

The Case for Wilderness in Drake's Estero

Where else but in West Marin would a community newspaper print legal opinions prepared by its readers about a local controversy? But there you have it in a recent letter to the West Marin Citizen concerning the future of Drake's Bay Oyster Company. Because our community is intelligent, educated and passionately engaged on this issue, we offer the following analysis as a response.

The Park Service cannot issue a permit for DBOC to remain after the expiration of its Reservation of Use and Occupancy without directly violating the Wilderness Act and Park Service regulations. Both the statute and the regulations prohibit commercial enterprises such as mariculture in designated wilderness. *16 USC 1132, Sec. 4(c), 2006 NPS Management Policies Section 6.4.4*. The renewal clause in the Reservation of Use and Occupancy prohibits the issuance of a permit if doing so would violate federal law, which it would.

For the past 32-plus years, the oyster business has operated as a non-conforming use within a federally designated "potential wilderness." But Congress and the Park Service policies both impose a requirement that non-conforming uses be phased out so that "potential wilderness" can be certified as wilderness. *H. R Report No. 94-1680 (1976); Senate Report No. 94-1357 (1976), Hearing Before the Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs, Feb. 5, 9, March 2, 1976 at 18, 306; 2006 NPS Management Policies 6.2.2.1, 6.3.1, 6.3.5*. On February 26, 2004, the Department of Interior issued a legal opinion on the oyster issue in Drake's Estero which instructed the Seashore that it is under an obligation "to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status."

Oystering proponents overlook these fundamental tenets and instead contend that certain rights held by the State of California-- the public right to fish and mineral rights -- constitute non-conforming uses which will forever prevent the transition of Drake's Estero to wilderness even if the oystering is discontinued. This is incorrect. Recreational fishing is not prohibited by the Wilderness Act and is therefore not a non-conforming use. Beyond the Wilderness Act itself, the Rules and Regulations for Point Reyes National Seashore say that fishing is allowed anywhere in the Park, subject to state regulations.

The state's ownership of mineral rights is also not a non-conforming use. As a general matter, designated wilderness areas often include outstanding mineral interests. But many of these claims are not viable and will never present any actual conflict with wilderness purposes or uses. Moreover, the 1964 Wilderness Act specifically addressed the question of mineral rights, directing managing agencies to develop regulations by 1984 to assure that mining activities were harmonized with wilderness restrictions as much as possible. *16 USC 1132, Sec. d(3); See also 43 USC 1782(c)* (extending provision to all agencies managing wilderness). This provision and others would not have been included if Congress believed that private or state ownership of mineral rights were categorically inconsistent with wilderness designation.

After a full debate on the Point Reyes Wilderness Act, Congress rejected the contention made the Department of the Interior that Drake's Estero was unsuitable for wilderness designation because of the outstanding mineral estate. *Senate Report No. 94-1357 (1976) at 17-18; Hearing Before the Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs, Feb. 5, 9, March 2, 1976 at 310, 319-20*. Instead, it sided with a large coalition of state legislators and environmental groups in Marin which opposed this view on mineral rights and advocated for a larger wilderness area

that would include Drake's Estero. *Hearing Before the Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs, Feb. 5, 9, March 2, 1976 at 328, 356-58.* In its February 26, 2004 opinion, the Department of Interior acknowledged that the position it had taken in 1976 regarding mineral rights was "not only inaccurate but overridden by the Congressional action."

Moreover, there is no actual exercise of the state's mineral rights that might interfere with wilderness purposes and unlikely ever to be any. The statute defining the mineral rights held by the state provides that "no well or drilling operations of any kind shall be conducted upon the surface of such lands." *Ca. Statutes of 1965, Ch. 983, Sec. 2.* Additionally, a state statute creating the California Coastal Sanctuary bars state agencies – absent a national emergency—from issuing any oil and gas leases within coastal waters under the state's jurisdiction. *Public Resources Code 6240.* According to the State Lands Commission, the statute's reference to "state waters" applies to the Estero regardless of the federal ownership (Pers. Comm.).

Accordingly, the only non-conforming use in the Estero is the mariculture enterprise.

A little background is needed to understand why the oyster company's state permit to continue oystering after 2012 does not override federal law or the Reservation. The State Department of Fish and Game (DFG) issued oystering permits, called water bottom allotments, to the Johnson Oyster Company (JOC) for decades. Even after the state conveyed the Estero to the Park in 1965, it continued to do so, renewing the allotment as recently as 2004. But in the 2004 legal opinion cited above, the Department of Interior suggested that the DFG's action of issuing allotments was inappropriate, given the federal ownership of the tidelands and submerged lands in the Estero. Subsequently, the DFG also reviewed the jurisdictional issue and acknowledged, in a letter dated May 15, 2007, that the Park Service rather than the state has primary management authority over the Estero and the oyster operation.

Jurisdictional problems aside, the allotment renewal was made contingent upon the operator's compliance with the Reservation of Use and Occupancy. In the absence of a new permit issued by the Park Service, then, the water bottom allotment will expire at the same time as the Reservation of Use and Occupancy. Accordingly, the oyster company's water bottom allotment does not confer a right to occupy the Estero after the Reservation expires.

Finally, the Park has not changed its position on the mariculture operation in recent years. The 1980 General Management Plan (p. 12) correctly states that the oyster farm "is under a reservation of possession" and has a DFG permit for oyster culture. The fact that it did not address the operation's long term future is not surprising given that there were 32 years remaining on the Reservation of Use and Occupancy. Any ambiguity in a 1998 Environmental Assessment is readily explained by the fact that it preceded the legal clarification subsequently provided by both the Department of the Interior and the DFG.

Nor have the attitudes within the environmental community shifted. During the 1976 hearings on the Pt. Reyes Wilderness Act, wilderness advocates-- including State Senator Peter Behr, Assemblymen Michael Wornum and John Burton, the Wilderness Society, the Golden Gate National Recreation Citizens Advisory Committee and Jerry Friedman, representing EAC, the Environmental Forum, Marin Conservation League, the Inverness Association and the Tomales Bay Association—all wanted the Estero included in designated wilderness while expressing a preference to have the JOC continue as a non-conforming use. *Hearing Before the Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs, Feb. 5, 9, March 2, 1976 at 264-73, 331, 354-63.* And so it has for the last 32

years. None argued that the mariculture should continue beyond the expiration of the Reservation of Use and Occupancy. Indeed, if that had been the objective, these parties would not have supported a wilderness designation for the Estero.

The bottom line is that the mandates of the Wilderness Act cannot be reconciled with a continuation of the oyster business beyond November, 2012. To weaken the Act for the sake of a private business could have disastrous consequences for other designated wilderness areas around the country, potential or otherwise, not to mention lands protected in other ways.

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