

Congress authorized the establishment of Padre Island National Seashore ("PAIS") in the Act of September 28, 1962, Pub. L. No. 87-712, 76 Stat. 650, codified as amended at 16 U.S.C.A. §§ 459d through 459d-7 (West 1993). The express purpose of establishing PAIS was "to save and preserve, for purposes of public recreation, benefit, and inspiration, a portion of the diminishing seashore of the United States that remains undeveloped. ..." 16 U.S.C. § 459d.

PAIS's enabling legislation authorized the Secretary of the Interior to acquire the land and waters within PAIS's authorized boundaries, 16 U.S.C.A. at § 459d-1, but directed him (1) to permit a reservation of oil, gas, and other minerals, along with certain rights to the occupation and use of the surface, by grantors of land and waters to the United States and (2) to exclude from any federal acquisition certain existing rights reasonably necessary for mineral development. Id. at § 459d-3. The legislation also authorized the Secretary of the Interior to "grant additional rights of occupation or use of the surface for the purposes aforesaid upon the terms and under such regulations as may be prescribed by him." Id.

The United States subsequently acquired the surface estate of Padre Island itself through condemnation of private property interests and the surface estate of the submerged lands in the Laguna Madre through purchase or donation from the State of Texas. The United States did not acquire and does not own any interest in the mineral estate within PAIS.

B. Yarborough Pass Facility

The Yarborough Pass Facility occupies less than ten acres of land on Padre Island. Sun Oil Company constructed the facility during the 1950s and 1960s and operated it until 1989. During that time the facility gathered natural gas from several State of Texas oil and gas leases in the Laguna Madre and at least one private oil and gas lease on Padre Island itself.

C. United States' Acquisition of Surface Estate of Lands Where Yarborough Pass Facility Is Located

The United States acquired the surface estate of the land on which the Yarborough Pass Facility is located through the filing of the First Amended Original Complaint in Condemnation with a Declaration of Taking on December 22, 1965. The estate taken by the United States (as described in the complaint and in the Final Judgment with Deficiency, entered by the court on January 2, 1968) excluded "oil and gas minerals, and other minerals that can be removed by similar means." It also expressly reserved to the mineral estate owners certain rights to occupy and use the surface and expressly subjected the United States' estate to other, existing rights of surface use and occupation.

After the United States acquired the surface of Padre Island, Sun continued to operate the facility under the authority of special use permits issued by the NPS and, beginning in 1984, a plan of operations approved by the NPS under the authority of the regulations found at 36 C.F.R. Part 9, Subpart B ("9B regulations"). In 1989 Oryx U.K. Energy Company ("Oryx"), Sun's successor-in-interest, assigned its interest in the facility to Amerox Acquisition Corporation ("Amerox"). After informing the NPS that it was taking over operation of the facility, American Exploration Company (apparently Amerox's sister company) adopted Oryx's plan of operations and posted a \$200,000.00 irrevocable letter of credit in favor of the NPS, security which the NPS continues to hold (but which will expire in May 1998).

Although no gas was processed through the facility after 1989, American exercised control over the site (through maintenance of equipment, structures, and fences and posting of signs) and removed, dismantled, or sold some equipment, including a natural gas compressor, located on the site.

D. Previous Litigation Respecting Yarborough Pass Facility

In an action filed earlier this year in the Northern District of Texas and styled Austral Oil Company Inc. v. National Park Service, No. 3:97-CV-0058-H (N.D. Tex.), Austral Oil Company Inc., the successor corporation to Amerox, and American Exploration Company sought a declaratory judgment that Amerox did not acquire any interest in the Yarborough Pass Facility when it ostensibly purchased the facility from Oryx in 1989. The plaintiffs alleged that Oryx had defrauded Amerox in that transaction. They also challenged the NPS's authority to regulate the facility under the 9B regulations. On October 23, 1997, Senior Judge Barefoot Sanders dismissed the action for lack of subject matter jurisdiction on the ground that the NPS had not yet taken any final agency action that was reviewable by the court. Although the judicial action against the NPS has been dismissed, the abandoned, contaminated site remains in need of remediation and reclamation.

In the course of helping to defend the recent action against the United States, Angela O'Connell, a staff attorney in the ENRD's Environmental Enforcement Section, inspected the Yarborough Pass Facility and offered her assistance in filing counterclaims against the plaintiffs and cross-claims against the nonfederal defendants (Oryx and a sister company). After the action was dismissed, Ms. O'Connell indicated her willingness to assist the NPS in negotiating a pre-enforcement-action settlement with the potentially responsible parties.

II. Legal Authorities

The NPS believes that the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), codified as

amended primarily at 42 U.S.C. §§ 9601-75 (1994), provides a good basis for an enforcement action against all potentially responsible parties for the mercury contamination at the site and that the 9B regulations provide a good basis for an enforcement action against American Exploration Company (or its successor or assign) for remediation of the hydrocarbon contamination and reclamation of the site.

III. Federal Negotiating Team

The NPS is assembling a team with technical expertise in hydrocarbon and mercury contamination to assist in the negotiations. The Santa Fe Field Solicitor's Office will provide legal support.

If you approve Ms. O'Connell's participation in the pre-enforcement-action negotiations, the Santa Fe Field Office will provide her with copies of all relevant documents and legal research support as necessary.

If you have any questions about this letter, please contact Robert Eaton, Attorney-Adviser in the Santa Fe Field Solicitor's Office, at (505) 988-6200. Thank you.

Sincerely,

Tim Vollmann
Regional Solicitor

cc:

Associate Solicitor, Division of Conservation and Wildlife
Field Solicitor, Santa Fe
Regional Director, Intermountain Region, NPS
Attention: Deputy Regional Director, Southwest
Superintendent, Padre Island National Seashore