

Federal Lands Update

News and information for federal concessioners, permittees and land users

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ANTI-FEE GROUPS FILE LAWSUIT TO REMOVE FOREST SERVICE CONCESSIONERS

A lawsuit was recently filed in federal court seeking to remove concessioners at certain Forest Service areas. The lawsuit, filed by parties who oppose user fees on public lands, alleges the permits at issue are illegal because they allow concessioners to charge fees to individuals who visit or park in these areas but who do not actually use any of the other improvements or services at the sites.

The law at issue, the Federal Lands Recreation Enhancement Act (FLREA), states that fees may be charged to enter areas that contain certain amenities, but not solely for parking or for traveling through an area that has those amenities. The lawsuit alleges that no fees can be charged if a visitor visits a developed area but does not actually use any of those items other than parking.

COURT DISMISSES CONCESSIONER'S LAWSUIT TO REQUIRE ARBITRATION

After waiting for nearly three years for payment of its possessory interest value from the concessioner who succeeded its operations at Lake Mead National Recreation Area, an incumbent concessioner brought a lawsuit against both NPS and the successor concessioner seeking to force an arbitration of the value of the possessory interest owed to the incumbent. The parties had spent one year attempting to negotiate the possessory interest value but were unable to reach an agreement. The concessioner then took action to initiate arbitration proceedings. However, the successor concessioner did not move forward with the arbitration, asserting that NPS was causing it to delay the proceeding. After spending another year pursuing arbitration efforts, the incumbent concessioner sought judicial assistance through a lawsuit.

In the lawsuit, the Court determined that it did not have jurisdiction to order NPS to stop interfering with the arbitration because the contract did not require NPS to arbitrate, but in fact required the incumbent to arbitrate with the concessioner who took over operations. NPS argued that the incumbent's only relief against NPS was to pursue a monetary claim in a different court. The Court also concluded that the successor concessioner could not be ordered to arbitrate with the incumbent because the successor had no contractual relationship with the incumbent, asserting that both concessioners' contracts were with NPS, not with each other. The successor also alleged that any delays were due to NPS's insistence that the successor use NPS's appraisal in the arbitration which has not been completed.

COURT IMPLEMENTS NEW POLICY ALLOWING USER GROUPS TO INTERVENE IN LAWSUITS BROUGHT BY ENVIRONMENTAL GROUPS

A federal court allowed groups interested in recreational snowmobile use to intervene in a lawsuit brought by environmental organizations challenging a

program that groomed and maintained snowmobile trails. The court noted that, until recently, private groups could not intervene as a matter of right with regard

to the merits of any lawsuits which alleged a violation of the National Environmental Policy Act (NEPA) based on the reasoning that NEPA was not intended to protect the harm that they incurred. The prior rule, known as the “federal defendants rule,” was based on the view that only government entities were the proper parties to defend against NEPA claims.

However, noting that the Ninth Circuit has overturned the federal defendants rule, the court allowed timely intervention where it involved a protectable interest of the party that could be harmed by the ruling in the case and the government may not adequately protect the party’s interest. In the case at issue, the court noted that the party claimed that the government was not sufficiently advocating the party’s interests in negotiations related to resolving the lawsuit.

**NPS AMENDS ITS CONTRACT WITH CONSULTANT
WHICH WAS INVOLVED IN PREPARING PROPOSALS FOR PRIVATE PARTIES**

The National Park Service recently amended its contract with an outside firm hired to assist NPS in preparing concession prospectuses and in conducting environmental audits of concessioners after NPS discovered that an employee of the firm had assisted a private party in preparing a proposal for an NPS concession contract. NPS determined the employee had used knowledge of NPS’s prospectus development process to give the private party a competitive edge that other offerors did not possess. NPS also concluded that, while the employee had sought consent for her involvement, the consent was provided by an individual also working under a contract with NPS and was given without full knowledge of the situation or its implications.

After learning of the violation, NPS informed the firm of the specific provisions of the contract which had been violated, communicated with it in an effort to make sure that it was clear that it could not be involved in preparing proposals for NPS concession contracts, and amended the firm’s contract in an effort to provide assurances that the violations would not happen again.

**NPS CONTINUES TO INCLUDE CLAUSE RETAINING ANY AMOUNTS LEFT IN A CONCESSIONER’S REPAIR AND
MAINTENANCE FUND AFTER PREVIOUSLY WITHDRAWING THAT CLAUSE PURSUANT TO A PROTEST**

NPS continues to insert into concession contract prospectuses a new clause which would entitle NPS to keep any remaining money in a concessioner’s repair and maintenance fund, even though NPS agreed to withdraw that clause in a prior prospectus when a concessioner asserted that it was illegal. The prior standard contract clause stated that a concessioner retains any balance left in its repair fund at the end of the contract. NPS explained that the repair fund was essentially a forced savings account to ensure that the concessioner retained sufficient revenues to take care of any needed repair and maintenance. In an apparent change of position, NPS revised its standard contract clause with no public input, to allow NPS to retain any balance in the fund as an additional franchise fee payment.

However, a concessioner filed a protest at the Government Accountability Office alleging that the new revised clause violated the law. In response to the legal challenge, NPS voluntarily withdrew that clause from the draft contract in that situation. Nonetheless, NPS is continuing to insert its new revised clause in other prospectuses.

Notice:

If you would like to receive your copy of the Federal Lands Update by **email**, please send an email to kevin@gardenlawfirm.com and in the subject line type “Please add me to the newsletter.”

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.