



United States
Department of
Agriculture

Forest
Service

Lolo National Forest
(406) 329-3750

Building 24
Fort Missoula
Missoula, MT 59804

File Code: 1570 - 251

Date: March 24, 2000

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

J. Tiffin Hall
Milodragovich, Dale, Steinbrenner & Binney
620 High Park Way
P.O. Box 4947
Missoula, MT 59806-4947

In accordance with the Secretary of Agriculture's appeal regulation at 36 CFR 251.94, this statement is in response to your February 7, 2000, appeal of my decision to implement the new Recreation Residence Fee Schedule.

Texts in bold print are quotes from your appeal letter.

“Appeals the fee increase for our recreation residence special-use permits...The fee increase is appealed for the reason that such increase is unfair, unjust, confiscatory, unconstitutional, and illegal for the following reasons:”

Issue 1: “This proposed rent increase is far in excess of what we had been led to expect...Now, this change in policy will cost many of us tens of thousands of dollars because of diminished value of our investments...”

Response: The rent increase reflects the lot value determined by the appraisal conducted in 1997 as directed by Forest Service policy that became effective June 17, 1994, Federal Register Vol. 59, No. 105, June 2, 1994. (Attachment A) The process for fee determination for recreational residence special use permits follows national direction legislatively mandated by H.R. 2107, The Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1998. Section 343 of the Act legislatively amended Forest Service policy with respect to establishing and assessing base rental fees for recreational residence uses.

Personnel from the Lolo National Forest have demonstrated their commitments to help you know and understand the fee determination process and what to expect through letters and meetings. Their efforts include:

- 1) A letter was sent to you on August 15, 1996 inviting you to a meeting on August 31, 1996 at Seeley Lake Ranger District. (Attachment B) “The purpose of the meeting is to review the upcoming appraisal process and give the permittees a chance to comment in



person to the District Ranger and Forest Appraiser.” The letter included a brief description of the appraisal process steps as outlined in current Forest Service policy and your permit stipulations. We encouraged you to review the designated groupings and typical lots for the appraisal process.

- 2) After the August 31, 1996 meeting, a letter was sent to all permit holders on September 6, 1996 to inform them what transpired at the meeting. (Attachment C) The cabin owners present at the meeting chose the typical lots for two of the groupings. The typical lot for the cabins off the lake was not selected at the meeting, as none of those cabin owners were present. The Forest Service chose the lot and gave you the opportunity to contact Karen Linford if the choice was unacceptable.
- 3) The contract appraiser, Duane R. Price, contacted you at our request in a letter dated May 22, 1997, to invite you to a June 25, 1997 meeting at the Seeley Lake Ranger District. (Attachment D) He invited you to accompany him during his inspection of the typical lots after the meeting.
- 4) At our request, Duane, updated you with a letter dated August 12, 1997. (Attachment E) He let you know the scheduled delivery date of July 31, 1997 for his appraisal to the Forest Service would be delayed until September 8, 1997. He relayed information that the Forest Service appraisers would review the submitted appraisal reports for relevancy and completeness of market data, reasoning and analysis; consistency of procedures with established standards and appraisal instructions; and consistency of value conclusions with the market data and analysis by mid-October, 1997.
- 5) Chuck Wildes, Forest Supervisor, sent you a letter on January 8, 1998 letting you know the appraisals were completed for the Seeley Lake Villa Sites Tract. (Attachment F) In that letter, specific estimated lot values were given at \$19,500 for Lot #47, Block A, and \$140,000 for both Lot #15 in Block B and Lot #13 in Block C. (Attachment G) He notified you of his acceptance of the appraiser’s recommended value and a copy of the appraisal report be made available to each holder upon request. The letter included changes to the recreation residence policy as amended by Section 343, H.R. 2107, the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year, 1998. The policy provided a one-year minimum notification for base rental fee implementation. The policy requires a three-year phase in period for fees exceeding a 100% increase. The Forest Supervisor informed permit holders in Blocks B and C with the exception of Lot #5, Block B, the fee increase would exceed 100% of the projected 1999 calendar year rental fee and would be phased in, in equal installments, over the subsequent three-year period. The letter let you know you had 45 days to contact the Forest Supervisor if you requested a second appraisal of the typical lot.
- 6) Carter Williams, a recreation resident on Seeley Lake, called a meeting on May 25, 1998 to discuss the reappraisal and subsequent permit fee increase for the year 2000. Several cabin owners shared their fees were increasing from \$800 to \$2,500. Kim Zier, Forest Service appraiser, shared the results of an informal survey of 17 cabin owners on Seeley Lake showing the average fair rent to be \$2453. (Attachment H)

The Lolo National Forest employees purposefully scheduled meetings during the summer to communicate with permit holders while they were visiting their cabins.

In addition to Lolo National Forest employee's efforts, the Northern Regional Forester sent a letter, October 2, 1998 to Mr. Randy and Lonnie Warner (Attachment I). The Director of Lands in the Washington Office and the Special Assistant to the President responded to Mr. Robert Haraden. (Attachment J). As shown by the contractor's appraisal, it is clear your investment has increased in value, not diminished in value.

Issue 2: "The proposed rent increase is based upon 5% of the market value of a typical lot as based upon the premise that the leased lots are owned in fee simple. For many obvious reasons, that premise is false and creates a rent which is unreasonable and unfair."

Response: The Federal Register Vol. 59, No. 105, June 2, 1994 "clarifies the policy for determination of annual rental fees." As discussed at the June 25, 1997 Reappraisal Meeting (Attachment K) and in the National Forest Homeowners Appraisal Guidelines (1996) (Attachment L), the difference between fee simple estate and National Forest Service recreation residence is accounted for in the rate the Forest Service applied to the appraised value. Fee simple is defined as a fee without limitation to any class of heirs or restrictions on transfer of ownership. (Webster, 1970) Permit conditions, prohibition of full time occupancy, the seasonal nature of use are factors the Forest Service considered to create a rent that is reasonable and fair. The Forest Service used 5 percent instead of 8 to 12 percent of fair market value which is the factor used by the private market for rental property.

Issue 3: "...and there is no justification for the USFS charging rent upon these improvements...the total cost to the lessees is far in excess of the same amount they would have to pay for equal and better facilities offered commercially (emphasis added). Judged by this standard, the proposed rent increase is further unfair and unreasonable."

Response: The US Forest Service rental fee is based upon the appraised value of bare land not improvements as stated in Forest Service Handbook 2709.11, 30.0 to 33.3, g, as revised by Federal Register Vol. 59, No. 105, June 2, 1994. (Attachment A) It states, "Do not adjust for improvements furnished by holders." The National Forest Homeowner Appraisal Guide, pgs. 9 to 11, (Attachment L) lists eight generally accepted items appraisers consider that impact a value conclusion, which are fair, reasonable and based on bare land values. In Appendix B, pg. B-2, of the Appraisal Guide, under the question, "Will any improvements on the lot be appraised?" The answer is, "No, only the lot itself. Lot value may be enhanced, however by having public (sic) road access and utilities available." In an August 15, 1996 letter (Attachment B) from Chuck Wildes, Forest Supervisor, he re-iterated this in Item #5. "It is important to remember that the National Forest land underlying the typical lot is being appraised and not your improvements." (Attachment B). The Appraisal Review (Attachment G) shows, "i.e. Improvements: None. Improvements provided by the holders were not included.

Recreation residence special use permits are for private use only and are not to compete with commercial facilities. Based on these factors, the proposed rent increase is fair and reasonable.

Issue 4 "Some members of the SSFSLHA were not provided copies of the report; they were told they could purchase copies at Kinko's for \$25"

Response: The Forest Supervisor sent a letter dated January 8, 1998 (Attachment F) directing a copy of the appraisal report be made available to each holder upon request. Copies were made

available for review at the Seeley Lake Ranger District, in Seeley Lake, MT, Lolo National Forest Supervisor's Office in Missoula, MT, Helena NF Supervisor's Office in Helena, MT and Lewis and Clark NF Supervisor's Office in Great Falls, MT. If the holder wanted a personal copy to keep, they had the options to copy it or purchase it from Kinko's

Issue 5 “We were not notified that we had 45 days to review the appraisal; we were told we had 45 days to request a second appraisal. This represents a significant departure from the Federal Register”

Response: The Forest Supervisor sent a letter dated January 8, 1998 (Attachment F) which stated, “If you do not agree with this appraised value, you have 45 days from the date of this letter to contact me, in writing, and request a second appraisal of the typical lot.” This gave you “45 days to review the appraisal” and “provide an opportunity for affected holders to obtain, at their expense, an appraisal report from an appraiser holding at least the same or similar qualifications as the one selected by the Forest Service.” Federal Register Vol. 59, No. 105, June 2, 1994. FSH 2709.11, 33.32, 2. and 3.(Attachment A)

On February 24, 1998, Chuck Wildes, Forest Supervisor sent you a letter (Attachment M) providing an opportunity to negotiate a final date for a second appraisal. He requested the second appraisal should be completed no later than September 30, 1998.

Issue 6 “During the May 25 meeting, Mr. Zier, Lolo National Forest, was asked ... about the policy regarding sleeping cabins. Mr. Zier responded that the fee was intentionally set high in order to discourage sleeping cabins. This is in direct conflict with information provided by Flathead Forest personnel...”

Response: The Forest Service Manual, 2721.23a, gives each National Forest the discretion on administration of sleeping cabins.

Sincerely,

/s/Deborah L. R. Austin
DEBORAH L. R. AUSTIN

Forest Supervisor



United States
Department of
Agriculture

Forest
Service

(406) 758-5200

Flathead National Forest
1935 Third Avenue East
Kalispell, MT 59901

File Code: 1570 – 251
#00-01-00-14
#00-01-00-15

Date: March 23, 2000

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Missoula, MT 59806-4947

Richard Kiehl
5505 Navaho Drive
Pensacola, FL 32507-8519

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Dear Mr. Hall and Mr. Kiehl:

In a February 18, 2000, letter, Reviewing Officer Gary Morrison informed you that your appeals regarding the recreation residence fees on the Flathead and Lolo Forests were being consolidated. In accordance with the Secretary of Agriculture’s appeal regulation at 36 CFR 251.94, this statement responds to your February 7, 2000, appeals of my decision to implement the new Recreation Residence Fee Schedule, and my decision not to grant further time extensions for submission of a second appraisal.

Texts in bold print are quotes from your appeal letters. Unless otherwise specified, the bolded quotes are from the appeal letter submitted by Mr. Hall.

APPEAL ISSUE 1

“I am appealing the increase in the Recreation Residence Special Use permit Annual Rental Fee (Lot 6 Tract 13, Holland Lake), for the following reasons.” (Kiehl)

“Appeals the fee increase for our recreation residence special-use permits...The fee increase is appealed for the reason that such increase is unfair, unjust, confiscatory, unconstitutional, and illegal for the following reasons:”

Contention 1a: **“This proposed rent increase is far in excess of what we had been led to expect through decades of the prior policy of the USFS...Now, this change in policy will cost many of us tens of thousands of dollars because of diminished value of our investments, and will force many of us to give up our leases.”**

Response: The current policy, which directs the authorization and administration of

recreation residence permits, was implemented by federal regulation on June 17, 1994 (Federal Register, Volume 59, Number 105, June 2, 1994). In developing this policy, the Forest Service considered nearly 8,000 comments received from recreation residence permit holders, the National Forest Homeowners Association, and the general public. This policy directs the Forest Service to use “fair market value,” as determined by appraisal, to establish the base annual rental fees for recreation residence lots.

On November 14, 1997, the President signed the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1998 (P.L. 105-83). Section 343 of this Act legislatively amended Forest Service policy with respect to establishing and assessing base rental fees for recreation residence uses by requiring two primary changes in the policy: (1) provides permit holders a minimum of one year between the time when the Forest Service appraisal/billing of a new base rental fee is considered due and payable, and (2) a phase-in, over a three-year period, of that portion of the rental fee increase which exceeds a 100-percent increase (doubling) over the most recently paid rental fee.

On November 29, 1999, the President signed the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 2000 (P.L. 10-113). Section 342 of this Act legislatively amended Forest Service policy by requiring that rental fee increases be “capped” at a maximum increase of \$2,000. Any rental fee increases above the “cap” would be phased-in over a three-year period.

The appraisal conducted in 1997 was conducted in accordance with the direction contained in Federal Register Volume 59, Number 105 (June 2, 1994). The process for fee determination for recreational residence special use permits followed national direction legislatively mandated by P.L. 105-83 (1997) and P.L. 10-113 (1999).

Since 1996, personnel from the Flathead and other National Forests have strived to communicate with you and other permit holders through letters and meetings to clarify the process. The following are a few examples of the efforts that were made by Flathead Forest employees to communicate and inform permit holders of the appraisal and fee determination process:

- On June 6, 1996, Swan Lake District Ranger Charles Harris sent you a letter informing you of the upcoming appraisal and inviting you to an informational meeting.
- On July 30, 1996, a meeting was held between Holland Lake permit holders and Flathead Forest employees to discuss the upcoming re-appraisal. For the benefit of permit holders, the meeting was held at Holland Lake.
- On December 13, 1996, Swan Lake District Ranger Harris sent you a letter and several informational documents to keep you informed of the re-appraisal process.
- On March 25, 1997, Ranger Harris sent you a letter informing you that a contract appraiser had been selected, and inviting you to an appraisal meeting.
- On June 26, 1997, the contract appraiser wrote each permit holder a letter offering to meet to discuss the upcoming appraisal process.

- On February 12, 1998, Flathead Forest Supervisor Richardson sent each permit holder a letter informing them that the appraisal of a typical lot was completed and accepted, and providing information on H.R. 2107, which amended Forest Service policy regarding establishing and assessing base rental fees for recreational residences. Enclosed were copies of the appraisal report and review.
- On April 6, 1998, personnel from the Flathead National Forest, Idaho Panhandle National Forests, Regional Forester's Office, the contract appraiser and members of Senator Baucus' and Congressman Hill's staff met with Mr. Dan Hall (your representative) to address 26 of your concerns.

In addition, the Terms and Conditions of your Special Use permits, which were signed by Mr. Kiehl in 1988 and Mr. Hall in 1991, specify how fees were to be determined. These terms and conditions clearly specify how the 1999 appraisal will be implemented. It points out, *"the fee shall be 5 percent of the appraised fair market fee simple value of the lot for recreational residence use."* You agreed to these terms and conditions when you signed your special use permit. The same is true for all listed members of the Seeley-Swan Forest Service Leaseholders Association (SSFSLHA).

Contention 1b: "The proposed rent increase is based upon 5% of the value of a typical lot as based upon the premise that the leased lots are owned in fee simple. For many obvious reasons, that premise is false and creates a rent which is unreasonable and unfair."

Contention 1c: "...and there is no justification for the USFS charging rent upon these improvements...the total cost to the lessees is far in excess of the same amount they would have to pay for equal and better facilities offered commercially (emphasis added). Judged by this standard, the proposed rent increase is further unfair and unreasonable."

Contention 1d: Fair Market Value as defined by the USFS appraisal is flawed. Privately owned lake lots are not comparable to half acre building sites in the woods, no matter what formula is devised to make them so." (Kiehl)

Response: The Forest Service must comply with direction in Forest Service Handbook 2709.11, Chapter 30, section 31.1 (1a and b). Under the Direct Sales Comparison (1b), the method we now use, 5 percent is the minimum the Forest Service can legally charge, *"...unless a different rate is clearly supported by current market data."* If the Forest Service were to use the Rental Comparison method described in (1a), we would be required to apply actual current market data. According to a June 10, 1998, memo from Region One Lands Use Specialist Schofield, *"Such data would likely support a fee of 8-12 percent of fair market value for recreation residence uses."*

The Forest Service offered ample opportunity for public review and comment prior to publication of the final policy and procedures for recreation residence, including the appraisal process and 5 percent provision, in the Federal Register (Volume 59, Number 105, June 2, 1994). The time for appealing or protesting these policies has long past.

As stated in the National Forest Homeowners Appraisal Guidelines (1996), the difference

between fee simple estate and National Forest Service recreation residence is accounted for in the rate the Forest Service applied to the appraised value. Permit conditions, prohibition of full time occupancy, and the seasonal nature of use are factors we considered to create a rent that is reasonable and fair. The Forest Service used 5 percent instead of 8 to 12 percent of fair market value, which is the factor used by the private market for rental property.

This is further emphasized in a letter to Senator Grassley from Washington Office Acting Director of Lands Jack Craven, dated July 10, 1998. In that letter, which responded to concerns Mr. Robert Hall wrote on your behalf, Director Craven states, *"In accordance with agency policy, the base annual rental fee for recreation residence uses is assessed at 5 percent of the appraised fee simple value of each lot. This is a substantial reduction from annual rental rates that are commonly charged by nonfederal landowners when leasing recreation properties for comparable purposes. Market rent surveys that the Forest Service has conducted find that annual rental rates in the nonfederal market commonly range from 8-12 percent of land value. When the Forest Service developed its recreation residence policy in the 1980's, we elected to use a 5 percent rate to reflect the restrictive nature of the terms and conditions of our special use permit."*

In regards to the appraisal of the typical lot at Holland Lake, a June 26, 1997, letter from contract Real Estate Appraiser Warren Illi to recreational residence special-use permit holders explained the process for appraisal of recreational residence lots on the Flathead National Forest. In that letter, Mr. Illi states that his appraisal includes comparison of his evaluation of typical lots with the sale of similar lots that have sold on the open real estate market. In addition, he states that the Forest Service requested that he inspect all of the lots in the Holland Lake group to ensure that the typical lots were comparable to the other lots. The appraisal report was subsequently reviewed by the Forest Service and accepted as meeting all applicable Forest Service and other federal standards. Regional Forester Bosworth reiterated this determination in a May 8, 1998, letter to Senator Baucus regarding your concerns.

Contention 1e: You contend, "...the appraisal report does not follow FS guidelines in several instances..." You further contend that the appraisal report contained at least one mathematical error that resulted in a 64% adjustment, when the correct calculation should have resulted in a 61% increase.

Response: The appraisal process requires review of the appraisal report by a Forest Service Review Appraiser prior to final acceptance. In his February 12, 1998, letter, Flathead Forest Supervisor Richardson informed you that the appraisal of the Holland Lake Tract had been completed and approved by the Forest Service Review Appraiser.

The math equation in question was further reviewed and found to be correct. This was discussed at the April 10, 1998, meeting at Congressman Hill's Missoula office, where Mr. Dan Hall represented your interests.

In addition, in a May 8, 1998, letter to Senator Baucus, Regional Forester Bosworth states that "We are not aware of any errors in the appraisal nor in our procedures which would have the potential to affect residence lot values and thereby holders' fees."

Contention 1f: You contend that Lolo Forest employee Kim Zier stated, "...the fee (for

sleeping cabins) was set high to discourage sleeping cabins” while Flathead personnel “...stated that such cabins are not allowed. This is an excellent example of conflicting policy administration by Forest Service personnel.”

Response: The Federal Register, Vol. 59, No. 105, June 2, 1994, states, “*Allow no more than one dwelling per lot to be built. In those cases where more than one dwelling (residence/sleeping cabin) currently occupies a single lot, allow the use to continue in accordance with the authorization. However, correct such deficiencies, if built without prior approval, upon transfer of ownership outside of the family (husband, wife and dependent children).*” Thus it is up to individual National Forests to determine what specific conditions exist for each permit where sleeping cabins are an issue.

APPEAL ISSUE 2

“We...appeal the December 20, 1999 decision of (Flathead Forest Supervisor) Cathy Barbouletos refusing the Holland Lake Homeowners the opportunity to submit a second appraisal.

Contention 2a: **“According to the Federal Register, Vol. 59, No. 105, Chapter 30, Section 33.32, ‘Following review and acceptance of the appraisal, notify affected holders of Forest Service acceptance of the report. In the notification that they and other interested parties have 45 days in which to review the appraisal. Upon request, provide copies of the report(s) and supporting documentation pursuant to the Freedom of Information Act.’ Some members (of SSFSLA) were not provided copies of the (appraisal) report; they were told they could purchase copies at Kinko’s for \$25.”**

Response: It is not clear from your appeal letter who informed SSFSLA members that they must pay \$25 for a copy of the appraisal report, or when and how they were informed. Flathead National Forest Supervisor Richardson provided a copy of the appraisal report and review to each Flathead Forest recreational residence permit holders on February 12, 1998.

Contention 2b: **“The 45-day time period is for review of the appraisal and not a time period for requesting a second appraisal; we were told that we had 45 days to request a second appraisal. This represents a significant departure from the Federal Register.”**

Response: The decision letter denying your request for additional time to submit a second appraisal was dated December 20, 1999. A 45-day appeal period for decisions concerning administration of special use permits is provided under 36 CFR 251.88(a)(2). The appeal period ended on February 3, 2000. Your letter of appeal was postmarked February 7, 2000, and, therefore, was not submitted in a timely manner. However, I will address your contentions to explain the rationale for my decision.

It is clear that you were afforded reasonable opportunities to acquire and submit a second appraisal:

- On February 12, 1998, you were notified in a letter from Flathead Forest Supervisor Richardson that the Forest Service had reviewed and accepted the appraisal.

- On February 26, 1998, Mr. Daniel Hall, acting on your behalf, sent a letter to Swan Lake District Ranger Harris asking for an extension of the 45-day time period so you could consider requesting a second appraisal.
- On March 5, 1998, you requested a second appraisal in a letter to Flathead Forest Supervisor Richardson. In his March 13, 1998, reply to you, Supervisor Richardson stated that the Forest would be willing to extend the 45-day timeframe if you still wished to do so, approved your request for a second appraisal, and informed you that *“Timing for the second appraisal is negotiable; however it should be completed by September 30, 1998.”*
- In a letter dated September 9, 1998, you informed Forest Supervisor Richardson that the leaseholders had hired an appraiser to conduct a second appraisal of a typical lot at the Holland Lake Summer Home Tract and hoped to have the report by the first week in October.
- On November 16, 1998, you wrote Supervisor Richardson and stated that you expected to receive the appraisal report by Thanksgiving.
- On February 1, 1999, you again wrote Supervisor Richardson stating that you hoped to provide the appraisal report to the Forest within the next couple weeks.
- On June 25, 1999 you wrote to me stating that you were suing the original appraiser you hired, and were considering hiring another appraiser and asking to extend the timeframe for the second appraisal until September 1999. I answered your letter on July 9, 1999, stating, *“We agree with your request and would appreciate having your report no later than September 15. This should allow the necessary review time prior to the 2000 billings that are mailed in November.”*
- On November 30, 1999, you wrote me again asking if the Forest would be willing to allow you to hire an appraiser and submit a second appraisal next year.

I responded to your request in a December 20, 1999, letter stating that I was unwilling to grant any additional time for completion of your second appraisal.

This concludes my responsive statement to your appeals.

Sincerely,

/s/

CATHY BARBOULETOS
Forest Supervisor