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DRAKES ESTERO

Legal Analysis on Wilderness Designation

Site Description

Point Reyes National Seashore (“PRNS”), a popular visitor destination, was established in 1962 to “save and preserve [the area], for purposes of public recreation, benefit and inspiration.” 16 U.S.C. 459c *et seq.* The variety of habitats and the unique geology of the park provide a home for over 45 percent of North American avian species, almost 18 percent of California’s plant species, and 38 threatened and endangered species.

PRNS includes Drakes Estero, a shallow tidal estuary created as a drowned river valley, submerged by an ancient river on a small block of granitic-based crust of the Pacific Plate. *See* http://www.nps.gov/pore/parkmgmt/upload/planning_drakesestero_superlatives_060302.pdf (last accessed June 18, 2008). Seagrass beds and tidal mud flats are the most widespread habitat types in the estuary, followed by salt marsh and rock intertidal areas. The large mudflats and extensive eelgrass beds in Drakes Estero are home to numerous invertebrates and serve as foraging and breeding grounds for many birds, fish and pinnipeds. *Id.* The Estero is home to one of the largest harbor seal populations in California. *Id.* Collectively, the harbor seal colonies on the Point Reyes coast represent approximately 20 percent of the California population, and of those colonies, Drakes Estero is one of the primary pupping sites.

History of Wilderness Designation

In 1972, NPS purchased approximately five acres of land along the banks of Drakes Estero from the then owner, Johnson’s Oyster Company, subject to a terminable reservation of a right to use and occupy (“RUO”) the property, which provided:

[A] terminable right to use and occupy the above-described property . . . for a period of 40 years . . . Upon expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property . . . provided, however, that such permit . . . for continued use *will be issued in accordance with National*

Park Service regulations in effect at the time the reservation expires.

See Exhibit C to Grant Deed conveying property to United States, ¶ 11 (Exhibit 1) (emphasis added).

In 1976, portions of PRNS were designated as wilderness under the Point Reyes Wilderness Act of 1976. 16 U.S.C. § 1132. The Congressional Record discussion of the authorizing legislation noted that the intent of the legislation, H.R. 8002, was to protect and manage the wilderness “in as pure a condition as possible—completely free from the evidences of any works or mechanisms of civilization.” See Congressional Record, Vol. 122, p. 33621 (Exhibit 2). The portion of PRNS containing the operations of Johnson’s Oyster Company, due to its temporary nonconforming use, was designated “potential wilderness,” a subdesignation of wilderness. Potential wilderness remains as such until all nonconforming uses are eliminated. See H.R. Rep. No. 94-1357, at 7 (1976) (Exhibit 3). When this is the case, potential wilderness automatically becomes wilderness upon the Secretary of the Interior’s publication in the Federal Register of a statement that all nonconforming uses have been eliminated. See Pub. L. No. 94-567, § 3 (Oct. 20, 1976); see also H.R. Rep. No. 94-1357, at 7 (1976) (Exhibit 4). Addressing the potential wilderness lands and water, House Report 94-1680, accompanying H.R. 8002, states that it was the intent of the legislation that there be “efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.” See H.R. Rep. No. 94-1680, at 3 (1976) (Exhibit 5).

Congress passed House Bill 8002, which designated portions of PRNS as a wilderness area and designated the land and waters upon which Johnson’s Oyster Company operated as “potential wilderness.” Congress heard testimony regarding the presence of the oyster company and its non-conforming use in the Estero. See, generally, Exhibit 6 (Hearing Before The Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs, February 5 and 9, Mar. 2, 1976). By designating Drakes Estero as potential wilderness, Congress signified that, even though Johnson’s Oyster Company had an existing RUO, the commercial enterprise should be removed from the Estero in a determinable time (i.e., when its RUO expired), thus gaining full wilderness status. Congress clearly intended that all of the areas in PRNS designated as wilderness, including Drakes Estero, should be treated as wilderness and did not exclude Johnson’s Oyster Company from the consequences of that designation.

In January 2005, DBOC purchased the property and business from Johnson, subject to and with full knowledge of the RUO. Presumably, DBOC priced into its bid for the property the termination of the RUO.

The Mandate of the Wilderness Act

In order to continue operation after the expiration of the RUO, DBOC must obtain a special use permit for the commercial use of designated wilderness areas. However, granting such a permit would be contrary to the Wilderness Act. Congress passed the Wilderness Act in 1964, with the explicit statutory purpose to “assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and

protection in their natural condition.” 16 U.S.C. § 1131(a). Congress thereby expressed support for the principle that wilderness has value to society that requires conservation and preservation.

The mandate of the Wilderness Act is to preserve wilderness in its natural condition. *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 648 (9th Cir. 2004). In section 1131(a), the Act states, “and [wilderness areas] shall be administered for the use and enjoyment of the American people *in such a manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character.*” (Emphasis added.) The Act stresses the importance of wilderness areas as places for the public to enjoy, but simultaneously restricts their use in any way that would impair their future use as wilderness. *High Sierra Hikers Ass’n*, 390 F.3d at 648. The responsibility of the administering agency is reiterated in Section 1133(b), in which the administering agency is charged with preserving the wilderness character of the wilderness area. *Id.* (holding that Forest Service renewals of special use permits for commercial packstock operators is outside Forest Service statutory discretion, given, *inter alia*, mandate of Wilderness Act). The Wilderness Act mandates apply to all federally owned land designated as wilderness, and the area so designated continues to be managed by the agency having jurisdiction over the area before the designation.

The Wilderness Act specifically prohibits motorized equipment and structures within any designated wilderness area. This includes even structures that have historic value. *See, e.g., Olympic Park Associates v. Mainella*, 2005 WL 1871114 (D. Wash. 2005). In *Olympic Park*, the court considered whether the repair and maintenance of wilderness shelters, which were eligible for inclusion in the National Historical Register, was “necessary to meet minimum requirements for the administration of the area for the purpose of this chapter.” The *Olympic Park* court determined that, to the extent the Wilderness Act seeks to preserve historical values, the reference is to the historical values of the natural environment, not to the structures placed there by man. *Id.* at *6; *see also High Sierra Hikers Ass’n v. United States Forest Service*, 436 F. Supp. 2d 1117, 1136 (E.D. Cal. 2006) (holding that Forest Service’s planned repair, maintenance and operation of dams in wilderness area to enhance downstream flows and thus enhance fishing was categorically impermissible under the Wilderness Act).

The Continued Presence Of DBOC Is A Prohibited Commercial Use of Land Designated As Wilderness And Would Thus Violate The Wilderness Act

The Wilderness Act also generally prohibits commercial enterprises in wilderness areas. 16 U.S.C. § 1133(c) (“Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise . . . within any wilderness area designated by this chapter”); *see also Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065 (9th Cir. 1997) (holding that the Wilderness Act provisions statutorily prohibited commercial fishing in Glacier Bay National Park’s designated wilderness areas). There are some few exceptions, such as for measures to control fire, insects and disease; mineral prospecting if carried on in a manner compatible with the preservation of the wilderness environment; water resources development activities if authorized by the President; and commercial services to the extent necessary for recreational or other wilderness purpose. 16 U.S.C. § 1133(d). Even within these exceptions, however, commercial enterprises are prohibited where the purpose of the enterprise is to benefit

commerce. *See, e.g., Sierra Club v. Lyng*, 662 F. Supp. 40 (D.D.C. 1987) (holding that Secretary of Agriculture's insect control program was conducted solely to aid outside adjacent property interests, not to further wilderness interests or wilderness policy).

The continued presence of DBOC on land designated as wilderness would violate the language, purpose and structure of the Wilderness Act. *See, e.g., Wilderness Society v. United States Fish & Wildlife Service*, 353 F.3d 1051, 1061-64 (9th Cir. 2003) (analyzing a sockeye salmon enhancement project in terms of the language, purpose and structure of the Wilderness Act, and concluding that the project, which benefited a commercial enterprise located outside of wilderness boundaries, was impermissible under the Wilderness Act). The language of the Wilderness Act prohibits commercial enterprises in the wilderness area, with the limited exceptions as noted above. Although the Wilderness Act does not define the term "commercial enterprise," the common-sense meaning of the statute's words determine whether it is ambiguous. *See U.S. v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998). Webster's defines "enterprise" to mean "a project or undertaking." Webster's Ninth New Collegiate Dictionary 415 (1985). Webster's defines "commercial" as "occupied with or engaged in commerce or work intended for commerce; of or relating to commerce." *Id.* at 264-65; *see also The Wilderness Society v. United States Fish & Wildlife Service*, 353 F.3d 1051, 1061 (9th Cir. 2003). The American Heritage Dictionary of the English Language provides a strikingly similar definition, viewing "commercial" as meaning "of or relating to commerce, engaged in commerce, involved in work that is intended for the mass market." American Heritage Dictionary of the English Language 371 (4th ed. 2000). Black's Law Dictionary adds that "commercial" may be defined as "relates to or is connected with trade and traffic or commerce in general; is occupied with business or commerce." Black's Law Dictionary 270 (6th ed. 1990). These definitions suggest that a commercial enterprise is a project or undertaking of or relating to commerce. *The Wilderness Society*, 353 F.3d at 1061. Thus, using the common sense meaning of the words, DBOC is a commercial enterprise under the Wilderness Act. The plain language of the statute prohibits its continued operation.

The presence of a commercial enterprise on wilderness land also subverts the purpose of the Wilderness Act. The Act's declaration of policy states as a goal the "preservation and protection" of wilderness lands "in their natural condition," so as to "leave them unimpaired for future use and enjoyment as wilderness and so as to provide for the protection of these areas, [and] the preservation of their wilderness character." 16 U.S.C. § 1131(a). The Wilderness Act further defines "wilderness," in part, as "an area where the earth and its community of life are untrammelled by man." *Id.* § 1131(c). These statutory declarations show a mandate of preservation for wilderness and the essential purpose to keep commerce out of it. Here, the continued operation of DBOC would squarely place the activities of a commercial enterprise in a protected wilderness, contrary to the purpose of the Wilderness Act.

The structure of the relevant provisions of the Wilderness Act also demonstrates that DBOC is prohibited from continuing its commercial enterprise in a designated wilderness area. The Wilderness Act's opening section first sets forth the Act's broad mandate to protect the forests, waters and creatures of the wilderness in their natural, untrammelled state. 16 U.S.C. § 1131. Section 1133, devoted to the use of wilderness areas, contains a subsection entitled "[p]rohibition provisions." *Id.* § 1133(c). Among these provisions is a broad prohibition on the

operation of all commercial enterprise within a designated wilderness, except as “specifically provided for in this Act.” *Id.* The following subsection of the Act enumerates “special provisions,” including exceptions to this prohibition. *Id.* § 1133(d). This statutory structure, with prohibitions including an express bar on commercial enterprise within wilderness, limited by specific and express exceptions, shows a clear Congressional intent to enforce the prohibition against “commercial enterprise” when the specified exceptions are not present. *See United States v. Smith*, 499 U.S. 160, 167 (1991) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”), quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *Far West Fed. Bank, S.B. v. Director, Office of Thrift Supervision*, 951 F.2d 1093, 1097 (9th Cir. 1991) (“[W]hen Congress explicitly enumerates exceptions to a general scheme, exceptions not explicitly made should not be implied, absent evidence of contrary legislative intent.”).

There is no exception for commercial enterprises such as DBOC even if such an enterprise has a benign purpose and minimally intrusive impact. Courts have held that even minimally intrusive commercial enterprises are prohibited in designated wilderness. For example, in *The Wilderness Society v. United States Fish & Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003), the Fish & Wildlife Service (“FWS”) granted a permit for sockeye salmon enhancement, permitting the introduction of hatchery-reared salmon fry into a lake located within a designated wilderness in the Kenai National Wildlife Refuge. Plaintiffs asserted that the permit violated the Wilderness Act by offending its mandate to preserve the “natural conditions” that are a part of the “wilderness character” of the wilderness and by sanctioning an impermissible “commercial enterprise” within a designated wilderness area. The court noted that the project had a benign purpose and modest impact on wilderness. The court also noted that the Enhancement Project had positive aims. But because commercial fishermen benefited from the Project, the court held that the Enhancement Project was a project relating to commerce which was prohibited by the Wilderness Act. *Id.* at 1067 (“In light of the clear statutory mandate, the Wilderness Act requires that the lands and waters duly designated as wilderness must be left untouched, untrammelled, and unaltered by commerce”); *see also High Sierra Hikers Ass’n v. United States Forest Service*, 436 F. Supp. 2d 1117, 1137 (E.D. Cal. 2006) (holding that even unobtrusive structures that are harmonious with the natural environment are impermissible under the Wilderness Act). In PRNS itself, minimally intrusive telephone poles have been removed from potential wilderness lands in Muddy Hollow, Abbotts Lagoon and the Limantour Area, in order to “fully comply with congressional direction,” changing the designation of these lands from potential wilderness to wilderness. *See Fed. Reg.*, Vol. 64, No. 222, p. 63057 (Nov. 18, 1999) (Exhibit 8).

The language, purpose and structure of the Wilderness Act support the conclusion that Congress spoke clearly to preclude commercial enterprise in the designated wilderness, regardless of the form of commercial activity, and regardless of whether it involves minimal intrusion on wilderness values. Whatever else might be permissibly done within wilderness in extraordinary circumstances for purposes relating to conservation or preservation of the wilderness, it is “quite clear” that conduct with the primary purpose and effect to aid commercial enterprise cannot be countenanced. *The Wilderness Society v. United States Fish & Wildlife*

Service, 353 F.3d 1051, 1069 (2003). Therefore, the NPS does not have the discretion to grant a special use permit to DBOC to continue its operations in this designated wilderness area.

The Land Presently Used By DBOC Has Been Designated By Congress As “Potential Wilderness”- A Status That Prohibits The NPS From Issuing A Special Use Permit To Allow DBOC To Continue Operations

The existence of an RUO is not the same as the granting of a permit for commercial use. The first is a reservation of rights by the grantor, and was a pre-existing use at the time of the original designation. That use had an agreed-upon expiration date, which is the reason that the area was called “potential wilderness.” A special use permit is not the extension of a preexisting use, but the continuation of a commercial use in an area that was intended to become wilderness.

The “Potential Wilderness” Designation Requires Removal of Nonconforming Uses

The land and waters on which DBOC operates have been designated by statute as wilderness. Public Law No. 94-544, section 1, states as follows:

[T]he following lands within the Point Reyes National Seashore are hereby *designated as wilderness*, and shall be administered by the Secretary of the Interior in accordance with the applicable provisions of the Wilderness Act: those lands comprising twenty-five thousand three hundred and seventy acres, and potential wilderness additions comprising eight thousand and three acres, depicted on a map entitled “Wilderness Plan, Point Reyes National Seashore,” . . . to be known as the Point Reyes Wilderness.

Pub. L. No. 94-544, § 1, 90 Stat. 2515 (Oct. 18, 1976) (emphasis added). Within the designation of “wilderness” is the subdesignation of “potential wilderness.” The term “potential wilderness” is not defined by statute. The term was aptly explained, however, by Gary Everhardt, Director of the NPS, at a hearing on wilderness designations. Mr. Everhardt explained that the NPS’ wilderness recommendations contained areas termed “potential wilderness” because they involve “lands [that] are presently unqualified but will *within a determinable time* qualify [for full wilderness designation], [and] a special provision is included in the legislative proposal giving the Secretary of the Interior the authority to designate the land as wilderness when he determines it qualifies.” Hearing Before The Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs, February 5 and 9, Mar. 2, 1976, at 18 (emphasis added) (Exhibit 6). Drakes Estero exemplifies this understanding of “potential wilderness” because the nonconforming use that existed at the time the area was designated wilderness—the oyster farm operation—was scheduled to cease “within a determinable time” *i.e.*, when the RUO expired in 2012.

The legislative history of the wilderness designation at PRNS further illustrates Congress’ intent that, by designating potential wilderness additions as wilderness, it was requiring removal of non-conforming uses. The House Committee report on H.R. 8002 (which became the Point Reyes Wilderness Act) demonstrates Congress’ intent that potential wilderness areas in PRNS be treated as wilderness, and that non-conforming uses steadily be removed:

As is well established, it is the intention that those lands and waters designed as potential wilderness additions will be essentially managed as wilderness, to the extent possible, with efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status.

H.R. Rep. No. 94-1680, at 3 (1976) (Exhibit 5).

Similarly, the Senate Committee Report on H.R. 13160 (enacted as Public Law No. 94-567), designating certain lands within the NPS as wilderness, explains:

National Park Service wilderness proposals have embodied the concept of “potential wilderness addition” as a category of lands which are essentially of wilderness character, but retain sufficient non-conforming structures, activities, uses or private rights so as to preclude immediate wilderness classification. It is intended that such lands will automatically be designated as wilderness by the Secretary by publication of notice to that effect in the Federal Register when the non-conforming structures, activities, uses or private rights are terminated.

Senate Report No. 94-1357 at 3 (Sept. 29, 1976) (Exhibit 3). The Senate Committee Report further confirms Congress’ intent that the 8,003 acres of potential wilderness in PRNS will “automatically gain wilderness status when the Federal government gains full title to these lands, and when certain non-conforming uses and/or structures are eliminated.” *Id.* at 7.

By designating the 8,003 acres of PRNS as “potential wilderness additions” to be administered as wilderness under the Wilderness Act, Congress indicated that the potential wilderness areas were to become full wilderness upon the anticipated cessation of all uses inconsistent with the wilderness designation. Congress further provided a mechanism by which potential wilderness would become wilderness without the need for further Congressional designation:

All lands which represent potential wilderness additions, upon publication in the Federal Register of a notice by the Secretary of the Interior that all uses thereon prohibited by the Wilderness Act have ceased, shall thereby be designated wilderness.

Pub. L. No. 94-567, § 3.

When Congress determined that Drakes Estero should be designated as wilderness and specifically classified it as potential wilderness, Congress clearly intended that the NPS eliminate any temporary, nonconforming uses so that the designated area would reach full wilderness status. In light of the clear statutory language and legislative history, it would be contrary to Congressional intent to permit oyster operations in the Estero after the RUO expires.

NPS May Not Issue A Special Use Permit For Continuing DBOC Operations

NPS may issue “special use” permits for certain types of commercial operations within wilderness areas. DBOC is not a use for which NPS issues permits and DBOC is not eligible to receive such a permit.

The NPS is authorized to issue special use permits for “commercial services” pursuant to the Wilderness Act to the extent “necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.” 16 U.S.C. 1133(d)(5); *see also High Sierra Hikers Ass’n*, 390 F.3d 639 (“A special use permit is the legal instrument by which the Forest Service authorizes commercial services.”). Moreover, special use permits for commercial services have been granted by the administering agency when specifically authorized in the Wilderness Act or subsequent amendments. *See, e.g., Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1121-22 (8th Cir. 1999) (upholding Forest Service’s authority to grant special use permit to commercial towboats towing camping gear, boats, supplies and campers, where the Wilderness Act directed the Secretary of Agriculture to develop and implement quotas for use of motorboats). There is no legal precedent for granting a special use permit to a commercial enterprise that is not necessary for realizing the recreational or other wilderness purposes of the area, where specific provisions for doing so do not exist in the Wilderness Act. *See, e.g., The Wilderness Society v. United States Fish & Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003) (holding that Congress in the Wilderness Act “spoke clearly” to prohibit commercial enterprise in designated wilderness areas). Here, DBOC utilizes structures, including processing facilities and oyster racks. DBOC also uses motorized equipment to harvest oysters and clams. DBOC is furthermore a commercial enterprise operating in a designated wilderness area. Therefore, the NPS does not have the authority to grant DBOC a special use permit.

Conclusion

The NPS is mandated by the 1964 Wilderness Act and the 1976 Point Reyes Wilderness Act to convert potential wilderness to wilderness status as soon as the nonconforming use can be eliminated. The RUO allows DBOC to operate its commercial enterprise, but expires in 2012. Upon expiration of the RUO, there is no legal basis for permitting DBOC to continue its operations.