

Federal Lands Update

News and information for federal concessioners, permittees and land users

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INSPECTOR GENERAL DETERMINES THAT NPS KNOWINGLY USED FALSE SCIENTIFIC DATA IN EFFORT TO ASSESS IMPACTS OF BUSINESS OPERATING WITHIN NPS UNIT

In a recent report, the Office of Inspector General (OIG) for the Department of the Interior concluded that the National Park Service (NPS) had published reports containing inaccuracies regarding the environmental impacts of an oyster farm operation within Point Reyes National Seashore. The oyster farm wanted to continue its operations past its impending scheduled termination date, but NPS was apparently trying to prevent any extension of the existing lease. At issue were the environmental impacts of the operation.

The OIG concluded that a senior scientist at NPS “had misrepresented research regarding sedimentation” caused by the oyster farm. The OIG determined that she was aware of information that contradicted her assertions and she did nothing to correct her assertions before they were released to the public. The OIG also commented that the Superintendent of Point Reyes National Seashore “could have exercised better judgment and expressed NPS’ position with greater clarity and transparency.”

COURT HOLDS THAT THE BLM MUST EXPLICITLY ADDRESS ANY WILDERNESS CHARACTERISTICS OF AREAS COVERED BY LAND USE PLANS

A court recently held that the BLM improperly failed to address the wilderness characteristics of the areas covered by a resource management plan. BLM asserted that the Federal Land Policy and Management Act (FLPMA), which defines BLM’s land management authority, did not require it to address wilderness characteristics as a value of the public lands in its environmental analysis. Thus, BLM asserted, while it could address those

values, it could also choose not to in its management plans. The court rejected BLM’s argument, noting that the wilderness characteristics of any land areas are necessarily part of the various values which the BLM must consider in preparing an environmental analysis. The court also held that the BLM’s obligation was continuing and its prior designation of potential wilderness areas did not eliminate this obligation.

COURT FINDS THAT PROPERTY OWNERS HAVE A VALID EASEMENT TO TRAVEL THROUGH WILDLIFE REFUGE, BUT FISH & WILDLIFE SERVICE CAN REGULATE USE

A court recently held that property owners retained an easement to access their land after the adjacent lands were transferred to the Fish & Wildlife Service (FWS). The lands at issue were landlocked, and the adjacent lots provided the only reasonable access. The

property owners had historically used this access with the consent of the prior owners of the adjacent lots. When those adjacent lots were given to the FWS and became part of a Wildlife Refuge, the government denied access during the waterfowl migration season.

The deeds provided to the FWS stated that the lands were subject to existing easements. When the prior owners deeded the lots over to the government, they wanted to ensure that their neighbor's access was secure. The government attorneys informed them that the language in the deed was sufficient and no more specific language was needed. However, the government then later claimed that the language in the deed was ambiguous, and that no easement existed. The court rejected the government's arguments, but did find that the government could reasonably regulate the access through its police powers.

COURT AWARDS ATTORNEYS FEES BASED ON BLM'S FAILURE TO RESPOND TO A FOIA ACT REQUEST

A federal court recently held that the BLM was liable for the attorneys' fees incurred by a party which was forced to bring a lawsuit to obtain documents in response to a Freedom of Information Act (FOIA) request. FOIA is an important tool used by private parties to obtain government documents. The court noted that the BLM repeatedly provided anticipated dates for its production of the documents, but never met those dates and failed to provide any reason for its delay.

While the BLM subsequently produced the documents after a lawsuit was filed, the court concluded that the BLM was liable for attorneys' fees given its unreasonable delays and the public benefit derived from the documents. As the court held, "Congress made clear that lack of government responsiveness would not be tolerated under the new FOIA regime" and that the revised FOIA law "will help reverse the troubling trends of excessive delays and lax FOIA compliance in our government and help restore the public's trust in their government."

NINTH CIRCUIT CRITICIZES ITS OWN PRIOR HOLDINGS IN ENVIRONMENTAL CASES

In a highly unusual opinion, the Ninth Circuit Court of Appeals, widely regarded as favoring environmental groups, has issued a decision criticizing itself for imposing improper standards in its review of proposed projects on National Forests. Noting that courts should not act as a panel of scientists when reviewing agency decisions on environmental issues, the court concluded that its own cases have "shifted away from the appropriate standard of review and could be read to suggest that this court should play such a role." The court found that some of its prior decisions had defied well-established law regarding the deference which should be given to agencies when conducting analyses of the environmental impacts of proposed projects.

The court commented that the National Forests were established for outdoor recreation as well as other uses, and that "it has never been the case that the national forests were ... to be 'set aside for non-use.'" In reversing several of its prior holdings that enjoined various activities on forests, the court noted that it should not impose its own notion of which procedures are "likely to further some vague, undefined public good." By improperly inhibiting projects on National Forests, the court concluded that it "may well be complicit in frustrating one or more of the other objectives the Forest Service must also try to achieve," including outdoor recreation, range and timber uses.

FOREST SERVICE ISSUES FINAL NEPA POLICY

The Forest Service recently issued its final policy for implementing the National Environmental Policy Act (NEPA), which is the law that requires environmental analyses such as EAs or EISs for federal projects and decisions. In doing so, the Forest Service deleted the policy provisions which had been set forth in its internal policy Manual and Handbook. The NEPA policy is now codified as a binding regulation at 36 C.F.R. Part 220.

Editor- Kevin R. Garden

For Additional Information

With offices in Alexandria, Virginia and Washington, D.C., The Garden Law Firm P.C. represents clients nationwide in matters related to all manners of federal land use and management, including recreation, concessions, natural resources and public utilities. The firm provides its clients with legal counseling and strategy, as well as representation before administrative and judicial forums. If you would like further information regarding the above matters, please contact us.