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IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF THE SOLICITOR

San Francisco Field Office  
1111 Jackson Street, Suite 735  
Oakland, California 94607

February 26, 2004

To: Superintendent  
Point Reyes National Seashore

From: Field Solicitor  
San Francisco Field Office

Re: Point Reyes Wilderness Act

As requested, this memorandum opinion reviews the Point Reyes wilderness situation as it related to the Johnson Oyster Company 40-year Reservation of Use and Occupancy which expires in 2011, or might be terminated sooner for cause or other processes. The Wilderness Act of 1964, and the Point Reyes Wilderness Act of 1976, provide the guidance for implementation of wilderness within the Seashore and are the basis for NPS's obligations to manage the subject land and waters toward conversion of the potential wilderness areas to wilderness status.

In conjunction with the Seashore authorization Act of 1962, the State of California, by 1965 legislation (copy attached), conveyed to the United States all of the right, title and interest of the State in lands one-quarter mile seaward of the mean high tide. More precisely the State granted "all the tide and submerged lands or other lands beneath navigable waters situated within the boundaries of the Point Reyes National Seashore . . ." to the United States. Excepted from this grant and reserved to the State were the "right to fish upon, and all oil, gas and other hydrocarbons in the lands . . . together with the right to explore or prospect . . ." within the tidal and submerged lands. However, these reserved rights were not to be "exercised in such manner as to cause . . . unnecessary pollution of the coastal waters", and no "well or drilling operations of any kind shall be conducted upon the surface of such lands."

On October 18, 1976, the Point Reyes Wilderness Act designated 25,370 acres as wilderness, and 8003 acres as potential wilderness. Public Law 94-544, Oct. 18, 1976. The area designated as potential wilderness (2811 acres) for area 2 of three areas

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included the waters of the Drakes Estero and the adjoining inter-tidal land and upon which Johnson Oyster Farm operates a commercial oyster business.<sup>1</sup> (map attached)

This Congressional designation of the wilderness and potential wilderness (see the House and Senate discussions of the legislation in the Congressional Record -copy attached) was made notwithstanding a September 8, 1976 letter written by John Kyl, Assistant Secretary of the Interior, to James A. Haley, Chairman of the Committee on Interior and Insular Affairs wherein he stated the Department's position on the Point Reyes Wilderness Act. While DOI was largely supportive of the Act, Mr. Kyl's letter said that the Department did not recommend the inclusion of the tidelands extending one-quarter mile offshore within the boundaries of Point Reyes, as granted by the State of California as potential wilderness. According to the Kyl's letter, the State's retention of mineral and fishing rights rendered this area "inconsistent with wilderness." This letter is the only record in the legislative history that raises this point in the area's wilderness and potential wilderness designation. After review of the 1965 State Act, the Wilderness Act, Point Reyes Wilderness Act, case law and present day NPS Directors' orders and Management Policies, it is the view of this office that the remarks in the Kyl letter are not only inaccurate but overridden by the Congressional action, as explained below.

The 1965 State Act is very limited in its two reservations of rights, i.e., public right to fish and severely restricted mineral exploration access, i.e., no surface disturbance of any kind. Both reservations would not conflict with the Secretary converting the potential water area and shore land wilderness acres into designated wilderness. Further, notwithstanding the Departments' letter, the Congress ultimately designated 25,370 wilderness and 8000 potential wilderness acres which exceeded the acreage recommended by the Administration. This reflects that Congress did not heed Mr. Kyl's recommendation and conclusions and enacted its preferred wilderness act.

Addressing the potential wilderness lands and water, the House Report 94-1680, accompanying the eventually enacted Bill (HR 8002) states that it was its intent that there be "efforts to steadily continue to remove all obstacles to the eventual conversion of these lands and waters to wilderness status." (copy attached) The designations are implemented by the Park Service's 2001 Management Policies on wilderness which state that "[I]n the process of determining suitability, lands will not be excluded solely because of existing rights or privileges (e.g., mineral exploration and development, *commercial*

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1. It is noted that the State continues to issue to Johnson Oyster Company commercial allotments in Drakes Estero which seem to be in conflict with the 1965 State legislative grant and 1976 Congressional mandate to convert the bays of the Estero into wilderness status. On the other hand, the continued public fishing in the Estero is consistent with the State legislative grant and the conversion to wilderness status.

Further, since the United States owns the tide and submerged lands in Drakes Estero, it clearly follows that permission of NPS is appropriate for commercial activities taking place on those granted lands.

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operations...")<sup>2</sup> Further, the Park Service's Management Policies clearly state that the Park Service must make decisions regarding the management of potential wilderness even though some activities may temporarily detract from its wilderness character. The Park Service is to manage potential wilderness as wilderness to the extent that existing non-conforming conditions allow. The Park Service is also required to actively seek to remove from potential wilderness the temporary, non-conforming conditions that preclude wilderness designation. 6.3.1. Wilderness Resource Management, General Policy. (selected excerpts attached)

Hence, the Park Service is mandated by the Wilderness Act, the Point Reyes Wilderness Act and its Management Policies to convert potential wilderness, i.e., the Johnson Oyster Company tract and the adjoining Estero, to wilderness status as soon as the non conforming use can be eliminated.<sup>3</sup>



Ralph G. Mihan

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2. See the District Court ruling that past commercial activities, in this case timber harvesting, do not preclude an area's wilderness designation. Minnesota Public Interest Research Group v. Burr, 401 F. Supp. 1276, 1329 (1975)

3. The status of the Johnson Oyster Company will be addressed in a separate document.

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MEMORANDUM

To: Superintendent  
Point Reyes National Seashore

From: Field Solicitor  
San Francisco Field Office

Re: Johnson Oyster Company Property Status

February 27, 2004

As requested, this office has reviewed the case file pertaining to the long standing non compliance by the Johnson Oyster Company (JOC) with the terms and conditions of its Reservation of Use and Occupancy. ("Reservation")

The Johnson Oyster Company is operating on National Park Service fee land in Point Reyes National Seashore under a 1972 Reservation in which Tom Johnson, as a condition of his sale to the Park Service, reserved the right to operate an oyster farm for 40 years until 2012<sup>1</sup>. For the last many years, the JOC has operated in violation of the agreed upon conditions contained in the Reservation. Some of this property and the adjoining Drakes Estero where the oysters are farmed are currently within designated "potential wilderness" Area 2 and will become "wilderness" upon cessation of JOC's operations. As soon as the property and waters are vacated, NPS would proceed with its conversion to wilderness preservation, as required by the Wilderness Act (16 U.S.C. 1131-1136), and more specifically the Point Reyes Wilderness Act of 1976. (PL 94-544, Oct.18, 1976)

"Potential wilderness" is an area which contains "lands that are surrounded by or adjacent to lands with the wilderness designation but that do not themselves qualify for immediate designation due to temporary, non-conforming, or incompatible conditions." National Park Service Management Policies 2001, Section 6.2.2.1. This designation imposes land management obligations on NPS in that the NPS's 2001 Management Policies direct that the Park seek to remove the non-conforming conditions that preclude wilderness designation.

The October 12, 1972, Charles W. Johnson (Tom Johnson's father) sold his five acres of property for \$79,200.00 to the National Park Service. The Reservation

<sup>1</sup> In addition, the National Park Service has issued various special use permits to Mr. Johnson over the years.

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retained for the "Vendor, its successors and assigns, a terminable right to use and occupy the ... property ... together with the improvements situated thereon, for a period of 40 years for the purpose of processing and selling wholesale and retail oysters, seafood and complimentary food items, the interpretation of oyster cultivation to the visiting public, and residential purposes reasonably incidental thereto...."

The right to engage in these activities, however, was made contingent upon the satisfaction of various conditions including maintaining the property in a "safe, sanitary, and sightly condition, open to reasonable inspection by the National Park Service, and meeting all Federal, State, and County health, sanitation, and safety standards applicable to operation of and residence within areas engaged in the processing and retail sale of oysters." In addition, the JOC was made responsible for utility services, including sanitation, not committing waste, and complying with all National Park Service rules and regulations. It also precluded constructing any temporary or permanent structures without the approval of the Park Service.

On December 5, 1995, the Superintendent, wrote JOC a letter describing a variety of violations of the conditions of the Reservation, i.e., operating a septic system, water system and buildings in violation of Marin County health and safety codes (Condition 1 of the Reservation); maintaining numerous buildings and trailers that were not authorized by NPS or permitted by Marin County (Condition 5); and erecting structures that were not authorized by NPS or permitted by Marin County (Condition 7).<sup>2</sup> Six months later, on April 10, 1996, the Superintendent sent JOC another letter explaining his noncompliance with the mobile home conditions imposed on JOC in the Reservation.<sup>3</sup>

To date JOC continues to violate the terms of the Reservation. In his most recent communication with Mr. Johnson on September 17, 2003, the Superintendent wrote a letter detailing JOC's continuous violations of the Reservation. The letter notes that required permits have not been obtained, a sewage system was not installed, and design and environmental compliance reviews have expired. The letter also describes other violations found during a recent inspection including water draining into the Estero from JOC's shucking room; the presence of overflowing oil and gas drums; inadequately contained above-ground fuel storage tanks; the careless presence of fuel containers, engines, refrigerators, and other items; operation of essentially a junkyard; and other health and safety violations.

Because JOC operates with major violations of the terms of the Reservation, well documented noncompliance JOC is clearly in breach of contract, which relieves the National Park Service of its obligation to permit JOC to remain on the property until

<sup>2</sup> The letter also described a variety of violations of the conditions of JOC's special use permits for the use of a water-well drilled on Seashore land, and also for parking facilities.

<sup>3</sup> Despite Mr. Johnson's continuous violation of both the terms of his agreements with the National Park Service and Marin County's regulations, the County sought to find a friendly solution that would avoid forcing Mr. Johnson off the property on which he operated JOC. Thus, on January 9, 1997, Marin County and Mr. Johnson entered into a Stipulated Agreement Between the Parties and Order ("Stipulated Agreement") detailing Mr. Johnson's maintenance obligations and specifying the consequences of noncompliance. Marin County Superior Court #165361.

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2012.<sup>4</sup> Given the requirements of the Reservation and JOC's failure to satisfy them, the Park Service clearly has the authority to terminate the Reservation and to direct JOC to vacate the property on which it operates.

Removal of JOC from the Point Reyes National Seashore property and its oyster farming from the Estero, would allow the Service to begin the conversion of the area to wilderness status, which directive Congress charged the Park Service to accomplish.



Ralph G. Mihan

<sup>4</sup> In contrast to the Reservation, the Marin County Court approved Stipulated Agreement does specify consequences for failure to comply with its conditions. These consequences are cessation and removal of the offending activity.