# Federal Lands Update

News and information for federal concessioners, permittees and land users

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## COURT RULES THAT FOREST SERVICE, TO AVOID LIABILITY, MUST SHOW WHY IT BURNED ADJACENT PRIVATE LAND TO STOP WILDFIRE

**A** federal appeals court recently held that the Forest Service cannot avoid liability for setting backfires on private land unless it was actually necessary to set the fires. The case involved plaintiffs who owned merchantable timber lands surrounded by the Shasta-Trinity National Forest in California. In 2008, a series of wildfires burned in the National Forest. In response, the Forest Service intentionally lit fires on plaintiffs' land to reduce the unburned timber that could fuel the fires. The intentionally lit fires burned timber on 1,782 acres of plaintiffs' property, valued at approximately $6.6 million.

**P**laintiffs brought a claim against the government alleging that its actions constituted an uncompensated taking of private property for public use. The government argued that the doctrine of necessity, which recognizes that in times of peril the government can destroy the property of a few if needed to save the property of many, absolved the government from liability. The lower court agreed with the government, but the appeals court overruled that decision, finding that the lower court was incorrect when it automatically applied the necessity doctrine to any case involving fire control.

**T**he appeals court held that the necessity doctrine only applied if there was imminent danger, an actual emergency and the destructive action was necessary. The appeals court held it was "certainly plausible that the Iron Complex fire did not pose an imminent danger or actual emergency necessitating the destruction of such a sizable portion" of plaintiffs' property. The appeals court also noted that only 2% of the Shasta-Trinity National Forest was burning, and it would be important to find out why the Forest Service thought that the plaintiffs' property had to be sacrificed rather than other parts of the National Forest. The appeals court concluded that "[i]t would be a remarkable thing if the Government is allowed to take a private citizen's property without compensation if it could just as easily solve the problem by taking its own."

## GRAND CANYON CONCESSIONER WITHDRAWS DISTRICT COURT LAWSUIT AGAINST NATIONAL PARK SERVICE AFTER OBTAINING CONTRACT EXTENSION

**A** concessioner at the Grand Canyon recently withdrew a lawsuit it had filed challenging decisions made by the National Park Service (NPS) regarding the succeeding contract for future concession operations. The concessioner, Xanterra Parks & Resorts, Inc., sought an extension of its contract as well as a re-structuring of the prospectus which NPS had issued for the succeeding long-term contract. The concessioner withdrew the lawsuit upon receiving a one-year extension of its existing contract to provide services at the park.

**T**he concessioner also sought to prevent the NPS from awarding a smaller concession contract to another operator at the Grand Canyon, Delaware North Companies, asserting that the smaller contract would preclude fair competition for the contract that would succeed Xanterra's existing contract.

**W**hile the lawsuit was pending, NPS withdrew its pending prospectus, the third one it had issued, due to a continued lack of interested offerors. NPS then solicited submissions from parties interested in operating under a temporary contract until NPS could issue a new prospectus for a long term contract, and reportedly received interest from three companies. However, to settle the lawsuit, NPS granted Xanterra an extension of

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its existing contract. Both parties agreed to the dismissal of the lawsuit after they reached their agreement. Because the lawsuit was dismissed with prejudice, Xanterra cannot bring a new lawsuit raising the same issues.

**T**he lawsuit was unusual because it challenged NPS's concession prospectus in a federal district court in Colorado rather than the Court of Federal Claims located in Washington, DC. Based on recent decisions by the Court of Federal Claims concluding that NPS concession contracts are not procurements, the ability of concessioners to bring challenges related to NPS concession prospectuses at their local federal district court appears to be viable.

## COURT UPHOLDS FOREST SERVICE APPROVAL OF SPECIAL USE PERMIT FOR WIND FARM

**A** federal court recently upheld a Forest Service decision to issue a special use permit for the construction of a wind farm in the Green Mountain National Forest in the face of a challenge by a local environmental group. Among other arguments, the court rejected the plaintiffs' assertions that the scope of the Final Environmental Impact Statement (FEIS) relied on for the decision was improperly narrowed to only a consideration of the wind farm being located at the specific site at issue. The court found that it made sense for the Forest Service to consider only that location because the proposal received by the Forest Service was for a wind farm at that specific location. The court also upheld the Forest Service's refusal to consider locating the wind farm on private land based on that being "beyond the scope" of the FEIS.

**I**n addition, the court upheld the Forest Service's decision not to choose the alternative with the least environmental impacts. The Forest Service had found that its selected alternative would "provide more robust beneficial impacts to address climate change issues," which was the goal of the project. The court held that the National Environmental Policy Act (NEPA) does not require an agency to select the environmentally preferred alternative, only that it consider the environmental consequences of its actions.

## NPS NOT IMMUNE FROM LIABILITY FOR FAILING TO WARN OF HAZARD IT CREATED

**A** court recently held that the NPS was not immune from liability for failing to warn visitors of a hazard it had created. The case was brought by plaintiffs whose young daughter had fallen into a 12 foot deep hole that had formed underneath the snow near the visitor center at Mount Rainier National Park and suffered serious injury. NPS had installed a transformer near the visitor center building and then deposited snow from its road-plowing operations on the transformer. The heat from the transformer melted the snow immediately above it, creating a large cavity with a thin roof. NPS was aware of the danger posed by the cavity, but had not placed any signs warning visitors about it. The plaintiffs' daughter was wandering on the snow near the visitor center, fell through the thin ceiling and landed on a concrete pad.

**I**n response to the lawsuit, the government claimed that it was not liable pursuant to the discretionary function exemption to the Federal Tort Claims Act. The discretionary function exemption protects the government from legal liability related to decisions grounded in social, economic or political policy. The court held that, while NPS may have been immune for actions related to general decisions on when and where to place warning signs in the park, NPS's decision not to place warning signs on a known hazard was not entitled to protection. In rejecting NPS's argument, the court concluded that "[w]here, as here, warning against a hazard known to and created by the NPS would not implicate concerns for access, visitor enjoyment, or environmental preservation, the only policy the NPS must consider is one it appears to have ignored: visitor safety."

## COURT FINDS THAT FEDERAL LAW PROHIBITS STATE FROM IMPOSING TAX ON RAFTING ACTIVITIES

**A** state court invalidated a state tax imposed on canoe and rafting activities on the Ocoee River because a federal statute barred such taxes. The federal statute prohibited taxes on any passengers or crew of watercraft by states if the watercraft was operating on navigable waters unless certain criteria were met, such as the tax was for a service provided. The state attempted to impose a tax on whitewater rafters as a privilege tax, and admitted that the tax was not for any service provided. The court held that the federal tax preempted and thereby forbid any such state tax.

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