

Federal Lands Update

News and information for federal concessioners, permittees and land users

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COURT FINDS THE FEDERAL GOVERNMENT LIABLE FOR TAKING A RANCH'S RIGHT TO WATER FLOWING FROM FEDERAL LAND

The Court of Federal Claims recently held that the federal government must pay \$4,220,431 for having denied a party its right to use water which flowed from federal lands onto its ranch land through irrigation ditches. The court had previously determined that the party had a vested right to the water under state law as well as a right to maintain the irrigation ditches based on its use of the water. The ditches were located on federal land. The court also awarded compensation for the value of structures which had been built on federal land under a grazing permit which was revoked.

The plaintiff had operated a cattle ranch in Nevada and depended upon access to large areas of federal lands and the water supply on that land. The federal government then introduced elk to the area and erected fences on the federal land to prevent plaintiff's cattle from

accessing certain water sources which plaintiff had a right to use. The government also insisted that plaintiff maintain its irrigation ditches with only hand tools, resulting in a reduction in the water flow.

The court noted that the government's cancellation of a grazing permit which allowed plaintiff's cattle to directly access the water did not constitute a taking. However, the government's actions in preventing the plaintiff from accessing its water through threats of prosecution for trespassing and the construction of fences, along with its restrictions on how plaintiff could maintain its ditches, did constitute a physical taking of its property rights. Recognizing that the public policy which initially created the water rights in the 1800s has now changed, the court noted that this change did not result in the elimination of private property rights.

COURT REJECTS FOREST SERVICE'S MANAGEMENT PLAN FOR COMMERCIAL PACK STOCK AND SETS SPECIFIC CONDITIONS FOR OPERATION IN WILDERNESS AREAS

After determining that a Forest Service Management Plan for commercial pack stock operations in wilderness areas was invalid, a court recently imposed specific conditions for those commercial activities to continue in those areas. While the court could have restricted all further activities until a new Management Plan was completed, the court stated that it realized that the vast majority of commercial pack stock operations are family owned businesses that "operate out of love for the wilderness rather than strictly commercial motives." The court also noted that it had

imposed fewer restrictions than had been requested because it had taken the packers' concerns into account.

The Management Plan was for activities in the Ansel Adams and John Muir Wilderness Areas, and was the Forest Service's second effort to produce a plan in the face of objections by a local hikers' association. The Forest Service's initial plan had been rejected by the court because the agency had violated NEPA and the Wilderness Act. The conditions imposed by the court included a limit on the overall annual number of service days,

use of trailhead quotas, a 1:1.5 stock-to-person ratio, limitations on where stock could travel in order to protect the Yosemite Toad, elevational campfire restrictions and a prohibition on stock holding areas closer than 100 feet to water.

COUNTY AGREES THAT NATIONAL PARK SERVICE CONCESSIONERS ARE NOT LIABLE FOR PROPERTY TAXES UNDER STATE LAW

A Pennsylvania county recently agreed to withdraw its claims against several National Park Service concessioners operating in Delaware Water Gap National Recreation Area for a payment of a leasehold interest tax. As reported in our last issue, the county had insisted that the tax was authorized under applicable state law. However, the concessioners pointed out that they did not own any real property under the terms of their concession contracts, only a Leasehold Surrender Interest in that property. In addition, the state law only authorized real estate taxes. Therefore, even if the concession contracts were in fact leases, a leasehold interest was not recognized as real estate under the state law. The county was apparently unaware of this limitation in its own taxing power and voluntarily withdrew its tax claims.

COURT UPHOLDS NATIONAL PARK SERVICE DECISION ALLOWING CONTINUED USE OF MOTORIZED RAFTS IN GRAND CANYON

A court has upheld the National Park Service's decision to continue with the use of motorized rafts within the Grand Canyon. Several groups with a stated intention of protecting the Grand Canyon's wilderness character had asserted that the use of motorized rafts by commercial guides was contrary to the NPS's 2001 Management Policies which prohibited NPS from diminishing the wilderness character of a potential wilderness area. However, the court held that NPS was not legally bound by this policy manual.

In addition, the court held that the NPS policy did not require it to immediately remove existing uses that did not conform with a wilderness area. The plaintiffs also asserted that the 1998 Concessions Act required NPS to limit concessions to only where they were necessary and appropriate, and that motorized rafts in the Grand Canyon were neither. While first noting that the determination of what activities were necessary under the 1998 Concessions Act differed from the same determination under the Wilderness Act, the court held that the NPS properly considered the need of visitors who did not have the skills to navigate the river on their own.

The plaintiffs also asserted that federal law prohibited NPS from allowing commercial operations that interfered with free access to the National Parks, and that the allocation of river access between commercial and non-commercial users violated this law. The court disagreed, noting that NPS had increased the access by non-commercial users. The court also concluded that commercial operators undertake a public function and, therefore, "the basic face-off is not between the commercial operators and the non-commercial users, but between those who can make the run without professional assistance and those who cannot." The decision has been appealed.

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.