

Ms. Mary Kendall
Inspector General (Acting)
Department of Interior
1849 C Street, NW
Washington, DC 20240

August 11, 2010

Dear Ms. Kendall:

I am writing on behalf of Public Employees for Environmental Responsibility (PEER) to request that your office conduct an investigation concerning extensive noncompliance with regulations governing protection of natural resources within the care of the National Park Service (NPS) and the actions by high-level agency officials, including the NPS Director, to encourage or condone this noncompliance.

According to documents obtained by PEER, national park managers, contrary to long-standing rules, are allowing Native Americans, even those not affiliated with any federally-recognized Tribes, to gather entire plants, roots or other plant parts from parks. This widespread noncompliance occurs with the apparent support of the NPS Director who has declared the rules to be “wrong” and vowed their repeal.

There has been a general prohibition against removing plants, wildlife and other resources since the very first park system rules in 1936. The current version of the regulation was adopted during the Reagan administration in 1983, following the 1978 American Indian Religious Freedom Act (AIRFA).

The Current Regulation

NPS regulations at 36 CFR Part 2 generally prohibit the take of park resources except as provided for in law. The NPS regulations at 36 CFR 2.1(a), prohibit the “possessing, destroying, injuring, defacing, removing, digging, or disturbing from its natural state:

- (i) Living or dead wildlife or fish, or the parts or products thereof, such as antlers or nests.
- (ii) Plants or their parts or products thereof.
- (iii) Nonfossilized and fossilized paleontological specimens, cultural or archeological resources, or the parts thereof.
- (iv) A mineral resource or cave formation or the parts thereof.”

On June 30, 1983, the Department of the Interior (DOI) made the above rule final in the Federal Register. The Preamble for the Final Rule discussed a few public comments that “...questioned the applicability of this regulation (36 CFR 2.1) to the taking, use or possession of fish, wildlife

or plants for ceremonial or religious purposes.” The Preamble continued” [I]n response to these comments, the service has added a provision to this section (36 CFR 2.1(d)) prohibiting such activities except where authorized by Federal statutory law, treaty rights, or in accordance with sections 2.2 or 2.3. *This section (36 CFR 2.1(d)) is also intended to cover activities undertaken by Native Americans.*” Emphasis added. 48 *Federal Register* (FR) 30255.

The Preamble explained:

“[T]he Service recognizes that the American Indian Religious Freedom Act directs the exercise of discretion to accommodate Native religious practice consistent with statutory management obligations. The NPS intends to provide reasonable access to and use of, park lands and park resources by Native Americans for religious and traditional activities. *However, the National Park Service is limited by law and regulation from authorizing the consumptive use of park resources.*” (Emphasis added) (*Ibid.*)

In the Final Rule, the NPS added subsection (d) to 36 CFR 2.1. Title 36 CFR 2.1(d) states:

“This section (2.1) shall not be construed as authorizing the taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes, except where specifically authorized by Federal statutory law, treaty rights, or in accordance with sections 2.2 or 2.3.”

The Preamble then laid out at length why AIRFA does not provide the specific statutory authorization to satisfy the test of 2.1(d). The Preamble states:

“Paragraph (d) is intended to clarify the Service’s policy on the taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes. Such taking, use or possession is prohibited except where specifically authorized by Federal statutory law, treaty rights, or in accordance with section 2.2 or section 2.3. This section is also intended to cover activities undertaken by Native Americans.

The Service recognizes that the American Indian Religious Freedom Act states that:

[H]enceforth it shall be the policy of the United States to protect and preserve for American Indians, their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rights. 44 U.S.C. 1996.

This statute, however, does not create additional rights or change existing authorities. Rather it directs the exercise of discretion to accommodate Native religious practices consistent with statutory management obligations. Therefore, the Service will provide reasonable access to and use of park lands and park resources by Native Americans for religious and traditional activities. However, the National Park Service is limited **by law**

and regulation from authorizing the consumptive use of park resources.” (Emphasis added) 48 FR 30263-4.

The words of the current regulation are unequivocal and clear. We have also enclosed a formal legal opinion by the Interior Office of the Solicitor underlining that NPS is legally required to protect park resources absent an explicit congressional waiver. As indicated by this Solicitor opinion, the legality or meaning of the current regulation is not in doubt.

Official Noncompliance

A summary of documents obtained by PEER under the Freedom of Information Act is also enclosed. These documents evidence widespread violation of these rules. Some park managers have done so by permits. Other parks such as Zion, Bryce and Pipe Springs entered into Memoranda of Understanding, without public involvement or required environmental reviews, and improperly citing AIRFA as authority, in open contradiction of the NPS’ official rules. Many of other violations are under the table without a paper trail, however. For example in 2009, the acting Superintendent of Yosemite National Park advised a gathering of Indians that they could take any plant they wished and did not need either a permit, or to report what or how much they had taken.

In clear defiance of regulations, the Park Service seems to have adopted a “don’t ask, don’t tell” posture on Indian removal of plants.

This unofficial rejection of the “no-gather” regulation appears to be led by Jon Jarvis, both as a Regional Director and now as NPS Director. At a Tribal Consultation meeting with Cherokee officials on July 16, 2010 concerning the gathering of ramps (a wild onion) in Great Smoky Mountains National Park, Jarvis declared that the regulation is “just wrong” and would be changed soon: “It became a mission of mine to fix this. Now, that I’m director, I’m in a position to fix it.”

On July 29, 2010, PEER e-mailed David Barna, the NPS chief of public affairs, to ask whether Director Jarvis’ comments were reported accurately. This was Mr. Barna’s e-mailed response later that day:

“Yes, the article is accurate.

Director Jarvis has deep experience working in parks where the ties between First Americans and the lands that are now parks have never been broken.

He believes that maintaining those ties can nourish our landscapes while supporting native cultural traditions and providing opportunities for all Americans to better understand the history of America's first peoples.”

Director Jarvis cannot unilaterally change a federal regulation. Moreover, federal officials such as Mr. Jarvis are not entitled to defy rules with which they have personal or ideological disagreement.

Further, any decision made by the Park Service to completely reverse course on protecting plants has direct implications for park wildlife, minerals and cultural artifacts. As with plants, a number of Tribes still claim hunting or other gathering rights on a score of iconic national parks.

Such changes in policy cannot be made through secret decisions of officials. Federal law sets out a process for changing regulations, assuming in this case that NPS can act without explicit act of Congress.

Request for Investigation

Specifically, we are requesting that your office review –

1. The extent of violations of federal regulations prohibiting Indian removal of plants or other resources from national park system units;
2. The role that Mr. Jarvis and other senior NPS officials played in encouraging or condoning such violations; and
3. How NPS can and should act to ensure compliance with these regulations.

Should your office require additional information about this request or desire to examine documents or additional materials, please do not hesitate to contact me.

Cordially,

Jeff Ruch
Executive Director

Enclosures