



File Code: 1570-1/2720

Date: June 5, 2006

Mr. Robert Albright
P.O. Box 147
Yakutat, AK 99689

Dear Mr. Albright:

This is my decision on the appeal you filed under 36 CFR 251 (No. 06-10-00-0007) regarding the award of commercial boat-days on the Situk River offered under a Prospectus and Request to Bid proposal solicited by the Yakutat District Ranger. You requested a second level review of the Yakutat District Ranger's October 24, 2005 decision to allocate 110 boat-days to applicants other than yourself.

Background

The Yakutat Ranger District solicited proposals to provide sport fishing and related services on the Situk River. A total of 110 boat-days in four packages were advertised in the original prospectus, with no more than 50 boat-days to be awarded to any one applicant.

The prospectus was first offered on January 20, 2005. After the Prospectus and Request for Bid was published, an additional 90 boat-days of capacity on the Situk River became available for reallocation. On April 22, 2005, the District Ranger issued a decision allocating a total of 200 boat-days. Her decision was appealed by you and others, and subsequently remanded by the Deputy Forest Supervisor with instructions to issue a new decision for the 110 boat-days advertised in the original prospectus.

On October 24, 2005, the Yakutat District Ranger issued a new decision consistent with the Deputy Forest Supervisor's instructions. You did not receive any boat-days, and you appealed the decision. On March 13, 2006, the Forest Supervisor affirmed the District Ranger's decision regarding the allocation of boat-days to three other applicants. In accordance with 36 CFR 251.78 (c), you filed a second level appeal with the Regional Forester on May 8, 2006.

Discussion

Issue 1. Whether the Forest Service inappropriately withheld information requested in the Freedom of Information Act (FOIA).

As explained in the Forest Supervisor's response to this issue, regulations for implementing the Freedom of Information Act include the opportunity for an appeal of determinations made under that Act (5 U.S.C. 552(a)(6)(A)(i)). On June 1, 2005, you submitted a FOIA request for records related to the applications received by the Yakutat District Ranger in response to the prospectus and the Ranger District's review of those applications. On July 12, 2005, the Regional Forester



responded to your FOIA request, providing the records you requested except that information that fell under the FOIA exemptions for confidential business information [5 U.S.C. 552(b)(4)] and deliberative, pre-decisional agency communications [5 U.S.C. 552(b)(5)]. In this July 12, 2005 response to your FOIA request, the Regional Forester informed you of your right to appeal his decision to deny portions of the records you requested. You did not exercise your right to appeal the FOIA decision.

The District Ranger's prospectus award decision is subject to appeal under 36 CFR 251. I concur with the Forest Supervisor's finding that your disputes regarding information sought under FOIA cannot be resolved through the 36 CFR 251 appeal process.

Issue 2. Whether the prospectus should be rescinded and re-advertised.

Although your appeal does not specifically state why you believe the prospectus should be rescinded and re-advertised, I assume that you do not agree with the award process. I have reviewed the record and the rationale provided by the District Ranger regarding her selection of successful applicants, and find that the process she used is consistent with Forest Service policy and Forest Service Manual (FSM) direction at FSM 2712.1.

Issue 3. Whether the District Ranger's consideration of an assault conviction during the review process was appropriate, and whether it negatively affected your constitutional and civil rights.

You state that the prospectus application asked for information specifically related to compliance with Federal, State, or local fish and game rules, special use permits, regulations, or laws. You believe that the District Ranger's consideration of your previous criminal conviction for assault was improper and violates your civil rights. While I agree that the information requested as part of the prospectus process does relate primarily to compliance with fish and game laws, I also believe that it is within the discretion of the District Ranger to consider other aspects of an applicant's history in order to assure safe and efficient service to the public. The record indicates that all applicants were evaluated equally using publicly available information through a law enforcement database.

Although the application did not specifically ask about compliance with laws other than conservation related laws, you did not disclose your past criminal conviction or take the opportunity to provide any mitigating information. In my opinion, the District Ranger acted within her discretion in verifying and considering the criminal backgrounds, if any, of all the applicants, and her consideration of this information, using a publicly available database, did not violate your civil rights.

Issue 4. Whether the prospectus process is valid and based on existing direction or law.

Forest Service Manual 2712 identifies the prospectus process to be used to solicit applicants for a special use permit and follows direction provided in the regulations at 36 CFR 251, Subpart B. The District Ranger described the process and rationale she used to select successful applicants in her October 24, 2005 letter of decision. The record indicates that the evaluation panel

consisted of persons knowledgeable in special use administration who provided their expertise in the review of the prospectus applications (Responsive Statement, Appendix D). Based on my review of the record, I find that the process followed by the District Ranger in soliciting and reviewing the applications is consistent with Forest Service Manual direction.

Decision

Based on my review of the record provided by the Yakutat District Ranger, I concur with the Forest Supervisor's decision that the process used by the District Ranger to solicit applications for 110 boat-days of use on the Situk River through a Prospectus and Request for Bids process is consistent with direction provided in Forest Service Manual 2712.1 and with instructions provided in the August 25, 2005 letter remanding the earlier prospectus award decision. I affirm the Forest Supervisor's and District Ranger's decision with respect to all of the issues raised in your appeal.

My decision constitutes the final administrative determination of the Department of Agriculture on your appeal [36 CFR 251.87(e)(3)]. It is not subject to further review by the Chief of the Forest Service.

Sincerely,

/s/ W.B. Kessler for
DENNIS E. BSCHOR
Regional Forester

cc: Forrest Cole
Patricia OConnor
Dennis Rogers