) The Court first considers the threshold issues of whether Plaintiffs have standing to bring their APA claim and whether the Disputed Agreements are subject to judicial review before turning to whether the Disputed Agreements exceed the DVA's statutory authority.

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Co, 463 U.S. 29, 43 (1983).) This standard is not applicable where, as here, Plaintiffs contend that the agency's actions are in excess of its statutory authority. *See State Farm*, 463 U.S. at 42-43 (holding that a court may not set aside agency action as arbitrary and capricious when the "agency rule . . . is rational, based on consideration of the relevant factors and **within the scope of the authority delegated to the agency by the statute**" (emphasis added)).

A. Plaintiffs' Standing to Challenge the Disputed Agreements

The Court previously held that Plaintiffs have established that they have standing to bring their claim under the APA. (MTD Order 9-14.) The Government nevertheless again raises the issue in the instant Motions. Article III of the Constitution limits the exercise of judicial power to "Cases" and "Controversies." U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). For a case to satisfy a federal court's case-or-controversy requirement, Article III, Section 2 requires an "irreducible" minimum of standing. *Id*. at 560. Three elements must be satisfied for a plaintiff to have standing under Article III: "(1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008) (citing *Lujan*, 504 U.S. at 560-61)).

In its Motion, the Government argues that Plaintiffs "suffered no direct injury from the allegedly unlawful agreements, and even if they had suffered such injury, no judicial declaration could redress it." (Defs.' Mot. 4 n.6.) The Court has already considered and rejected these arguments. First, Plaintiffs have suffered both a substantive and a procedural injury. Under the injury-in-fact requirement, a plaintiff must show "it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). This injury can be either substantive or procedural. However, if a plaintiff is asserting a purely procedural injury, then "[t]o satisfy the injury in fact requirement, a plaintiff . . . must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003) (internal quotation marks omitted). "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Here, the Court held that Plaintiffs have suffered a substantive injury because the premise of Plaintiff's APA claim is that "portions of the WLA Campus are not being used to benefit veterans . . . [as required by] the statutes that regulate the DVA's ability to lease its land." (MTD Order 10.) The Court also found that Plaintiffs have alleged a procedural injury sufficient to establish standing because "Plaintiffs are homeless veterans in the Los Angeles area who used, and would like to continue to use, the services at the WLA [C]ampus," and Plaintiffs are denied procedural protections by virtue of the fact that Defendants utilized their Health Care Resource Sharing Authority to enter into the Disputed Agreements, which, unlike EULs, provides no procedural safeguards to persons such as Plaintiffs. *Compare* 38 U.S.C. § 8153 *with* 38 U.S.C. § 8163. Further, Plaintiffs have provided evidence in support of these alleged injuries. (*See generally* Summers Decl.; Valentini Decl.; Richardson Decl.) These declarations establish that Plaintiffs are homeless veterans with various disabilities who live in the Los Angeles area who have sought and continue to seek

benefits and services from the DVA at its WLA Campus. This is sufficient to establish Plaintiffs' injury-in-fact for the purposes of Article III standing.[5]

Second, the Court held that Plaintiffs meet the redressability requirement of Article III standing. "Redressability depends on whether the court has the ability to remedy the alleged harm." *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 955 (9th Cir. 2006). Where, as here, Plaintiffs allege procedural injury, the redressability requirement is relaxed. For procedural injury, Plaintiffs "need not demonstrate that the ultimate outcome following proper procedures will benefit them." *Cantrell v. City of Long Beach,* 241 F.3d 674, 682 (9th Cir. 2001). Instead, "[p]laintiffs alleging procedural injury . . . need to show only that the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision of whether to take or refrain from taking a certain action." *Salmon Spawning*, 545 F.3d at 1226-27; *see also Lujan*, 504 U.S. at 573 n.7 (noting that a plaintiff "living adjacent to the site for a proposed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will be withheld or altered"). As the Court has already held:

> The relief Plaintiffs seek under their APA claims is not that land-use agreements be executed as EULs going forward. (FAC Req. for Relief.) Rather, Plaintiffs seek: (1) a declaration that the existing land-use agreements entered as ESAs unrelated to sharing health-care resources are unauthorized by law or regulation; and (2) an injunction prohibiting the DVA from entering into ESAs in the future that do not concern the sharing of health-care resources. (FAC Req. for Relief.) . . . The Court has the ability to declare unlawful the current land-use agreements entered into pursuant to ESAs that do not relate to health-care resource sharing and to enjoin the Government from entering into future ESAs unrelated to health-care resource sharing. Such relief would free the land on the WLA Campus to be used to benefit veterans and thereby remedy Plaintiffs' asserted harm.

(MTD Order 14.) Defendants have not provided good reason for the Court to deviate from this reasoning.

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[5] Defendants also note that some of the Disputed Agreements "provide for at least some ongoing use of the land or resource at issue" by veterans. (Opp'n to Pls.' Mot. 3 n.4.) While this may be true, this does alter the Court's standing analysis, as all of the Disputed Agreements at the very least severely curtail veterans' access to the portions of the WLA Campus encumbered by the Disputed Agreements, and many of the Disputed Agreements deny veterans access to the encumbered land altogether.

Defendants also argue Plaintiffs lack standing to challenge the Disputed Agreements because "most of the [Disputed Agreements] had expired by the time the FAC was filed." (Opp'n to Pls.' Mot. 4 n.5.) This claim is belied by the Administrative Record, which establishes that all of the Disputed Agreements were in effect when the FAC was filed in August 2011, except for the non-recurring film agreements, the Barrington Park agreement, and the Richmark Entertainment agreement.[6] (*See* Administrative R. 186-87, 415-44, ECF No. 96.) With respect to the filming agreements, Plaintiffs seek only to bar future filming agreements as being in excess of the DVA's statutory authority.[7] This remedy is within the power of the Court. Accordingly, the Court finds that Plaintiffs have standing to challenge the Disputed Agreements under Article III.

B. The Court's Authority to Review the Disputed Agreements

The Government next contends that its decisions to enter into the Disputed Agreements are not subject to judicial review because they were committed to the DVA's discretion. (Defs.' Mot. 3-11.) The APA provides that courts may not review "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). As explained by the Ninth Circuit, "there is a strong presumption that Congress intends judicial review of administrative action." *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 718 (9th Cir. 2011); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41(1967) ("[T]he [APA] . . . embodies the basic presumption of judicial review . . . . [O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "This presumption is overcome only in two narrow circumstances:" (1) when Congress bars judicial review by statute; and (2) "in 'those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply,'" *Pinnacle Armor*, 648 F.3d 708, 718-19 (citing *Webster v. Doe*, 486 U.S. 592, 599 (1988)).

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[6] Defendants also claim that the Court previously limited Plaintiffs' injury-in-fact to that caused by ESAs that the Government entered into after 2008 in the MTD Order, and thus "[b]ecause the only agreements Plaintiffs challenge that were executed after 2008 expired before the FAC was filed, this alleged injury cannot support Plaintiffs' standing." (Opp'n to Pls.' Mot. 4 n.5.) This argument is incorrect, as the Court did not so limit Plaintiffs' claim. Rather, the Court was merely paraphrasing portions of the FAC. (MTD Order 10.)

[7] Defendants are correct, however, that Plaintiffs may not challenge the Barrington Park agreement pursuant to their APA claim, as there is no evidence in the Administrative Record that Defendants entered into this agreement pursuant to its Health Care Resources Sharing Authority. (Administrative R. 1690-1700.) Rather, it appears that the DVA entered into the Barrington Park agreement with the City of Los Angeles in 1983 pursuant to general authority to lease land, and no formal agreement was ever reached to renew this agreement.

Defendants argue that the second exception to judicial review of agency action applies here, as it is undisputed that Congress has not explicitly barred judicial review of the DVA's use of its authority to enter ESAs pursuant to 38 U.S.C. §§ 8151-8153. Defendants make a number of arguments in support of their claim that the DVA has complete discretion to enter into ESAs to share health-care resources. (Defs.' Mot. 6-11.) These arguments miss the mark, for there is a clear statutory standard to apply: whether the land and facilities that are the subject of the Disputed Agreements constitute "health-care resources" as that term is defined by Congress. Indeed, the fact that Congress included a statutory definition of "health-care resources" evinces a clear intent on Congress's part to limit the scope of the DVA's authority to enter into ESAs. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (holding that agency "action at least can be reviewed to determine whether the agency exceeded its statutory powers"); *U.S. Fidelity & Guar. Co. v. Lee Invs., LLC*, 641 F.3d 1126, 1135 (9th Cir. 2011) (explaining that "the constant theme generally applicable to administrative agencies [is] that they are creatures of statute, bound to the confines of the statute that created them"). In other words, while the DVA may well have discretion as to what health-care resources it chooses to share under § 8153, its authority is nevertheless constrained by the fact that only health-care resources may be shared.

Defendants' arguments to the contrary are not persuasive. First, Defendants contend that the language of § 8153 indicates that "Congress intended the decision to enter into any ESA to be entrusted exclusively to the [DVA] Secretary." (Defs.' Mot. 6.) Specifically, Defendants argue that the following textual features demonstrate Congress's intent to delegate complete discretion to enter into ESAs to the DVA: (1) § 8153 provides that the DVA "may" enter into ESAs; (2) § 8153 conditions entering into an ESA on the Secretary of the DVA's "determin[ation]" of what is in the "best interest of the prevailing standards of the [DVA] medical care program"; and (3) § 8153 provides that the DVA may enter into ESAs "with any health-care provider or other entity or individual." (Defs.' Mot. 6-8 (citing 38 U.S.C. § 8153).) While this language may empower the DVA with discretion as to what health-care resources it wishes to share and with whom, it does not authorize the DVA to enter into agreements for the use of land and facilities that are not health-care resources in the first instance.

Second, Defendants argue that the statutory structure of §§ 8151-8153 confirms Congress's intent to confer complete discretion on the DVA as to the ESAs it enters into. (Defs.' Mot. 8.) In particular, Defendants note that "Congress did not include any guidelines for judicial review and did not require the Secretary to promulgate any regulations, which might have constituted law that could be applied." (Defs.' Mot. 8.) This argument fails to overcome the presumption that agency action is generally subject to judicial review, as the Court can determine whether the DVA has exceeded its statutory authority to share health-care resources through traditional tools of statutory construction. Defendants also observe that the subchapter in which § 8153 is located is entitled "Sharing of Medical Facilities, Equipment and Information" and that "medical facilities" is defined broadly in a different portion of the subchapter. (Defs.' Mot. 9.) This is irrelevant, as there is no need to resort to statutory definitions in an altogether different section of the statute when the key

term, "health-care resources," is specifically defined, and the term "medical facilities" does not appear in the relevant provisions.

Third, Defendants argue that "[t]he legislative history of § 8153 makes clear that Congress intended this statute to expand the scope of ESAs into which the [DVA] could enter." (Defs.' Mot. 9.) As discussed above, prior to 1996, the DVA was only authorized to enter into ESAs with "medical schools, health-care facilities, and research centers" for the use of "specialized medical resources."[8] 38 U.S.C. § 8151 (1993), *amended by* The Veterans Health Care Eligibility Reform Act of 1996, Pub L. No. 104-262, 110 Stat. 3177 (1996). Under the current version of the statute, the DVA may enter into ESAs with any entity for the sharing of "health-care resources," which is defined more broadly than "specialized medical resources." *See* 38 U.S.C. §§ 8152-8153. To be sure, it is clear that the 1996 amendments expanded the scope of the DVA's power to enter into ESAs. This is not the same, however, as giving the DVA unfettered and unreviewable discretion to enter into ESAs, especially when there is a clear standard by which to judge the DVA's actions.

Fourth, the Government argues that its decisions to enter into the Disputed Agreements "are typical of actions committed to agency discretion" because the DVA is better situated to "determine the optimal uses for its space, land, and property." (Defs.' Mot. 10-11.) The cases cited by the Government in support of this argument, however, are all readily distinguishable from the instant action. In *Drakes Bay Oyster Co. v. Salazar*, — F. Supp. 3d ----, 2013 WL 451860 (N.D. Cal. 2013), the court found that "[t]he express language and legislative history" of the statute at issue "evidence Congress' intent to grant the Secretary complete discretion." *Id.* at *11; *see also Strickland v. Morton*, 519 F.2d 467, 471-72 (9th Cir. 1975) (finding that Secretary of the Department of Interior's decision to classify land was unreviewable because plaintiffs failed to show that the government "acted contrary to law, or beyond the limits Congress has put on [its] discretion"). Here, by contrast, there is no express language evincing an intent to give the DVA complete discretion to enter into any ESAs it wishes, and there is a clear limit on the DVA's authority, as the DVA may only enter into ESAs to share health-care resources. *Topgallant Group, Inc. v. United States*, 704 F. Supp. 265 (D.D.C. 1998), is also inapposite, as it involved national security, an area in which courts have been understandably reluctant to second-guess the policy decisions of those charged with authority to act. *Id.* at 266 (explaining that judicial review of agency decisions involving military concerns are not generally subject to review because "such review would impair necessary flexibility in the management of defense resources").

[8] "Specialized medical resources" was defined as "medical resources (whether equipment, space, or personnel) which, because of cost, limited availability, or unusual nature, are either unique in the medical community or are subject to maximum utilization only through mutual use." 38 U.S.C. § 8152(2) (1993), *amended by* The Veterans Health Care Eligibility Reform Act of 1996, Pub L. N. 104-262, 110 Stat. 3177 (1996).

Defendants also cite to two cases involving § 8153 for the proposition that the DVA's decisions to enter into the Disputed Agreements constitute unreviewable agency action. Neither is on point. In *Gibbons v. Fronton*, 533 F. Supp. 2d 449 (S.D.N.Y. 2008), the court did not determine whether a particular ESA involved a health-care resource. Rather, the court held that the DVA was not liable for the negligence of a clinic with which it entered into an ESA under the discretionary function exception of the Federal Tort Claims Act. *Id.* at 456. In doing so, the court reasoned that "[t]he [DVA]'s decision to enter a contract with an outside **health-care provider** is clearly within the discretion granted to the [DVA] in § 8153(a)(1)." *Id.* (emphasis added). Thus, the court in *Gibbons* merely found that the DVA's decision to enter into an ESA with a health-care provider for the provision of medical care was within the DVA's discretion—not whether an ESA wholly unrelated to the provision of medical care could constitute a health-care resource. Similarly, in *Rapides Regional Medical Center v. Secretary*, 974 F.2d 565 (5th Cir. 1992), the Fifth Circuit held that the DVA's contract with a hospital to share a radiation therapy device was a procurement procedure "expressly authorized by statute" and thus not subject to the Competition in Contracting Act's "full and open competition requirements." *Id.* at 574. As such, the Fifth Circuit did not have occasion to decide whether the subject of an ESA fit within the definition of a health-care resource as defined by Congress.

Finally, Defendants argue that § 8153's congressional reporting requirement indicates that Congress intended to confer complete discretion on the DVA. Section 8153 provides that "[t]he Secretary shall submit to the Congress not later than February 1 of each year a report on the activities carried out under this section during the preceding fiscal year." 38 U.S.C. 8153(g). The mere fact that § 8153 includes a requirement that DVA report on its use of its Health Care Resource Sharing Authority is insufficient to overcome the presumption that the DVA's decisions to enter the Disputed Agreements are subject to judicial review. *See, e.g.*, *Armstrong v. Bush*, 924 F.2d 282, 291-92 (D.C. Cir. 1991) (reasoning that "the fact that Congress retains some direct oversight . . . does not necessarily indicate an intent to preclude judicial review"); *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 44 (D.C. Cir. 1983) (holding that accepting the government's argument that the existence of a congressional reporting provisions precludes judicial review "would create an enormous exception to judicial review" because "Congress exercises oversight over all agencies, gets reports from many, and is often consulted by the executive branch before specific actions are taken"). Accordingly, the Court finds that the DVA's decisions to enter into the Disputed Agreements[9] are properly subject to judicial review.

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[9] Defendants also question why Plaintiffs chose to challenge some ESAs but not others, arguing that this "suggests that [Plaintiffs] are not asking the Court to exercise its jurisdiction to decide that the agreements were based on a misreading of the law but instead asking the court to set aside [DVA] policy decisions that Plaintiffs disagree with." (Opp'n to Pls.' Mot. 1, 4.) This argument is without merit. As noted by the Court at the hearing, Plaintiffs are under no obligation to challenge all ESAs that Defendants have entered into.

C. Whether the DVA Exceeded its Statutory Authority by Entering Into the Disputed Agreements

As discussed above, the Court follows the analytical framework set forth in *Chevron* to determine whether the DVA exceeded its statutory authority by entering into the Disputed Agreements. Thus, the Court must first attempt to ascertain whether the Disputed Agreements run contrary to the clear intent of Congress. If the Court finds that the provisions at issue are ambiguous, the Court must determine the amount of deference due the DVA's interpretation and whether this interpretation is reasonable.

1. Congressional Intent

"Congressional intent may be determined by traditional tools of statutory construction, and if a court using these tools ascertains that Congress had a clear intent on the question at issue, that intent must be given effect at law." *Wilderness Soc'y*, 353 F.3d at 1059 (internal quotation marks omitted). Here, Congress's intent is clear: under §§ 8151-8153 the DVA is authorized to enter into ESAs to share health-care resources, **not** to enter into land use agreements with no relation to the provision of health-care.

a. Plain Language

The Court first examines the plain language of the statute as the best evidence of Congress's intent. Here, Congress's intent is clearly expressed in the statute itself. Section 8151, entitled "Statement of congressional purpose," provides as follows:

> It is the purpose of this subchapter to strengthen the medical programs at Department facilities and improve the quality of health care provided veterans under this title by **authorizing the Secretary to enter into agreements with health-care providers in order to share health-care resources with, and receive health-care resources from, such providers** while ensuring no diminution of services to veterans.

38 U.S.C. § 8151 (emphasis added). This statement of purpose unambiguously evidences Congress's intent to authorize the DVA to enter into ESAs with health-care providers and related entities for the sharing of health-care resources. Notably, this statement of congressional purpose was amended in 1996, at the same time that the DVA's authority to enter into ESAs was expanded. Thus, it reflects current Congressional intent with respect to § 8153.

The statutory definition of "health-care resources" also demonstrates Congress's intent that § 8153 be used to provide for resources that are related to the provision of health-care. "Health-care resources" are defined as "hospital care and medical services . . ., [counseling services], any other

health-care service, and any health-care support or administrative resource." 38 U.S.C. § 8152(1). Hospital care, medical services, counseling services, and health-care services all clearly relate to the provision of health-care. Thus, under the *noscitur a sociis* and *ejusdem generis* canons of statutory construction, the "support and administrative resource[s]" referenced in the statute must also relate to the provision of health-care to be considered a health-care resource. *See United States v. Lacy*, 119 F.3d 742, 748 (9th Cir. 1997) (explaining that "[*noscitur a sociis*] means that a word is understood by the associated words, [and *ejusdem generis*], that a general term following more specific terms means that the things embraced in the general term are of the same kind as those denoted by the specific terms").

Defendants' arguments that the language of §§ 8151-8153 are ambiguous such that the Court should defer to the DVA's interpretation of the Health Care Resource Sharing Authority are unpersuasive. Defendants argue that "[t]he broad and ambiguous terms used in §§ 8151-8153 confer particularly great discretion on the agency to decide what criteria it will use in determining whether and how to exercise its statutory authority." (Defs.' Mot. 14.) Defendants also assert that "[b]ecause §§ 8151-8153 are silent as to critical matters such as how the Secretary is to determine whether entering a particular ESA is in the 'best interest' of the [DVA] medical program, and leave some ambiguity as to what constitutes a 'health-care resource,'" the Court should defer to the Government's interpretation. (Defs.' Mot. 15.) However, the only specific "ambiguities" identified by Defendants are the fact that the terms "health-care support or administrative resource" and "best interest" are not specifically defined within the statute. (Defs.' Mot. 15 n.19, 20.) The entire statutory regime is not rendered ambiguous, however, by the fact that not every single term contained therein is defined. Rather, the application of the traditional tools of statutory construction leads inexorably to the conclusion that "health-care support or administrative resource[s]" are limited to resources that relate to the provision of health-care. And while the use of the term "best interest" does indicate that the DVA has discretion as to what health-care resources it wishes to share and with whom, it does not confer complete and absolute discretion to enter into any conceivable land use agreement, as Defendants seem to contend.

b. Statutory Structure

The underlying statutory structure by which the DVA may use and dispose of its land also makes clear that Congress only intended § 8153 to be used for the sharing of resources relating to health-care. As set forth in detail above, at the time the Disputed Agreements were executed,[10]

[10] The fact that Congress has now prohibited Defendants from entering into EULs on the WLA Campus does not indicate that Congress intended that the DVA utilize its authority under § 8153 to enter into land use agreements such as the Disputed Agreements. To the contrary, barring the DVA from using its authority to enter into EULs on the WLA Campus would have been a meaningless act if the DVA could accomplish precisely the same result through the use of § 8153.

Defendants also had the power to enter into EULs pursuant to 38 U.S.C. §§ 8161-8169. The DVA was authorized to enter into EULs if "applying the consideration under such a lease to the provision of medical care and services would result in a demonstrable improvement of services to eligible veterans in the geographic service-delivery area within which the property is located." 38 U.S.C. § 8162(2)(B), *repealed by* 2012 Act, Pub. L. No. 112-154, 126 Stat. 1165 (2012). Thus, Congress knew how to authorize the DVA to enter into land use agreements for the purpose of generating revenue. As such, reading § 8153 to allow this same result, only without the procedural safeguards required by § 8163, would render the DVA's EUL authority superfluous. *See Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."). Additionally, if the DVA were authorized to enter into the same types of land use agreements under both § 8153 and § 8162, the DVA would never utilize § 8162, as agreements under that section are subject to the procedural safeguards set forth in § 8163. The Court will not interpret § 8153 to produce such an illogical result. *See United States v. Wahid*, 614 F.3d 1009, 1014 (9th Cir. 2010) ("[W]e abide by the principle that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Defendants cite to *Connecticut National Bank v. Germain*, 503 U.S. 249, 256 (1992), for the proposition that "redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." *Id.* at 253 (internal citation omitted). Here, however, the DVA has interpreted its authority to enter into ESAs in such a way that is "positively repugnan[t]" to its authority to enter into EULs, as it renders the EUL authority superfluous. As such, this statutory structure supports the conclusion that the DVA is only authorized to enter into ESAs that relate to the provision of health-care.

c. Legislative History

The legislative history of these provisions confirms Congress's intent to limit the DVA's authority under § 8153. As stated, the DVA's EUL authority may now be used "only for the provision of supportive housing." 38 U.S.C. § 8162(2) (2012). That Congress chose to so circumscribe the DVA's authority indicates that Congress knows both (1) how to authorize the DVA to lease underutilized DVA property to generate revenue and (2) how to repeal that authority. Reading § 8153 to allow the DVA to nevertheless enter into land use agreements solely for the purpose of revenue generation would thus undermine Congressional intent. Moreover, the legislative history of the 1996 amendments to §§ 8151-8153, which expanded the DVA's authority to enter into ESAs, demonstrates that this authority was not unlimited. This legislative history explains that ESAs "allow [DVA] medical centers and community providers to provide medical care to their respective patient populations more efficiently by avoiding wasteful duplication of equipment and services within a local community." S. Rep. No. 104-372, at 21 (1996). The 1996 amendments

were intended to "ease [restrictions on the DVA's authority to enter into ESAs] by authorizing [the DVA] to enter into agreements with any non-[DVA] **health care provider** for the mutual use or exchange of use of any health care resources." S. Rep. No. 104-372, at 21 (emphasis added). Examples of sharing partners referenced in the legislative history include "health maintenance organizations, insurance carriers, individual physicians, or other individual care providers." S. Rep. No. 104-372, at 21. This language clearly shows that § 8153 is intended to be used to share resources that relate to the provision of health-care, and not to enter into land use agreements with no purpose other than the generation of revenue.

Defendants point to the legislative history of 1993 amendments to the DVA's sharing authority, which expanded the DVA's authority to share resources with state veterans homes. Priority VA Health Care for Persian Gulf Veterans, Pub. L. No. 103-210, § 3, 107 Stat. 2496 (1993). The legislative history to these amendments states that "[t]here would appear to be significant opportunities to avoid duplication through the development of agreements to **share services necessary to the operation of a medical facility**. These might include such services as grounds maintenance, laundry, housekeeping, and pharmacy." H.R. Rep. No. 103-92, at 15 (1993) (emphasis added). Defendants maintain that this language indicates that "Congress specifically intended this 1993 amendment to cover all of those resources that supported the operation of a medical facility, even if they were not directly related to provision of medical care to a Veteran (or other eligible) patient." (Opp'n to Pls.' Mot. 10.) This argument fails because while § 8153 undoubtedly confers authority to enter ESAs for the provision of "health-care support or administrative resource[s]," it cannot be reasonably read to permit ESAs that do not relate to the provision of health-care and serve no purpose other than to generate revenue for the DVA for the reasons articulated above. Rather, this language indicates that Congress wished to expand the DVA's authority so that it could contract with third-party administrative or support services, such as "grounds maintenance, laundry, housekeeping, and pharmacy," to support the DVA's primary purpose of providing health-care to veterans.

The purpose of these provisions is clear and unambiguous: §§ 8151-8153 allow the DVA to enter agreements with third parties to share resources that are related to the provision of health-care. Here, none of the Disputed Agreements are for the purpose of sharing health-care resources as that term is defined by Congress.

2. The DVA's Interpretation of § 8153

Even if the Court assumes *arguendo* that §§ 8151-8153 were ambiguous such that the Court were to reach the second step under the *Chevron* framework, the Court finds that the DVA's interpretation of its sharing authority is entitled to no deference and that it unreasonably expands the DVA's authority to enter into ESAs as established by Congress.

The level of deference due an agency's interpretation depends on whether "Congress delegated authority to the authority generally to make rules carrying the force of law, *and* . . . the agency

interpretation claiming deference was promulgated in the exercise of that authority." *Wilderness Soc'y*, 353 F.3d at 1059 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). The deference due agency action that does not meet this standard "depends upon 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Wilderness Soc'y*, 353 F.3d at 1060 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The DVA's interpretations of its sharing authority is contained within informal guidance documents such as policy handbooks and directives that were not promulgated in accordance with the DVA's authority to make rules with the force of law. (*See* Administrative R. 15-88.) As such, the Court looks to the factors enunciated in *Skidmore* to determine the level of deference due the DVA's interpretation.

The DVA has interpreted "health care resources" to include "health care support and administrative resources, the use of medical equipment, **or the use of space**." (Administrative R. 24 (emphasis added).) Thus, per the DVA, "[ESAs] for the use of . . . space (including parking, outdoor recreational facilities, and vacant land) are authorized under 38 U.S.C. [§] 8153." (Administrative R. 26.) This conclusory assertion is not supported by any reasoned analysis or justification. It appears that the DVA has seized on the use of the word "space" in § 8153(a)(3) and concluded that "health care resources" includes "space," no matter how that space is utilized. This reading of § 8153 completely ignores the context in which the word "space" appears. Notably, the word "space" does not appear in the statutory definition of "health care resources." Rather, § 8153(a)(3) provides that the DVA need not utilize a competitive bidding process, as might otherwise be required, "**[i]f** the health-care resource required is a commercial service, the use of **medical** equipment or **space**, or research." 38 U.S.C. § 8153(a)(3) (emphasis added). This provision, and its use of the conditional subordinating conjunction "if" and the adjective "medical," recognizes that space **can** be a health-care resource in some situations and allows the DVA to bypass certain procedural requirements when that is the case. Section 8153(a)(3) does not, however, stand for the proposition that all space under the DVA or VA GLA's control may properly be the subject of ESAs, no matter the purpose for which the space is to be used.

Defendants make the related argument that "Plaintiffs have failed to articulate a consistent, coherent definition of the 'health-care resources' that [the DVA] is authorized to enter agreements to 'share' pursuant to 38 U.S.C. §§ 8151-8153." (Opp'n to Pls.' Mot. 11.) Specifically, Defendants argue, "[i]t cannot be . . . that whether a building or piece of land constitutes a 'health-care resource' depends upon how the parties to a sharing agreement intend to use it," because "[t]he statute itself includes no requirement that the resources subject to ESAs be used to provide health-care services."[11] (Opp'n to Pls.' Mot. 11.) Defendants are correct in that the propriety of

[11] Defendants also argue that "it cannot be that, as Plaintiffs appear to argue . . ., that whether a building or piece of land constitutes a 'health-care resource' hinges upon whether the sharing agreement would result in the provision of health-care services to Veterans."

an ESA does not hinge on precisely how the health-care resource is utilized. The determining factor is whether what is shared is a health-care resource in the first instance. As discussed, the term "health-care resources" is specifically defined in the statute. A plain language reading of that definition indicates that land or space may only be a health-care resource if it is a "**health-care** support or administrative resource." 38 U.S.C. § 8152(1). The inclusion of the adjective "health-care" before "support or administrative resource," limits the scope of "support or administrative resources" to resources that are related to the provision of health-care. As such, sharing space that is not related the provision of health-care is not authorized by statute. Rather, only space that is actually used for health-care related purposes may properly be the subject of an ESA.

Defendants attempt to justify their interpretation in their briefs by arguing that the DVA "has read that term [medical space] . . . to mean space controlled by the Veterans Health Administration ("VHA") . . . which may be any real property . . . under VHA's control, because such property may either be used directly to serve medically-related purposes or may be deemed necessary for the provision of medical care."[12] (Opp'n to Pls.' Mot. 8-9.) Importantly, however, this reasoning does not appear in the Administrative Record. Thus, this argument is nothing more than a "*post hoc* rationalization[] advanced by an agency seeking to defend past agency action against attack," and as such it is not entitled to deference. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (internal quotation marks omitted). Moreover, there is nothing in the language, statutory structure, or legislative history of §§ 8151-8153 indicating that Congress intended to grant the DVA such broad authority. Thus, while it is certainly true that property under the VHA's control **may** be used for "medically-related purposes," this does not mean that such space or property under the control of the VHA is **always** a "health-care resource" that may be shared under § 8153. This is the faulty assumption upon which the DVA's unreasonable interpretation of its sharing authority rests.

Defendants also argue that the DVA's interpretation is justified because "agreements to sell 'space' may benefit Veterans either by reducing [the DVA]'s costs to maintain under-utilized resources or by providing revenue that [the DVA] uses to support Veteran health care programs at WLA." (Defs.' Mot. 18.) This may be true, but this interpretation of the statutory language reads the phrase "health-care" completely out of the statute such that the DVA may enter into any land agreement it wishes for the sole purpose of raising revenue under § 8153. Such an interpretation cannot be reconciled with the clear and unambiguous statutory definition of "health-care

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(Opp'n to Pls.' Mot. 11-12.) The Court agrees that §§ 8151-8153 clearly authorize the DVA to share or "sell" health-care resources to other entities in the community, and so an ESA need not result in the direct provision of health-care to veterans.

[12] Defendants also argue that "[b]y deciding to enter a proposed land-use agreement as an ESA, [DVA] expresses its interpretation that that agreement is for use of a 'health-care resource,' and is permitted under the ESA authority." (Opp'n to Pls.' Mot. 16.) The Court is not persuaded by this circular reasoning.

resources," the underlying statutory structure by which the DVA may use and dispose of land under its control, or the legislative history of the 1996 amendments. As such, the Court finds that the DVA's impermissible construction of § 8153 is entitled to no deference. *See Wilderness Soc'y*, 353 F.3d at 1069 (declining to give agency interpretation deference under *Skidmore* because it "goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear" (quoting *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 481 (2001))).

Finally, the Government contends Congress is aware of and has implicitly accepted the DVA's interpretation, and therefore its interpretation is permissible.[13] Defendants cite to *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), for the principle that "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction." *Id.* at 137. In *Riverside*, however, the Supreme Court held that Congress had acquiesced to the agency interpretation at issue only because "the administrative construction [had] been brought to Congress's attention through legislation specifically designed to supplant it." *Id.* at 136-37. The Ninth Circuit has likewise recognized that "[c]ongressional acquiescence can only be inferred when there is 'overwhelming evidence' that Congress explicitly considered the 'precise issue' presented to the court." *Morales-Izquierdo v. Gonzalez*, 486 F.3d 484, 493 (9th Cir. 2007) (en banc). As such, "[a] finding of congressional acquiescence must be reserved for those rare instances where it is very clear that Congress has considered and approved of an agency's practice." *Id.*

The primary evidence from which Defendants would have the Court infer that Congress has implicitly accepted the DVA's interpretation are the annual reports that the DVA is required to make to Congress. Examination of these reports, however, reveals that they fail to explicitly state that many ESAs are completely unrelated to the provision of health-care. Rather, these reports obfuscate this fact by stating that the "[DVA] provides a limited number of resources, including unused medical space, to affiliated medical colleges, community hospitals, and other sharing partners." (*See, e.g.*, Administrative R. 126.) This language would naturally lead Congress to assume that the DVA is properly utilizing its sharing authority to enter into mutually beneficial agreements with third party health-care providers and related entities.[14] Defendants argue that

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[13] In its Reply, Defendants clarify that they are not arguing that the Court should accept their interpretation of the statute solely because Congress has acquiesced to it, only that Congress's "awareness and implicit acceptance of these interpretations" indicates that the interpretations are reasonable. (Defs.' Reply 3 n.1.)

[14] Indeed, following the publication of an article in the *Los Angeles Times* concerning the DVA's use of ESAs on the WLA Campus, Congressman Lane Evans and Congresswoman Corrine Brown, members of the House Subcommittee on Oversight and Investigations of the Committee of Veterans Affairs sent a series of letters to the then-Secretary of the DVA questioning the DVA's use of its authority under § 8153 to enter into the ESA with the Brentwood School (Administrative R. 246.1-246.26.) These letters expressed concern that

the reports are nevertheless sufficient because they "put Congress on notice that it understands generating revenue to be one of the objectives of using the ESA authority." (Defs.' Reply 4.) While the reports do state that the DVA's sharing authority has allowed it to generate revenue (*see, e.g.*, Administrative R. 127), they neglect to explain that the DVA has done so by entering into ESAs totally divorced from the provision of health-care. Defendants also contend that "[t]estimony before its oversight committees provided Congress with further information about [the DVA's] use of ESAs." (Defs.' Mot. 19.) DVA officials have testified before Congress concerning the DVA's legal authority to use and dispose of property under its control. *See Assessing Capital Asset Realignment for Enhanced Services and the Future of the U.S. Department of Veterans Affairs' Health Infrastructure: Hearing Before the Subcomm. on Health of the H. Comm. on Veterans' Affairs*, 111th Cong. 31-33 (2009) ("2009 Hearing"). However, the testimony itself did not reference the DVA's use of ESAs to enter into agreements such as those at issue here. Rather, the only information concerning the DVA's use of its sharing authority to enter into such agreements is located in the appendix. (2009 Hearing 79.) This limited information, buried in an appendix, does not constitute the "overwhelming evidence" necessary to infer congressional acquiescence.[15] Indeed, there is no evidence, such as proposed legislation that would amend the statutory language at issue, that Congress has actively considered the "precise issue" before the Court. *See Rapanos v. United States*, 547 U.S. 715, 750 (2006) (distinguishing between "Congress's deliberate acquiescence" and "Congress's failure to express any opinion"). Accordingly, the Court finds that these reports to Congress fail to establish the reasonableness of the DVA's interpretation of its authority under § 8153.

In sum, the Court holds that the DVA's interpretation of its authority to enter into ESAs pursuant to 38 U.S.C. §§ 8151-8153 violates the clearly expressed intent of Congress.

"local sharing agreements . . . have the potential for being undervalued, sole-source contracts that do not provide the public and the [DVA] with the protections of [EULs], and can significantly increase [the DVA]'s liabilities as a landowner." (Administrative R. 246.6.) The DVA assured Congressman Evans and Congresswoman Brown that it had "reviewed the terms and conditions of the agreement and determined that VA had the authority pursuant to 38 U.S.C. § 8153 to enter into [the Brentwood ESA]." (Administrative R. 246.28.) Relatedly, the Under Secretary for Health also recommended delaying the renewal of the ESA with the UC Regents for the use of Jackie Robinson Stadium because "there is no direct benefit to veteran care." (Administrative R. 411.)

[15] A letter from a member of the Brentwood School Board of Trustees to Senator Dianne Feinstein, which letter stated that the Brentwood School was "explor[ing] a more permanent, formal and long term association with the [DVA]" via an ESA (Administrative R. 229-30), and the single mention of an ESA for "roof top space [with] a private cellular communications company" (Administrative R. 101), are also not sufficient to constitute overwhelming evidence of acquiescence.

D. Remedy

At oral argument Defendants contended that, should the Court find that the DVA exceeded its statutory authority by entering into the Disputed Agreements, the Court should remand to the DVA for further deliberation in light of the Court's order. "The general rule is that when an administrative agency has abused its discretion or exceeded its statutory authority, a court should remand the matter to the agency for further consideration." *Abramowitz v. EPA*, 832 F.2d 1071, 1078 (9th Cir. 1987). However, "when the language of a statute is clear and unambiguous it must be given effect." *Id.* (citing *Chevron*, 467 U.S. at 842-43) Thus, in *Abramowitz* the court ordered the EPA to disapprove proposed state regulations because "the language of the Act [is] clear and unambiguous." *Abramowitz*, 832 F.2d at 1079.

Here, the language of §§ 8151-8153 is clear and unambiguous. The DVA is authorized to share health-care resources. Space may be a health-care resource when it is used in a manner that is related to the provision of health-care. The Disputed Agreements do not share space that is related to the provision of health-care. Accordingly, with the exceptions of the Barrington Park and Richmark Entertainment agreements,[16] the Court finds the Disputed Agreements to be unauthorized by law and therefore void. However, the Court will stay the enforcement of its Order pending the resolution of any appeal. In addition, the Court declines to enter an injunction with respect to future ESAs. The Court instead leaves the determination of what ESAs are appropriate in the future to the DVA in light of the Court's order.

III. RULING

For the foregoing reasons, the Court **DENIES** Defendants' Motion and **GRANTS IN PART** Plaintiffs' Motion.

IT IS SO ORDERED.

[16] As noted above, there is no evidence in the Administrative Record that the DVA ever used its authority under § 8153 to enter into the Barrington Park agreement. As for the ESA with Richmark Entertainment, it appears from the Administrative Record that the DVA terminated this ESA in 2010, and the DVA now has a Memorandum of Understanding with Richmark Entertainment. (Administrative R. 186.) As such, it does not appear that the DVA is currently exceeding its authority under §§ 8151-8153 with respect to these agreements.