

CONTACT PERSON FOR MORE

INFORMATION: Timothy H. Baker,
Executive Office, (202) 863-1839.

Date issued: December 30, 1986.

Timothy H. Baker,
Secretary.

[FR Doc. 86-29524 Filed 12-30-86; 3:54 p.m.]

BILLING CODE 6820-35-M

POSTAL SERVICE**FEDERAL REGISTER CITATION OF**

PREVIOUS ANNOUNCEMENT: 51 FR 48983,
December 29, 1986.

**PREVIOUSLY ANNOUNCED DATE OF
MEETING:** January 6, 1987.

CHANGE: Addition of the following
agenda item:

3. Officer Compensation.

CONTACT PERSON FOR MORE

INFORMATION: David F. Harris, (202) 268-
4800.

David F. Harris,
Secretary.

[FR Doc. 86-29522 Filed 12-30-86; 2:26 p.m.]

BILLING CODE 7710-12-M

SECURITIES AND EXCHANGE COMMISSION

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meetings during the week of January 5, 1987:

A closed meeting will be held on Tuesday, January 6, 1987, at 2:30 p.m.

The Commissioners, Counsel to the Commissioners, the Secretary of the Commission, and recording secretaries will attend the closed meeting. Certain staff members who are responsible for the calendared matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c) (4), (8), (9)(A) and (10) and 17 CFR 200.402(a) (4), (8), (9)(i) and (10), permit consideration of the scheduled matters at a closed meeting.

Commissioner Grundfest, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the closed meeting scheduled for Tuesday, January 6, 1987, at 2:30 p.m., will be:

- Participation in civil proceeding.
- Settlement of administrative proceedings.
- Institution of injunctive actions.
- Settlement of injunctive actions.
- Institution of administrative proceedings.
- Opinion.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted

or postponed, please contact: Patrick Daugherty at (202) 272-3077.

Jonathan G. Katz,
Secretary.

December 30, 1986.

[FR Doc. 86-29520 Filed 12-30-86; 1:58 pm]

BILLING CODE 8010-01-M

UNITED STATES INSTITUTE OF PEACE**TIMES AND DATES:**

9:00 a.m.-5:00 p.m., Thursday, January 15,
1987

9:00 a.m.-5:00 p.m., Friday, January 16, 1987

PLACE: National Trust for Historic Preservation, 1785 Massachusetts Avenue, NW., Washington, DC 20036.

STATUS: Open (portions may be closed pursuant to subsection (c) of section 552(b) of title 5, United States Code, as provided in subsection 1706(h)(3) of the United States Institute of Peace Act, Pub. L. 98-525).

AGENDA (TENTATIVE):

- Meeting of Board of Directors convened.
- Consideration of minutes of eighth meeting.
- President's report.
- Committee reports.
- Report on presidential search.
- Consideration of grant applications.

CONTACT: Mrs. Olympia Diniak.
Telephone: (202) 789-5700.

Dated: December 29, 1986.

Charles Duryea Smith,
Attorney Adviser, United States Institute of Peace.

[FR Doc. 86-29519 Filed 12-30-86; 11:34 am]

BILLING CODE 3155-01-M

Corrections

Federal Register

Vol. 52, No. 1

Friday, January 2, 1987

This section of the FEDERAL REGISTER contains editorial corrections of previously published Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 611 and 672

[Docket No. 61220-6120]

Groundfish of the Gulf of Alaska

Correction

In proposed rule document 86-27895 beginning on page 44812 in the issue of Friday, December 12, 1986, make the following corrections:

1. On page 44816, in the third column, under **Regulatory Changes**, in the last paragraph, in the first line, "1672.5(a)(1)" should read "672.5(a)(2)".

2. On page 44817, in the first column, in the third complete paragraph, in the eighth line, "specificaction" should read "specific action".

§ 672.7 [Corrected]

On page 44818, in the first column, in amendatory instruction 7, in the second line, "resignating" should read "redesignating".

BILLING CODE 1505-01-D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 611, 672, and 675

[Docket No. 61113-6213]

Foreign Fishing, Groundfish of the Gulf of Alaska, Groundfish of the Bering Sea and Aleutian Islands

Correction

In proposed rule document 86-27077 beginning on page 43397 in the issue of Tuesday, December 2, 1986, make the following corrections:

1. On page 43398, in the first column, in the second complete paragraph, in the first line, "672.20(a)," should read "672.20(a)(2),".

2. On page 43399, in "TABLE 1", in the fifth column heading designated "Reserve", add footnote 1 at the end of "Reserve".

3. On the same page, in the second column, in the first complete paragraph, in the fifth line, "1978" should read "1987".

4. On page 43401, in the second column, in the file line at the end of the document, the FR Doc. number should read "86-27077".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 78P-0173 et al.]

Approved Variances for Laser Light Shows; Availability

Correction

In notice document 86-26990 beginning on page 43473 in the issue of

Tuesday, December 2, 1986, make the following corrections:

On page 43474, the table should be corrected as follows:

1. In the third column, in the third line, "Incorporated" was misspelled.

2. In the same column, in the fourth line, the second word should read "Systems".

3. In the second column, in the entry for "82P-0137 (renewal)", in the second line, "Virginia" was misspelled.

4. In the third column, in the 11th line, "krypton lasers" should read "krypton ion lasers".

5. In the same column, in the 19th line, "heliumneon" should read "helium-neon".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA-060-07-4213-24; CA-13968]

Filing an Airport Lease Application, Serial Number CA-13968, San Bernardino County, CA

Correction

In notice document 86-25129 appearing on page 40356 in the issue of Thursday, November 6, 1986, make the following correction:

In the third column, in the land description for the San Bernardino Meridian, in the fourth line, "Sec. 21" should read "Sec. 29".

BILLING CODE 1505-01-D

1987
January 2, 1987
Part II
Department of
Transportation
Research and Special Programs
Administration
Prince George's County, MD; Code
Section Governing Transportation of
Radioactive Materials; Notice

Friday
January 2, 1987

Part II

Department of Transportation

Research and Special Programs
Administration

Prince George's County, MD; Code
Section Governing Transportation of
Radioactive Materials; Notice

DEPARTMENT OF TRANSPORTATION

Research and Special Programs
Administration[Inconsistency Ruling, No. IR-18; Docket
No. IRA-28]Prince George's County, MD; Code
Section Governing Transportation of
Radioactive MaterialsApplicant: Prince George's County,
MD.County Law Affected: Prince George's
County Code Section 18-187 dated May
13, 1980, governing the shipment and
transportation of radioactive materials
into, within, through, and out of the
County.Applicable Federal Requirements:
Hazardous Materials Transportation
Act (HMTA) (Pub. L. 93-633, 49 U.S.C.
app. 1801 *et seq.*) and the Hazardous
Materials Regulations (HMR) (49 CFR
Parts 170 through 179) issued
thereunder.Modes Affected: Rail and Highway.
Issue Date: January 2, 1987.Ruling: Subsections (b)(2), (c), (d), (e)
and (f) of Prince George's County Code
Section 18-187, are inconsistent with the
HMTA and regulations issued
thereunder and thus are preempted.
Subsections 18-187 (a)(1), (b)(1), (b)(3)-
(7) are consistent. Subsection 18-187
(a)(2) is not a requirement and thus is
not subject to preemption under the
HMTA.**SUMMARY:** This inconsistency ruling is
the opinion of the Office of Hazardous
Materials Transportation (OHMT)
concerning whether Section 18-187 of
the Prince George's County Code is
inconsistent with the HMTA and
regulations issued thereunder and thus
preempted by section 112(a) of the
HMTA. This ruling was applied for
under, and is issued pursuant to, the
procedures set forth at 49 CFR 107.201
through 107.209.**FOR FURTHER INFORMATION CONTACT:**
Edward H. Bonekemper, III, Office of the
Chief Counsel, Research and Special
Programs Administration, Department of
Transportation, Washington, DC 20590
[Tel. (202) 366-4401].

I. Background

A. Chronology

On May 5, 1983, the Government of
Prince George's County, Maryland (the
County) filed an application for an
administrative ruling seeking a
determination as to whether Prince
George's County Code Section 18-187,
restricting the movement of radioactive
materials into, within, through, and out
of the County, is inconsistent with theHMTA or the Hazardous Materials
Regulations (HMR) issued thereunder. In
its application, the County claimed that
certain subsections of the code section
were consistent with HMR, but did not
address the consistency of the remaining
subsections.On October 4, 1984, the Materials
Transportation Bureau (predecessor to
OHMT) published a Notice and
Invitation to Comment [49 FR 39260]. In
response to that invitation, comments
were received from four companies, four
industry associations, and one
individual. All commenters asserted that
the Prince George's County Code
Section was inconsistent with the
HMTA and the regulations issued
thereunder. All were of the opinion that
the code section would delay the
transportation of radioactive materials
and thus be an obstacle to the execution
of the HMTA and the HMR. Several of
the commenters noted that some of the
provisions of the code section provided
the County Executive with broad
discretionary authority as to the
movement of radioactive materials
through the County. Several commenters
also claimed that an intolerable burden
would be imposed on interstate
commerce if the prenotification
requirements of the Code were upheld.
A few of the commenters cited and
relied on previous inconsistency rulings,
especially inconsistency rulings 7
through 15 of November 27, 1984 (49 FR
46632).B. General Authority and Preemption
Under the HMTAThe HMTA at section 112(a) (49 U.S.C.
app. 1811(a)) preempts "... any
requirement, of a State or political
subdivision thereof, which is
inconsistent with any requirement set
forth in [the HMTA], or in a regulation
issued under [the HMTA]." This express
preemption provision makes it evident
that Congress did not intend the HMTA
and its regulations to completely occupy
the field of transportation so as to
preclude any state or local action. The
HMTA preempts only those state and
local requirements that are
"inconsistent."Although advisory in nature,
inconsistency rulings issued by the
Department under 49 CFR Part 107,
Subpart C provide an alternative to
litigation for a determination of the
relationship between Federal
requirements and those of a state or
political subdivision thereof. If a state or
political subdivision requirement is
found to be inconsistent, such a finding
provides the basis for application to the
Secretary of Transportation for a
determination as to whether preemptionwill be waived (49 U.S.C. app. 1811(b);
49 CFR 107.215 through 107.225).Since these proceedings are
conducted pursuant to the HMTA, only
the question of statutory preemption
under the HMTA will be considered. A
Federal court might find a non-Federal
requirement statutorily preempted under
another statute or preempted by the
Commerce Clause of the U.S.
Constitution because of an undue
burden on interstate commerce.
However, the Department of
Transportation does not make such
determinations in the context of an
inconsistency ruling.OHMT has incorporated into its
procedures (49 CFR 107.209(c)) the
following case law criteria for
determining whether a state or local
requirement is consistent:

- (1) Whether compliance with both the non-Federal requirement and the Act or the regulations issued under the Act is possible; and
- (2) The extent to which the non-Federal requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.

The first criterion, commonly called
the "dual compliance" test, concerns
those non-Federal requirements which
are irreconcilable with Federal
requirements; that is, compliance with
the non-Federal requirement causes the
Federal requirement to be violated, or
vice versa. The second criterion, the
"obstacle" test, requires an analysis of
the non-Federal requirement in light of
the requirements of the HMTA and the
HMR, as well as the purposes and
objectives of Congress in enacting the
HMTA and the manner and extent to
which those purposes and objectives
have been carried out through the
OHMT's regulatory program.There is a longstanding Federal-state
relationship in the field of highway
transportation safety which recognizes
the legitimacy of state action taken to
protect persons and property within the
state, even where such action impacts
upon interstate commerce. Despite the
dominant role that Congress intended
for the standards of the Department,
there are certain aspects of hazardous
materials transportation that are not
amenable to exclusive nationwide
regulation. One example is traffic
control. Although the Federal
Government can regulate in order to
establish certain national standards
promoting the safe, smooth flow of
highway traffic, maintaining that flow in
the face of short-term disruptions is
necessarily a predominantly local
responsibility. Another aspect of
hazardous materials transportation that

is not amenable to effective nationwide regulation is the problem of safety hazards which are peculiar to a local area. To the extent that nationwide regulations do not adequately address a uniquely local safety hazard, state or local governments can regulate narrowly for the purpose of eliminating or reducing the hazard. The mere claim of uniqueness, however, is insufficient to insulate a non-Federal requirement from the preemption provisions of the HMTA.

Certain areas of transportation safety do demand a strong, predominant Federal role. In the HMTA's Declaration of Policy (section 102) and in the Senate Commerce Committee language reporting out what became section 112 of the HMTA, Congress indicated a desire for uniform national standards in the field of hazardous materials transportation. Congress inserted the preemption language in section 112(a) "in order to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation" S. Rep. 1192, 93rd Cong., 2d Sess., 37-38 (1974). Through its enactment of the HMTA, Congress gave the Department the authority to promulgate uniform national standards. While HMTA did not totally preclude State or local action in this area, Congress apparently intended, to the extent possible, to make such state or local action unnecessary. The comprehensiveness of the HMR severely restricts the scope of historically permissible State or local activity. The nature, necessity and number of hazardous materials shipments make uniform standards extremely important.

It is important to note that, even when there is an unquestionably unique local safety hazard, a State or local government may not resolve the problem by effectively exporting it to another jurisdiction. (*Kassell v. Consolidated Freightways*, 450 U.S. 662 (1981)). For example, a previous inconsistency ruling dealing with a hazardous materials routing rule issued by the City of Boston (IR-3, 46 FR 18918, March 26, 1981), stated that consistency with the HMTA requires a state or local government to "act through a process that adequately weighs the full consequences of its routing choices and ensures the safety of citizens in other jurisdictions that will be affected by its rules." (46 FR 18922).

II. Prince George's County Code Section 18-187

Subsection (a)(1) of section 18-187 states that the purposes of the code section are "To provide minimum

standards and regulations insuring the safe shipment and transportation of radioactive materials into, within, through, and out of Prince George's County" and "To regulate the transport of hazardous radioactive wastes through Prince George's County." The right of state and local governments to regulate the transportation of hazardous materials through their jurisdictions was recognized in IR-12 (49 FR 46650, November 27, 1984) and IR-15 (49 FR 46660, November 27, 1984) provided the requirements are consistent with the HMTA and the HMR. IR-12 stated:

The HMTA does not preempt all state and local regulations of hazardous materials transportation safety, only those regulations which are inconsistent. Therefore, the mere statement of intent to regulate is not inconsistent with the HMTA. 49 FR 46651.

Section 18-187(a)(1) imposes no obligation to act on any party; therefore, no problem arises under the "dual compliance" test. With regard to the "obstacle" test, the statement of intent does not indicate a role for local government which exceeds that intended by the framers of the HMTA. Therefore, section 18-187(a)(1) is consistent with the HMTA.

In subsection (a)(23) of section 18-187, the County makes four findings regarding the transportation of "hazardous radioactive wastes and other radioactive materials." The following is a summary of their findings:

(A) The increased production of hazardous radioactive materials has led to increased transportation of them and more transportation accidents involving release of radioactivity into the environment.

(B) Although the County does not know the kinds or numbers of hazardous shipments going through its jurisdiction, there is persuasive evidence that the shipments are substantial and will increase in the foreseeable future.

(C) There is no monitoring of many of these shipments by either the Federal Government or the County, and Federal enforcement capabilities are inadequate unless supplemented by State or local action.

(D) Thus, these radioactive materials shipments into, within, through and out of Prince George's County pose a significant threat to the public health and safety and the environment.

Since the County did not submit comments on its application, and the Department does not have information to support them, it is difficult to determine the basis for these findings. No evidence has been presented showing that the threat to Prince George's County residents is any greater

than to residents of adjoining jurisdictions in Maryland, Virginia or the District of Columbia. Although the validity of the findings is not substantiated, because they impose no obligation to act, I find section 18-187(a)(2) does not constitute a "requirement" within the meaning of the HMTA. As in IR-9, (49 FR 46644, November 27, 1984), a State or local action which is not a "requirement" is not subject to preemption under the HMTA. Thus, the issue of inconsistency does not arise.

Subsections (b)(1)-(7) of section 18-187 contain definitions relating to the County's requirements.

IR-5 (47 FR 51991, November 18, 1982), which dealt with definitions of hazard classes in the City of New York Administrative Code is relevant in considering local definitions:

In addition to the fact that the City's differing hazard class definitions present an obstacle to the accomplishment of the general Congressional purpose of promoting uniformity in hazardous materials transportation, those definitions also present an obstacle to the accomplishment of the more specific purpose of achieving the maximum level of compliance with the HMR. The HMR are, in and of themselves, a technical set of regulations which occupy approximately 1,000 pages of the Code of Federal Regulations. . . . For the City to impose additional requirements based on differing hazard class definitions adds another level of complexity to this scheme. . . . Such duplication is a regulatory scheme where the Federal presence is so clearly pervasive can only result in making compliance with the HMR less likely, with an accompanying decrease in overall public safety. 47 FR 51994.

As noted in several prior inconsistency rulings, the Federal role in defining hazard classes is exclusive. (IR-5; IR-6, 48 FR 760 (January 6, 1983); IR-8, 49 FR 46637 (November 27, 1984); IR-12, 49 FR 46650 (November 27, 1984); IR-15, 49 FR 46660 (November 27, 1984); IR-16, 49 FR 20872 (May 20, 1985). Thus, review of (b)(1) through (7) will consider whether these County definitions conflict with the HMR's exclusive hazard classification scheme. In general, definitions of terms other than hazard classes are not requirements in and of themselves. However, an otherwise "consistent appearing" requirement may be rendered inconsistent if it is based on a definition that is inconsistent.

Subsections (b)(1) and (b)(3), respectively, define the terms—"curie" and "millicurie" as follows:

"curie"—an expression of the quantity of radiation in terms of the number of atoms which disintegrate per second; a curie is that quantity of radioactive materials which

decays such that thirty-seven billion atoms disintegrate per second.

"millicurie"—one-thousandth of a curie.

Although these terms are not specifically defined by either the HMTA or the HMR, they are used in the HMR to establish the degree of regulation (if any) to specific forms or amounts of radioactive materials. The definitions of them in section 18-187(b)(1) and (b)(3) are consistent with their usage in the HMR.

The term "large quantity radioactive materials" is defined in section 18-187(b)(2) as "a quantity the aggregate radioactivity of which exceeds that specified in Volume 10 of the Code of Federal Regulations (CFR) Part 71 entitled 'Packaging of Radioactive Material for Transport'; section 71.4(f)." When the County adopted this regulation, the HMR contained a similar definition. However, in a final rule issued on July 1, 1983 (Docket No. HM-169; 48 FR 10218) the term "highway route controlled quantity" was substituted for "large quantity radioactive materials." Therefore, use of the superseded terminology could cause confusion and undermine compliance with the HMTA and the HMR; thus, section 18-187(b)(2) is inconsistent with the HMTA and the HMR.

Subsection (b)(4) of section 18-187 defines "person" as "any individual, partnership, or corporation engaged in the transportation of passengers or property, as common, contract, or private carrier, or freight forwarder." That definition does not use the exact wording that is in the 49 CFR 171.8 definition of "person," but the intent of (b)(4) apparently is to include most individuals or entities engaged in the transportation of hazardous materials; however, it fails to include shippers (other than freight forwarders). Because it thus applies the County's requirements to fewer persons than the HMR, this definition minimizes possible dual compliance or obstacle requirements, and, therefore, is consistent with the HMTA and the HMR.

The definitions of "radioactive" and "radioactive material" in sections 18-187 (b)(5) and (b)(6), respectively, are as follows:

"radioactive"—spontaneously emitting ionizing radiation.

"radioactive material"—any material or combination of materials which spontaneously emits ionizing radiation.

Both definitions have the limitation that "Materials in which the estimated specific activity is not greater than 0.002 microcuries per gram of material and in which the radioactivity is essentially

uniformly distributed are not considered to be radioactive." (The (b)(5) limitation erroneously refers to specific "gravity" instead of specific "activity," but its intent is clear.)

This definition of "radioactive material" uses essentially the same wording that is in 49 U.S.C. app. 1807(b) and 49 CFR 173.403(y). The term "radioactive" is not specifically defined in either the HMTA or the HMR, but its definition in section 18-187(b)(5) is consistent with its usage in the HMTA and the HMR, including its use in the HMTA and HMR definitions of "radioactive material." Thus, section 18-187(b)(5) and (b)(6) are consistent with the HMTA and the HMR.

Finally, the definition of "transport" in section 18-187(b)(7) is different than under the HMTA (49 U.S.C. app. 1802(6)), since it includes only rail and highway transportation. Therefore, shipments of radioactive materials by air and water are excluded under this subsection. The definition's limitation of the County's program to highway and rail minimizes any "dual compliance" problem and presents no obstacle to the accomplishment and execution of the HMTA or the HMR. Although a regulation allowing certain hazardous materials to be carried by motor vehicle but not by other modes of transportation is inconsistent with the HMTA, *South Dakota Dept. of Public Safety ex rel. Melgaard v. Maddenham*, 339 N.W. 2d 786 (S.D. 1983), an otherwise consistent requirement will not be found inconsistent merely because it applies only to certain modes of transportation. Here, section 18-187(b)(7) indicates an intention to regulate highway and rail transportation but does not indicate an intention to bar transport by other modes. Therefore, I find that section 18-187(b)(7) is consistent with the HMTA and the HMR.

In summary, with respect to definitions in the County's rules, therefore, I find that section 18-187(b)(2) is inconsistent with the HMTA and the HMR and thus is preempted, and that the remaining subsections, section 18-187(b)(1), (b)(3), (b)(4), (b)(5), (b)(6), and (b)(7), are consistent with the HMTA and the HMR.

The County's substantive regulations contain an extensive permitting system for the transportation of radioactive materials into, within, through or out of the County. A "Certificate of Emergency Transport" is required for transportation of numerous types of radioactive materials. Specific information must be provided to obtain the Certificate, and the County Executive has discretion to require more information. Conditions for obtaining the Certificate include the

making of several findings by the County Executive and the filing of a bond by the applicant.

The essence of section 18-187 is found in subsection (c)(1), which prohibits the transportation in the County of certain classes of radioactive materials unless the transporter obtains a "Certificate of Emergency Transport" authorizing those materials to be transported into, within, through, or out of the County. Subsection (c)(1) provides:

(c) Transporting of radioactive materials.

(1) No person shall transport into, within, through, or out of Prince George's County any of the following materials unless a "Certificate of Emergency Transport" has been issued by the County Executive or his designee:

(A) Plutonium isotopes in any quantity and form exceeding two grams or twenty (20) curies, whichever is less;

(B) Uranium enriched in the isotope U-235 exceeding twenty-five (25) atomic percent of the total uranium content in quantities where the U-235 content exceeds one kilogram;

(C) Any elements with atomic number eighty-nine (89) or greater, the activity of which exceeds twenty (20) curies;

(D) Spent reactor fuel elements or mixed fission products associated with such fuel elements which exceeds [sic] twenty (20) curies;

(E) Large quantity [now highway route controlled quantity] radioactive materials;

(F) Any quantity, arrangement, and packaging combination of fissile material specified by the United States Nuclear Regulatory Commission as a "Fissile Class III" shipment in 10 CFR, 571.4(d)(3) [sic] relating to packaging of radioactive materials for transport.

(G) Any shipment or transportation of radioactive material that is required by any federal or Prince George's County regulating agency to be accompanied by an escort for safety reasons.

Classes (A)-(E) are identical to classes considered in IR-12 (49 FR 46650, November 27, 1984), in which a St. Lawrence County (N.Y.) law was found to have created, in effect, a new hazard class by the imposition of additional requirements on a subgroup of radioactive materials. That ruling stated:

If every jurisdiction were to assign additional requirements on the basis of independently created and variously named subgroups of radioactive materials, the resulting confusion of regulatory requirements would lead directly to the increased likelihood of reduced compliance with the HMR and subsequent decrease in public safety. 46 FR 46651.

Thus, the establishment of these classes was found to "constitute an obstacle to the accomplishment of Congressional objectives of enhanced safety and regulatory uniformity underlying

enactment of the HMTA and adoption of the HMR." 49 FR 46651. As was the case in IR-12, the regulations here fail to distinguish between highway route controlled quantity radioactive materials, which are regulated under 49 CFR 177.825(b), and radioactive materials for which placarding is required, which is regulated under 49 CFR 177.825(a). The effect of these County provisions is to bar transportation of radioactive materials which is in compliance with the HMTA and the HMR unless a County Certificate is obtained. These restrictions apply because of the hazardous nature of the cargo and create the likelihood of diversion of transportation to other jurisdictions. Thus, Prince George's County's requirements in section 18-187(c)(1) (A)-(E) are inconsistent with the HMTA and the HMR.

The reference in section 18-187(c)(1)(F) to "10 CFR 571.4(d)(3)" is erroneous and should have been to 10 CFR 71.4(d)(3). This subsection covers all fissile material shipments designated as Fissile Class III, regardless of the quantity, arrangement, or package combination of the shipment. In section 18-187(c)(1)(G), the County went one step further in its hazardous class designations by creating a sweeping category including any radioactive materials shipment required by any Federal or County agency to have an escort for safety reasons. As with subsections (A) through (E), the County has improperly established a hazard class requiring a transportation permit; thus, section 18-187(c)(1)(F) and (G) are inconsistent with the HMTA and the HMR.

In summary, therefore, all of section 18-187(c)(1) (A)-(G) constitutes a system of hazard class designations at variance with the HMTA and the HMR. Just as in IR-12, and other cited inconsistency rulings, the section 18-187(c)(1) designation of hazard classes constitutes an obstacle to the accomplishment of the Congressional objectives underlying the enactment of the HMTA and the adoption of the HMR.

As indicated above, paragraphs (c), (d) and (e) of section 18-187 establish a detailed and subjective permit system for the above types of radioactive materials. However, the HMR already provide extensive regulation of the transportation of radioactive materials. Part 173, Subpart I (173.401 through 173.478) of 49 CFR provides detailed packaging requirements for radioactive materials and incorporates by reference the Nuclear Regulatory Commission

requirements in 10 CFR Part 71. Highway routing and training requirements concerning radioactive materials are contained in 49 CFR 173.825. In addition, 49 CFR 173.22(c) requires shippers of irradiated reactor fuel to provide physical protection in compliance with NRC requirements or equivalent requirements approved by OHMT.

Because, therefore, the HMTA and the HMR have almost completely occupied the field of radioactive materials transportation safety, State and local requirements in that field are limited, as appropriate, to: (1) Traffic control or restrictions applying to all traffic, (2) designation of alternate preferred routes under 49 CFR 177.825, (3) adoption of Federal or consistent requirements, and (4) enforcement of consistent requirements or those for which preemption has been waived. Thus, state and local permit requirements for the transportation of radioactive materials generally are inconsistent with the HMTA and the HMR. IR-8 (49 FR 46637), IR-10 (49 FR 46645), IR-11 (49 FR 46647), IR-12 (49 FR 46650), IR-13 (49 FR 46653), IR-15 (49 FR 46660) [all November 27, 1984].

The County's permit system includes extensive and open-ended advance notification and information requirements, including the following:

(c)(2)(D) Proposed date and time of shipments;

(c)(2)(E) Starting point, schedule route, and destinations; place and time of any stops; unscheduled stops prohibited (sic);

(c)(2)(G) Any other information required by the County Executive which is reasonably related to the foregoing information.

(d)(1)(A) . . . a showing that the radioactive material has been or will be containerized and packaged, and all warning labels affixed to the outer container holding the radioactive material and that the vehicle transporting such material will be operated and equipped in conformity with the regulations of the United States Department of Transportation, the United States Nuclear Regulatory Commission, or any other federal or county agency having jurisdiction regardless of whether the shipment is being made within, into, or out of Prince George's County (sic)

Interpretation problems aside, these advance notification and information requirements exceed Federal requirements, create an additional burden or delay and thus are inconsistent with the HMTA and the HMR. IR-2 (44 FR 75566, December 20, 1979); IR-6 (48 FR 760, January 6, 1983); IR-8 (49 FR 46637, November 27, 1984); IR-14 (49 FR 46656, November 27, 1984); IR-15 (49 FR 46660, November 27, 1984); IR-16 (49 FR 20872, May 20, 1985). The requirements in paragraphs (c)(2)(D) and

(c)(2)(E) violate the prohibition against disclosure to non-law enforcement local authorities of schedules and itineraries for specific shipments of specified quantities of radioactive materials contained in 10 CFR 73.21 and incorporated by reference in 49 CFR 173.22(c); therefore, they fail the "dual compliance" test and are inconsistent. Also, to the extent that paragraph (d)(1)(A) represents a local packaging requirement, it is inconsistent; state and local governments may not issue packaging requirements that differ from or add to Federal ones. IR-2 (44 FR 75566 at 75568, December 20, 1979).

The County's permit process is further flawed by a three-business day processing period and an unlimited possibility of extending that time period. Section 18-187(d)(4). As indicated in an OHMT policy statement on radioactive materials transportation, 49 CFR Part 177, Appendix A, requirements unnecessarily delaying transportation are inconsistent.

Among other fatal defects in section 18-187 are a provision for virtually unfettered discretion whereby the County may change dates, routes and times for radioactive materials transport (section 18-187(d)(4)); and vague prohibitions against such transport in the absence of findings of adequate emergency response capability (section 18-187(d)(3)) and of transportation "in a manner necessary to protect public health and safety . . ." (Section 18-187(d)(3)). With respect to emergency response, for example, the County neither can shift its own responsibility to carriers, IR-2 (44 FR 75565, December 20, 1979), nor hold carriers hostage to the County's case-by-case determination of its emergency response capabilities. These requirements conflict with the comprehensive OHMT/NRC regulatory system for the transportation of radioactive materials and constitute obstacles to the achievement of the objectives of the HMTA and the HMR. Therefore, I find them to be inconsistent.

Similarly, the open-ended authority to require escorts (section 18-187(d)(4)) is a prohibited obstacle to transportation. In radioactive materials transportation, a state or local requirement identical to or facilitating NRC's requirement for front and rear escorts for certain shipments is consistent, IR-14 (49 FR 46656, November 27, 1984), IR-17 (51 FR 20927, June 9, 1986), but a requirement which goes beyond the NRC's escort provisions is inconsistent with the HMTA and the HMR. IR-11 (49 FR 46647, November 27, 1984); IR-13 (49 FR 46653, November 27, 1984).

Section 18-187(e) requires, as a condition precedent to permit issuance, the posting of a bond sufficient to protect the County from "the cost of cleanup, decontamination, and immediate and residual health costs arising from radiation exposure." The County Executive determines the amount of the bond or waives the bond if the applicant proves it has made adequate provisions for bearing these possible costs. There is no indication that compliance with the motor carrier financial responsibility provisions of 49 CFR Part 387 would be deemed to be "adequate." In any event, indemnification or insurance requirements for transporting radioactive materials differing from, or in addition to, Federal requirements are inconsistent with the HMTA and the HMR. IR-11 (49 FR 46647, November 27, 1984).

In addition to these specific problems, the County's certificate requirement constitutes a routing rule in the form of a permit. As indicated in Appendix A to 49 CFR Part 177, a "routing rule" is:

... any action which effectively redirects or otherwise significantly restricts or delays the movement by public highway of motor vehicles containing hazardous materials, and which applies because of the hazardous nature of the cargo. Permits, fees and similar requirements are included if they have such effects

Some of the classes in section 18-187(c)(1)(A)-(G) are other than highway route controlled quantities and thus are subject to different routing requirements under the HMR than highway route controlled quantities. Subsection (c)(1) fails to make this distinction and thereby imposes the same routing requirements on both highway route controlled quantities and those which are other than highway route controlled quantities. Transporters of other than highway route controlled quantity radioactive materials are subject to the following Federal routing set forth in 49 CFR 177.825(a):

(a) The carrier shall ensure that any motor vehicle which contains a radioactive material for which placarding is required is operated on routes that minimize radiological risk. The carrier shall consider information on accident rates, transit time, population density and activities, time of day and day of week during which transportation will occur. In performance of this requirement the carrier shall tell the driver that the motor vehicle contains radioactive materials and shall indicate the general route to be taken. This requirement does not apply when—

(1) There is only one practicable highway route available, considering operating necessity and safety, or

(2) The motor vehicle is operated on a preferred highway under conditions described in paragraph (b) of this section.

The County's permit requirement for both highway route controlled quantity material and other than highway route controlled quantity is an unauthorized attempt by a local government to regulate the transportation of radioactive materials. Routing restrictions for non-highway route controlled quantities of radioactive materials are inconsistent with 49 CFR 177.825(a) unless identical to that section. For highway route controlled quantities, 49 CFR 177.825(b) provides States (but not local governments) with a means of modifying the status of preferred routes, and Maryland has designated preferred routes in accordance with the HMR. The term "preferred route" is defined as an Interstate System highway or an alternate route selected by a State routing agency in accordance with the Department's guidelines. Maryland's designated preferred routes are:

U.S. 48-I-70 (Hancock) to West Virginia State Line.

U.S. 301—Delaware State Line to Virginia State Line via William Preston Lane and Nice Memorial Bridges.

J.F. Kennedy Memorial Highway Delaware State Line via JFK Memorial Highway, plus I-95 west of Baltimore City of MD 695 via Key Bridge, I-95 to Capital Beltway and I-95 or I-495 to Virginia State Line.

Of concern to the County are U.S. 301, the Capital Beltway, I-495 and I-95, which run through Prince George's County. The permit requirements of section 18-187 would circumvent the State's designation of U.S. 301 by providing the County with an almost unfettered ability to ban shipments on this State-designated route and thereby usurping the State's authority under 49 CFR 177.825(b); it also is inconsistent with that Federal regulation's requirement that highway route controlled quantity radioactive materials be carried on an Interstate System highway in the absence of a state-designated route. While Prince George's County legitimately may seek to further reduce the County's exposure to the risk inherent in the transportation of radioactive materials, it cannot do so by ignoring the State's designation of preferred highways, nor can it export that risk to its neighboring jurisdictions. Such an approach not only frustrates the

equitable distribution of risk which the Federal rule sought to achieve, but also impedes the accomplishment and execution of the HMTA's objective of regulatory uniformity.

The following language of IR-12 (49 FR 46650, November 27, 1984) relating to permits is applicable here:

By restricting access to highways in St. Lawrence County, the requirement redirects shipments of other than highway route controlled quantity radioactive material into adjoining jurisdictions. In bringing about this result, St. Lawrence County has acted unilaterally to the exclusion of those jurisdictions through which the redirected shipments must travel. If St. Lawrence County could impose such restrictions on the availability of its highways to vehicles engaged in the interstate transportation of radioactive materials, then any local jurisdiction could do so. This would lead to the type of regulatory balkanization which Congress sought to preclude by enacting the HMTA. 49 FR 46652.

Section 18-187(f) provides for a fine of not more than \$1,000 for each violation of section 18-187 or the terms of the "Certificate of Emergency Transport." While penalties for violating consistent requirements are themselves consistent (IR-3, 46 FR 18918, March 26, 1981), penalties, such as this one, for violating inconsistent requirements are themselves inconsistent.

Therefore, for all the reasons discussed above, all provisions of section 18-187(c), (d), (e) and (f) are inconsistent with the HMTA and the HMR.

III. Ruling

For the foregoing reasons, I find subsections (b)(2), (c), (d), (e) and (f) of Prince George's County Code section 18-187 inconsistent with the HMTA and the HMR and, therefore, preempted under 49 U.S.C. app. 1811(a). Subsections 18-187(a)(1), (b)(1), (b)(3) through (7) are consistent with the HMTA and the HMR. Subsection 18-187(a)(2) is not a requirement within the meaning of the HMTA and therefore is not subject to preemption under the Act.

Any appeal of this ruling must be filed within 30 days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC on December 18, 1986.

Alan I. Roberts,
Director, Office of Hazardous Materials
Transportation.

[FR. Doc. 86-29022 Filed 12-31-86; 8:45 am]

BILLING CODE 4910-60-M

Forest Land

Friday,
January 2, 1987

Part III

Department of Agriculture

Forest Service

**Recreation Residence Authorizations;
Proposed Policy; Request for Comments**

DEPARTMENT OF AGRICULTURE

Forest Service

Recreation Residence Authorizations;
Proposed Policy

AGENCY: Forest Service, USDA.

ACTION: Notice of proposed policy;
request for comments.

SUMMARY: The Forest Service proposes to adopt revised policies and procedures for administering special-use permits that authorize privately-owned recreation residences on National Forest System lands. These policies and procedures reflect comments received on a proposal published May 23, 1984 (49 FR 21775) and subsequent discussions with permittee representatives. The proposal addresses (1) use of 1978-1982 fees as a base for a 20-year fee cycle with annual indexing, (2) recreation residence appraisal standards, (3) study guidelines for determining continuance of recreation residence permits, and (4) cooperation with permittee representatives in the resolution of appeals relating to recreation residence issues.

In addition, the Forest Service gives notice of its intention to develop several other proposals related to establishing fees for recreation residences.

The intended effect of these proposals is to help resolve the longstanding controversy and permittee concerns over recreation residence fees and to substantially reduce Agency costs of administering recreation residence permits.

DATE: Comments must be received by April 2, 1987.

ADDRESSES: Send written comments to R. Max Peterson, Chief (2720), Forest Service, USDA, P.O. Box 2417, Washington, DC 20013.

The public may inspect comments received on this proposed policy in the office of the Director, Lands Staff, Room 1010, Rosslyn Plaza East Building, 1621 North Kent, Rosslyn, VA, between the hours of 8:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Ruben Williams, Lands Staff, Forest Service, (703) 235-2253.

SUPPLEMENTARY INFORMATION: The Forest Service manages approximately 15,800 special-use permits that authorize recreation residences at specific sites on National Forest lands. On May 23, 1984, the Agency published for public comment a notice describing proposed changes in the fee determination policy (49 FR 21775). The major changes proposed at that time were to adopt a 20-year fee review cycle instead of the present 5-year cycle and to provide

annual adjustment of the fees based on changes in the overall Consumer Price Index.

Agency review of comments received, and as well as discussions with permittee representatives following the May 1984 proposal revealed that a number of permittees were concerned with policies dealing with tenure and security as well as rental fees charged for the sites. Since early 1985 a group of permittee representatives has been working cooperatively with the Forest Service on a plan for resolving the issues, with the result being the expanded proposal described in this notice.

Analysis of Public Responses

The Forest Service received 612 letters, 5,359 forms and 4 petitions for a total of 5,975 responses to the May 23, 1984 proposal. Most of the forms were response questionnaires generated through the joint efforts of the National Forest Recreation Association (NFRA) Homeowners Division and the National Inholders Association (NIA). Responses came from 48 states, the District of Columbia, and Puerto Rico. Almost one-half (47%) were from California, where 42 percent of all National Forest recreation residence permits are issued. Approximately 17 percent were from Oregon and Washington, which accounts for 16 percent of the total recreation residence permits issued by the Forest Service. Other states from which large numbers of responses originated include Arizona (4.7% of the responses), Colorado (3.7%), Idaho (3.5%), Montana (4.1%), Utah (4.4%), and Wyoming (3.1%).

The Agency received an array of comments, centering on the fee cycle, the fee base, the use of Consumer Price Index-Urban (CPI-U), reappraisal, fair market value, and land disposal. A large majority of the responses indicated a belief that the overall proposal was not fair as submitted.

The comments generally reflected permittee concerns with financial security and the fear that escalating fees might someday lead to only the "wealthy" being able to afford summer home sites they now enjoy. A desire for a less complicated and more objective fee system was also consistently expressed. As part of their response to our proposal, the NFRA Homeowners Division and the NIA submitted a fee determination proposal that would reallocate the sum total of existing fair market value fees under a site classification/point system. All sites would be classified and points (up to 12) assigned to reflect significant differences in access and proximity to

navigable waters. The fee for each site would depend upon the value of each point and would range between a minimum of about \$150 and a maximum of \$800.

An Oregon permittee presented the Forest Service a report of a permittee opinion survey prepared by a market research analysis company (MarStat). In conducting its study, the company mailed a 4-page summary outlining three fee options (A, B, & C) to 3,000 permittees. Option A contained the major thrust of the Forest Service proposal (a 20-year fee cycle with CPI fee adjustments). Option B (recommended by the permittee who commissioned the survey) proposed automatic permit renewal, a fee system at a higher rate than Option A (6-8 percent of the appraised site value as opposed to 5 percent now being used), the freezing of fees upon retirement or disability, and payment of damages (including leasehold value) in the event of the Government's decision not to renew a permit. Option C was very similar to the NFRA Homeowners Division/NIA proposal. Some 610 permittees actually completed and returned the survey form. According to this market study, 41 percent favored the "use value" method described in Option C; 30 percent favored Option B; 10 percent favored Option A; and 23 percent did not favor any of the 3 options. Of the total sample, 51 percent (311 permittees) indicated a willingness to pay higher fees in exchange for more security.

The following is a concise summary of the key points of public comments on Forest Service proposed changes in recreation residence fee policy. The items are numbered as in the May 23, 1984, Federal Register Notice of the proposal.

Responses To Proposal

Many respondents suggested that the Forest Service provide compensation or credit for stewardship and service work provided by permittees. Some suggested that a permittee board oversee and consent to any changes in fee policies before they become effective. Others suggested providing greater flexibility in the system, getting out of the leasing business, increasing revenues either through charging fees to all Forest patrons, through increasing commercial-use fees, or through creating more recreation residence tracts.

Some respondents indicated special consideration should be given to retirees, disabled persons, and veterans. Others suggested compensations such as allowing full-time residency or reduced

fees similar to the Park Service Golden Years Passport. Other special exemptions suggested were to freeze fees for 10 years and to freeze fees upon permittee retirement or disability with the difference owed the government to be paid upon sale of the property and reissuance of the permit to a new owner.

Item 1: 20-year Review Cycle

The May 1984 proposal would have increased the fee review cycle from 5 years to 20 years. Several respondents disagreed with 20-year reviews indicating that many factors can cause residence values and CPI to fluctuate dramatically within 20 years. Several responses suggested shortening the review cycle to either 5 or 10 years; providing an escape clause to adjust for changes occurring within the 20 years due to natural catastrophe or human impact; and ensuring that leases agreed with the county property appraisal process or California's Proposition 13.

Item 2: 1978-1982 as the Base Period

Under the proposal, the 20-year cycle would begin using fees established during the 1978-1982 period. A number of respondents suggested using earlier years as the base period rather than 1978-1982. These respondents generally felt that the late 1970's were marked by inflated values and inconsistent appraisals. Some suggested using fees established during the next-to-last fee appraisal period plus 50 percent. Some suggested that the Forest Service begin indexing of fees from the present year. Others suggested using the sum total of all fees nationwide with the 1978-1982 base period, and then redistribute the fees under a point system. Several suggested the Forest Supervisor review the fee base year before applying the Consumer Price Index.

Item 3: Annual Indexing

Under the May 1984 proposal, special-use permits would have been amended, as needed, to allow annual indexing. Several respondents preferred adjusting fees to the CPI at 5-year intervals rather than yearly. Some recommended allowing payment to be made in lump sum, rather than annual indexing, with proportionate reimbursement if the lease were broken within 20 years.

Item 4: Consumer Price Index—Urban

The Forest Service proposed making annual adjustments to fees based on changes in the Consumer Price Index—Urban. Most respondents to the use of the CPI-U disapproved of the idea because many of the factors used in the index are not related to land value. Comments noted that land values

remained stable or declined while the CPI rose. Respondents felt that using CPI-U would lead to increased appeals and chaos. Some respondents stated that the CPI was inflationary and that fees would become too expensive for retirees and middle- to lower-income permittees whose wages do not correspond to the CPI.

Some respondents suggested that the Forest Service use the average CPI-U over the most recent 20 years; multiply this average CPI-U times the current fee; or use the current lease cost plus CPI without compounding. Others suggested using a yearly percentage of the CPI, such as 50-85 percent, 50-60 percent with a surtax on 10 percent of the adjusted fee, 25 percent, or 2/3 of the CPI. Others suggested using a median or cumulative CPI-U from the base year. Some suggested the Forest Service sample fees periodically to see if land values correspond to the CPI increases; or that the Forest Service follow the Fiscal Year 1985 Appropriations Act, using a maximum fee of \$800 based on the next-to-last fee and the CPI. Some comments recommended using the CPI index modified to include a window based on a land value index.

Some respondents suggested alternative indices such as the Gross National Product Deflator, Rental Index, Rental CPI, CPI minus 2 or minus 3 (the Social Security index), Wholesale Price Index, or the "Relative Housing Price Levels". Two alternatives to indices were suggested: (1) Use of average increases in similar property and (2) use of a 2 percent annual inflation rise applied to a fee based on 75 percent of the selling price of the recreation residence.

Item 5: In Certain Cases, Apply CPI-U at 5-Year Intervals

The proposal called for 5-year CPI-U adjustments in cases where an existing term permit could not be amended to institute the 20-year review cycle. Most respondents agreed with this proposal, with some suggesting a modification to ensure that the fees would not increase more than 10 percent a year during the period.

Item 6: Yearly Limit and Deferment of Excess

The May 1984 proposal contained a 10 percent limit on annual adjustments, with the excess (in dollars) to be carried over to future years. Most respondents suggested removing the deferment provision. A few noted that a cap and deferment would not relieve inflated fee problems. Respondents suggested a variety of approaches: Maximum annual increases of 5 percent; 5-year caps of 6

percent, 15 or 20 percent; overall caps of 25 percent; and fee limits of \$150, \$250, or \$300, \$800, or administrative costs.

Item 7: Reevaluation Upon Transfer after Midpoint

The May 1984 proposal made provision for a reappraisal upon transfer of the residence to a new owner after midpoint in the fee cycle. Many respondents expressed concern that reappraisal upon sale of a recreation residence after midterm would penalize the selling permittees, deter sale, or create fee inequities among old and new permittees. Some respondents also noted that the policy would not be necessary if the CPI and appraisal method worked correctly. One respondent expressed the concern that appraisals take a long time, and during this time, both the buyer and seller would not know the cost of using the site.

Respondents suggested the cost of reappraisal should be paid by the buyer, the Forest Service, or divided between buyer and seller. Several suggested special exemptions be made for intra-family transfers which would include either no reevaluation, factoring in a sale price of zero, or applying 2-5 percent of land value at the most to the fee. Some recommended that permittees provide the appraisal, or that reevaluations be based on factors other than the CPI-U. Another respondent suggested that fees remain the same upon sale, with no reappraisal.

Item 8: Redetermining Fair Market Value Fees

The Forest Service originally proposed redetermination of base fees at the end of the fee cycle by using (1) land rental comparables, (2) a percent of appraised land value, or (3) the percent of land value changes over the period. Many respondents viewed the appraisal process as inaccurate, subjective, and biased. Several felt that the method does not fully compensate for devaluating factors inherent in the permit system. Some comments indicated that appraisal values are inflated because of the high demand on the scarce private land, a scarcity attributed to the large ownership of public land. In some areas, respondents felt the Forest Service actions of acquiring land have further inflated land values.

Among suggested modifications to the appraisal process were suggestions to use the county assessor's evaluations, or independent or permittee contracted appraisers. Other suggested modifications included providing

reappraisal when the 10 percent limit doubles within the 20-year cycle, establishing a fixed fee, basing fees on lot size, establishing a single fee for a given tract, and providing compensation for additional outside fees (taxes) and for lack of services. A few suggested eliminating the appraisal process. Two alternative methods suggested by respondents were (1) to base fees on administrative costs plus a 15-20 percent profit, or (2) base fees on a percentage of the improvements. Some respondents suggested establishing a permanent site classification system, including factors such as access, use, tenure, seasons, proximity to water, road conditions, public traffic, and available utilities. Many comments indicated fees should be lower for sites having shorter use seasons and for lots away from the waterfront. The NFRA/NIA joint proposal and Option C in the Mars%Stat survey also suggested types of site classification based on value of use.

Item 9: Resolution of Appeals

The proposal provided that outstanding appeals would be resolved based on the merits of each case and within the framework of the proposal changes. In event of appeals of fees, some respondents suggested that the Forest Service use independent arbitration with the cost split between appellants and the Forest Service.

Item 10: 5 Percent of Land Value

In situations where appraisal-established base fees did not exist for the 1978-1982 period, the proposal called for determining the fee by applying 5 percent to the 1982 land value. A number of respondents felt using 5 percent of appraised value for fee redeterminations is too high and does not adequately compensate for regulations, constraints, length of use, and personal property taxes. Some suggested 2-4 percent. However, some suggested applying private sector rental rates of 6 to 8 percent over the 20 years. One comment suggested 10 percent would be more appropriate and that the rental rates should be the same as those arrived at by the joint Forest Service-Bureau of Land Management Fee Task Force for linear rights-of-way.

Item 11: 20-Year Term

Under the proposal, term permits would have been issued for 20-year terms, subject to future use determinations. Although several respondents approved of a 20-year lease term, many suggested lengthening terms from 30 to 100 years, providing automatic renewal, or abolishing lease

terms. Most comments were concerned primarily with terminations, stating that longer terms provided false security without greater protection from terminations. Suggested modifications included clarifying guidelines and criteria, terminating permits on an individual basis, no terminations, or providing 20 year's notice with reevaluation of plans 3 years before actual termination.

Item 12: Land Exchanges

The May 1984 proposal provided for greater emphasis to be placed on land exchanges to convey ownership to tracts containing recreation residences. A small number of respondents disapproved of encouraging land exchanges, stating that Forest quality would deteriorate, exchanges cost time and money, and exchanges are usually unsuccessful due to too much red tape. In contrast, some respondents suggested improvements in the exchange process, such as allowing approval by only a majority as opposed to a consensus of permittees; listing areas where preferred lands for exchange are available; and including deed restrictions. Another suggestion was to allow homesteading in place of exchange or sale.

Many respondents recommended selling recreation residence sites with first option to buy going to permittees. Advantages noted were reduced Federal expenses, security for permittees, permittee ability to borrow and assume mortgages, reduced vandalism through yearlong occupancy, increased improvements, or increased tax revenues. These respondents suggested that lots should sell for either fair market value or land value plus an additional fee, that permittees have an option to purchase or hold a 99-year lease, and that the Forest Service should provide restrictions for lot maintenance.

Other respondents suggested how lots should be sold. Some suggested sale of only those lots with low public value or creation of additional public lands to compensate. Some suggested selling lots on a group basis; other respondents preferred lot sales on an individual and voluntary basis. One idea was to turn lots over to the county through exchange, and allow the county to handle sales.

Permittee Consultations

In March and April of 1985, the Forest Service held several meetings in Salt Lake City, Utah, and San Diego, California, with permittee representatives for the purpose of reviewing the public comment on the May 1984 proposal and of seeking an equitable resolution of the permittees'

concerns. These discussions led to a plan which the Chief outlined in an April 22, 1985, letter to the vice president of the NFRA Homeowners Division. As described, the plan entailed (1) use of the 1978-1982 fees brought forward with some form of indexing (perhaps CPI-U) under a 20-year fee cycle, (2) identifying and equitably resolving individual problem areas/unique appraisal situations, (3) developing unique methodologies, if needed, for responding to unusual circumstances, and (4) studying/developing a site classification approach to fees. In his letter, the Chief requested further input on the plan from the NFRA Homeowners Division, and offered to work personally with a representative group of permittees to oversee the effort and to work on modifications as needed.

Subsequently, a similar offer was made to the National Inholders Association (NIA). The permittee organizations agreed and in mid-1985 the Chief invited eight (8) permittee representatives (including leadership from the NFRA Homeowners Division and NIA and two individuals not affiliated with any permittee organization) to work cooperatively with him on the plan. The initial meeting with the group was held August 19, 1985, at which time the discussion centered on several key concerns identified by the group. These concerns were (1) establishing a regional appeal review board specifically for decisions affecting recreation residence permittees, (2) lengthening the term of the permit, (3) defining higher public purpose in the case of future use determinations, (4) compensating permittees in the event of termination or nonrenewal of the permit, (5) identifying and reviewing "problem area/unique fee situations", (6) placing a moratorium on termination and nonrenewal of permits, and (7) identifying differences between isolated cabins (those generally originating from trespass situations) and recreation residences (those summer homes situated within tracts or groups established by the Forest Service as part of its recreation management program).

On December 16-18, 1985, the permittee group met with Forest Service representatives and the Chief for the second time to discuss major elements in a revised proposal they had submitted a month earlier. The meeting, together with a third meeting held April 7-8, 1986, resulted in general agreement, subject to review by the Office of the General Counsel and the Office of Management and Budget, on a plan for resolving the permittees' concerns.

The subsequent reviews by Counsel and the Administration have resulted in some minor changes to the agreement, namely: (1) Elimination of the appeal panel originally proposed to provide for involvement of permittee organizations in the resolution of recreation residence appeals, (2) reduction in the time period for the phase-in of the 1987 fee increase from 4 years to 3 years, and (3) raising the "payback" requirement from one-third to one-half of the waived fee amount for those permits under termination notice or nonrenewal that are reissued after review of the decision, reference Forest Service Handbook 2709.11, Chapter 31.2.

Major Elements of Agreement

The major elements of agreement as subsequently modified are briefly summarized below. Some of these elements are incorporated in the proposed policy published as part of this notice. Others require further study or separate Agency action as noted.

1. Base Fees and Indexing

The Agency would use established fees that became effective during the years 1978-1982 as the base for a 20-year fee cycle using changes in the overall Implicit Price Deflator (IPD) for annual adjustments. Base fees would be updated to 1987 by applying the IPD adjustments. These new fees would not be immediately due in full; rather, the fees would be phased in over a 3-year period to provide an adequate, gradual adjustment of fees for permittees. This phase-in policy recognizes the fiscal impact that may occur on the permittee while assuring adequate revenue for managing these Federal lands.

After 1987, the Forest Service would adjust fees annually (where allowed under terms of the special-use permit) by changes in the overall IPD until the end of the 20-year fee cycle. At that time, new appraisals would be required.

2. Index Limitation

The Forest Service agrees to propose and submit for approval an amendment to its Special Uses regulations at 36 CFR Part 251 to limit IPD adjustments after 1987 to a 10-percent increase or decrease in base fees in any 1 year. The amendment would also provide that in the event an annual adjustment exceeded 10 percent, the excess amount would be carried over annually until the IPD adjustment drops below the 10 percent fee increase or decrease level.

3. Appraisals and Fee Determination

The Forest Service agreed to clarify and standardize instructions used in appraising recreation residence sites.

Specifically, the Agency will develop standard instructions to and for appraisers to ensure common minimum standards in:

- a. Appraisal format.
- b. Definition of appraisal terms.
- c. Site description checklists to assure complete consideration of forces and factors affecting values.
- d. Comparable sales checklists to coordinate consideration of the market evidence with the subject site.
- e. Agreements between the appraiser and the authorized Forest Service officer.
- f. Assumptions, limiting conditions, and required certifications.
- g. Standards of review to which the appraisal report will be subjected. Upon development, the appraisal instructions will be incorporated into FSH 2709.11, chapter 30, and become part of a standard contract form.

4. Annual Rental Rate

The Forest Service is agreeable to continuing to base recreation residence fees on 5 percent of the appraised site value.

5. Term Permit Form

The Forest Service has agreed to work with the permittee group and other interested parties in revising FS Form 2700-18, Term Permit for Recreation Residence. Such revisions will incorporate significant portions of the final recreation residence policy. The following areas are among those that may be considered for inclusion: Fees and indexing; issuance and renewal of permits; termination and nonreissuance; in-lieu sites; and other provisions, including optional permit provisions, governing the permit conditions and rights and restrictions of the permit.

6. Term Permit Renewal

New 20-year term permits will have a renewal clause that provides for reissuance, after the first 10 years, of a new 20-year term permit having the same renewal clause. Reissuance will be subject to a future use determination and updated terms and conditions.

7. Higher Public Purpose

The Forest Service and the members of the permittee group agree that for purposes of future use determination, the phrase "higher public purpose" refers to higher priority use of the site for benefit of the general public that is timely, clearly needed, in public demand, and otherwise could not be made available elsewhere. Consideration of the "higher public purpose" of lands under permit for recreation residences includes roads

and public utility easements, public safety considerations, and public recreation needs that may require removal of the recreation residences. Unspecified public needs or uses, such as general Forest use or need for open space alone, do not meet the test of "higher public purposes." Conversion of recreation residence tracts to commercial use, such as a resort or marina, would require a clear and convincing need and greater burden of proof than for other uses. Significant alternatives that the Forest Service should consider are: (1) Combination uses that include recreation residences; (2) adjustment of lot sizes or location of improvements to better accommodate other such uses; and (3) fulfillment of public needs at other sites.

8. Future Use Determinations

This new proposal includes specific guidelines for conducting studies of the potential need for general public use of recreation residence sites.

Future use determinations will be conducted, of course, in accordance with the National Environmental Policy Act (NEPA) standards and requirements. Determinations may be made as a part of National Forest land management planning or separately. The report will be a separate study or a separate appendix to the Forest Plan. Determination reports will include an objective and fully explanatory description and analysis of all relevant data needed to explore in detail the reasonable alternatives.

The following are among the elements to be considered in future use determinations: The feasibility of common, shared, or multiple use that integrates recreation residences with other uses; the feasibility of using other sites to meet the higher public purposes, and for the recreation residences; the potential recreational and financial losses of permittees and others using their improvements as opposed to the benefits to the general public to be gained by nonrenewal of the permits.

9. Nonrenewal Notice

The Forest Service plans to continue to give permittees a minimum advance notice of 10 years in the event of a decision identifying higher public need for a recreation residence site, unless the site has been rendered unsafe by such events as massive earth movement or flooding. In any event, the longest possible notice will be given.

10. In-Lieu Sites

In case of termination or nonrenewal, the Forest Service will use every

reasonable effort to provide other sites upon which permittees may build or relocate their improvements.

11. Adjustment of Fees Upon on Nonrenewal

After notice of nonrenewal is given, the fees for use of recreation residence sites will be reduced to reflect the lower fair market values associated with the limited occupancy.

12. Participation in Appeals

The Forest Service has agreed to work with permittee representatives in each Region that desire to participate in resolution of recreation residence issues appealed to the Regional Forester by other permittees. The Reviewing Officer will consider information submitted by the permittees within the context of the appeals process as provided in 36 CFR 211.18. The Reviewing Officer may exercise his authority to extend time to give the permittees and other parties a reasonable time to submit their information.

13. Base Fee Reviews

The Forest Service will review certain base fees to ensure they are reflective of fair market value. This involves identifying and reviewing appraisals and other data affecting no more than 20 percent of the total recreation residence permits. The Agency will use the following criteria for identifying groups or National Forest areas for review:

a. Permits where the 1978-1982 fees are currently under appeal or the appraisal for 1978-1982 fees has been set aside. For example, under this criterion, the Forest Service is reviewing appraisals at Priest Lake, Idaho, and on the Eldorado National Forest.

b. Permits where appraisals were not conducted and used in establishing fees during the 1978-1982 period.

c. Permits whose fees are not based on an appraisal.

d. Recreation residence groups in an area designated for special management by Congress where land acquisition and scenic easement purchases by the Government appear to have significantly enhanced land (rental) values. Under this criterion, the Forest Service is reviewing fees on the Sawtooth National Recreation Area.

There may be situations other than these identified criteria that should be reviewed. Interested parties are invited to identify additional criteria or unusual appraisal situations or problems as part of their comments on this proposal. The Agency requests that reviewers not identify appraisals or concerns that have already been reviewed and

resolved by the Chief through the appeals process.

14. Review of Decisions Not to Renew Permits

The Forest Service is agreeable to conducting supplemental or followup reviews of nonrenewal decisions prior to expiration of the permit to determine if circumstances have changed. Forest Service policy at section 2721.23a of the Forest Service Manual currently provides the following direction:

The Forest Supervisor may review a termination (nonrenewal) decision at any time before the actual termination. If a review clearly indicates that a particular site is not needed for higher public use, the Forest Supervisor may amend the future use analysis to provide for continuation of the current use.

Recreation residence permittee representatives have proposed making such supplemental reviews mandatory 2-3 years prior to expiration of the authorization to ensure nonrenewal criteria adopted in the final policy is met. (Servicewise, there are currently about 300 recreation residence permits that have been identified for nonrenewal and eventual removal. Most of these actions date from future use decisions made in the 1960's and early 1970's.)

The Forest Service is concerned that making such supplemental reviews mandatory will create an unnecessary burden on the Government by subjecting the reviews to the appeals process. For this reason, the Forest Service is agreeable to implementing such reviews only if the Agency's administrative appeal regulations at 36 CFR 211.18 are revised. The Forest Service, with the assistance of the Joint Permittee Committee, intends to develop and submit for consideration during the next scheduled review of the Secretary of Agriculture's Appeal Regulations, revisions that would expressly exempt followup reviews of nonrenewal decisions from the appeals process. The proposed rule document also will include proposed changes in the Forest Service Directives System necessary to implement the followup reviews.

15. Isolated Cabin Permits

Recreation residence permittee representatives have proposed that the tenure provisions (future use determination requirements, etc.) be extended to certain qualifying "isolated" cabin permits. Although some may be used for recreation purposes, individual "isolated" cabins came into being through a variety of circumstances. For example, some cabins originated through trespass; some were constructed

on invalid mining claims; others result from situations where use of buildings was reserved or agreed upon at the time of acquisition by the United States. Others resulted from a variety of individual unique situations: such as, remnants of old towns, dam tender cabins, railroad construction camps, and so forth. Some are used as year-round residences, and others are used as vacation or hunting cabins.

Under existing Forest Service policies, owners of virtually all such "isolated" cabins have been notified that the cabin must be removed by a specified date. Usually, the agreement to remove the cabin by a specified date was a condition for granting the original permit. Unlike recreation residences, there is no provision in law authorizing issuance of term permits for these types of uses. The uses are considered temporary uses and are authorized with annual renewable permits. Forest Officers have no authority to guarantee tenure for longer than the 1-year term of the annual permit. Thus, the agreement on date of removal is on a "not later than" basis. Pursuant to this longstanding policy, hundreds of such cabins have been removed from National Forest lands. About 1,000 are now under permit.

Recreation residence permittee representatives feel that, in some situations, the action taken by the Forest Service to establish a removal date was arbitrary and/or unfair to the cabin owner. For example, cabin owners often feel that if they don't sign and "agree" to Forest Service terms, they risk nonrenewal and loss of their improvements. Permittee representatives also believe that removal should be undertaken only if isolated cabins conflict with a higher public use and that isolation by itself is not sufficient cause for removal. Permittee representatives thus asked that a nation-wide review, similar to the process described for those recreation residences under nonrenewal notice, be undertaken.

The Forest Service intends that "isolated" cabin owners be treated fairly and, thus, is agreeable to working with permittee representatives to identify and review any arbitrary and/or unfair actions. However, this effort would be conducted in accordance with the following conditions:

a. As with review of recreation residences under nonrenewal notice, the Agency will not initiate reviews until after the appeal regulations (36 CFR 211.18) are amended to make any decisions resulting from the review nonappealable.

b. The Agency will not conduct reviews when the existing permits were issued and the removal dates have been established pursuant to one of the following conditions:

(1) In conformance with procedures set forth in the Church-Johnson Act which provided relief for occupants of invalid mining claims.

(2) To resolve a willful trespass.

(3) To resolve good faith trespass situations which now can be resolved by conveying the land to the occupant under authority provided in the Small Tracts Act.

(4) In recognition of situations where the use exists through a deed reservation or agreement reached at the time the United States acquired the property.

In the remaining situations, review may identify situations, such as (1) where the Forest Land Management Plan has found continued cabin use to be acceptable and nonconflicting with public use objectives; (2) where there has been a change in the management needs which led to establishment of the existing removal date; (3) where the cabin is situated in a location where recreation residence use would have been invited and authorized under normal circumstances; (4) where no conflict exists with management needs; or (5) the present cabin owner made a good faith purchase without knowing the particular status of the cabin. The authorized officer may, after review, decide to extend the removal date, retain the existing removal date, or convert the existing permit to a recreation residence permit, in which case, the tenure provisions applying to recreation residences would, in the future, apply.

Permittee representatives will conduct a survey of existing "isolated" cabin permits to determine which will qualify for review. Upon revision of the appeal regulations as noted above, the Forest Service will consult with permittee representatives on specific guidelines for conducting the reviews. Proposed changes in the Forest Service Directives System necessary to implement the reviews will be published along with the proposal to amend the appeal regulations (36 CFR 211.18).

18. Compensation

Many permittees feel very strongly that lack of security for retaining their permit is their greatest problem. The Mar%Stat permittee survey indicates a significant percentage of those permittees responding are willing to pay a higher permit fee for such security. To provide such security, permittee representatives proposed that the Forest

Service compensate permittees for the value of the improvements, restoration of the site, and the cost of moving to an alternative site whenever a permit is not renewed. Representatives feel that such compensation is both justified and dictated because: (a) The investment in improvements cannot be depreciated for tax purposes; (b) if a permit is not renewed, they cannot sell their improvements and recover full value; (c) permittees originally were invited on to public land; (d) permits have been administered in a manner which encouraged and sometimes required further investment in improvements; (e) the administration of permits has led many permittees to believe they enjoyed long-term tenure privileges; (f) legislative and administrative philosophy and practice acknowledges the need for increased tenure security; (g) real estate philosophy and practice have changed greatly since permits were established; and (h) the philosophy of tenants' rights in this country has changed greatly since permits were established.

Should term permits be terminated, for other than breach, during the term of the authorization, there is provision in the terms of the permit which would allow the Forest Service to acquire and compensate the owner for the value of the improvements. However, it is the Forest Service's position that statutory authority does not allow compensation after permit expiration. The Forest Service is agreeable to working with permittees in exploring alternative programs of compensation such as an insurance-type fund, or a proposal to seek authority for collecting a fee surcharge that could be used to establish a fund from which compensation could be paid. At this time, however, the Forest Service is not prepared to propose a specific statutory amendment.

The tenure security problem has received a great deal of attention by those persons involved in developing this proposal. Legal opinion obtained by the Joint Permittee Committee does not agree with the Forest Service's position on compensation after permit expiration. Historically, the Forest Service has not terminated permits in mid-term but has utilized nonrenewal permits to end recreation residence use in specific cases. In such cases, the 10-year advance notice of nonremoval that the Forest Service provides is intended to help permittees plan for the remainder of the use and amortize their investment.

Because of the difficulty and complexity of the issue, it has been agreed that resolution cannot be

immediately reached. There is agreement that discussion of the compensation issue will continue and that the Forest Service will work with permittee representatives to fully analyze possible methods and attempt to resolve the compensation problem.

17. Transition

Many recreation residence permittees have existing permits whose terms will not end for many years. If after public comment it appears that the preceding proposal should be adopted, permittees with unexpired terms on their permits must decide whether to immediately accept new term permits or wait until the existing permit term ends. For those choosing to accept new permits, it is anticipated that most will receive a 20-year term permit which will be revised to reflect the terms of the proposal. However, individual Forest Supervisors may elect not to grant a full 20-year term where a permit is on tenure or a future use determination study is under way or planned within 5 years.

Implementation

The Forest Service plans the following actions and methods for implementing the proposal, if adopted.

1. Within 30 days of final adoption, Forest Supervisors will notify each permittee of the length of term which will be granted.

2. If the Forest Supervisor decides on a term less than 20 years, the reasons therefore will be stated. Except for permits on tenure, the term must be at least 10 years and cannot be less than the term remaining on the existing permit. If a term less than 20 years is necessary because a future use determination study is under way or planned, the length of term granted should provide for time to complete the study plus 10 years.

3. Those permittees having annual permits or whose term permit ends December 31, 1986, will be offered new term permits on the same basis as though they had an existing term permit.

4. Annual fees for those permittees issued new term permits will be determined in accordance with provisions of the preceding proposal.

5. For those permittees electing to retain their existing permit, fees for 1987 will be determined by multiplying the aggregated IPD index for the number of years since the existing fee was established. For example, the 1987 fee for a permit with a fee of \$300, established in 1979, would be \$456 (\$300 times 1.52). In accordance with the terms of existing permits, the fee established for 1987 would remain

constant until the end of the 5-year fee adjustment period. At the time, the appropriate aggregate IPD index would be applied to redetermine the fee. This methodology would continue until expiration of the term of existing permits, at which time the new term permit would be issued, unless notice of termination or nonrenewal has been given.

6. In accordance with existing procedures there will be no phase in of fees established as set forth in the preceding paragraph.

Request for Public Comment

The proposed recreation residence policy will, upon adoption, be issued as amendments to Forest Service Manual (FSM) Chapter 2720 and Forest Service Handbook (FSH) 2709.11, Special Uses. The proposed revised policy for recreation residences, as it would appear in the Agency's directive system, is set forth at the conclusion of this notice for public review and comment.

The Forest Service will review and consider comments in development of final procedures and policy on recreation residence use. A discussion of public comment received on the proposal will be published in the *Federal Register* along with the text of the final Forest Service Manual and Handbook amendments.

Dated: December 24, 1986.

R. Max Peterson,
Chief.

Proposed Revised Recreation Residence Policy

Note.—The Forest Service uses alphanumeric codes and subject headings to organize the text of direction. Only those sections of the Forest Service Manual and Handbook that would be revised are set out here.

Title 2300—Recreation, Wilderness, and Related Resource Management

2347—Private Recreation Use

This section deals with privately built and owned structures allowed on National Forest land under special-use authorization. These structures are maintained exclusively for the use and enjoyment of holders and their guests. As recreation facilities, they are vacation sites and are not used on a permanent basis. (See FSM 2720 for nonrecreation special uses.)

2347.03—Policy

1. Manage private-use sites in accordance with a basic recreation policy (FSM 2303) that reflects the growing public need for access to all National Forest resources and the facilities thereon.

2. Maintain in place those facilities now occupying National Forest land under special-use authorization that (a) are at locations where the need for a higher public purpose has not been established, (b) do not constitute a hazard to National Forest resources, and (c) do not endanger the health, safety, or well-being of the holder or the public. Phase out all other uses.

3. Deny application for new private facilities except where they replace similar existing facilities.

4. Deny commercial activity at permitted, private-use sites.

5. Require private-use permittees to maintain their sites to protect and restore the natural Forest environment. Do not allow nonconforming facilities to be placed at these sites.

6. Make future use determination studies on private uses of National Forest land to determine the appropriateness of continuing the use. See FSH 2709.11, Special Uses Handbook, for conducting future use determinations.

2347.1—Recreation Residences. (FSM 2721.23 and FSH 2709.11).

1. Administer recreation residence special-use permits to ensure proper use of the site for family recreation purposes.

2. Phase out in a reasonable manner isolated occupancies originally authorized by recreation residence special-use permits (a) to resolve trespass cases, (b) to settle invalid mining claim occupancy cases, or (c) which acknowledged prior ownerships in cases of land acquisition. This does not apply directly to isolated recreation residence use in tracts or groups specifically planned and established for recreation residence purposes.

3. Use every reasonable effort to provide in-lieu sites to permittees having received termination or nonrenewal notice. For this purpose, sites in or adjacent to established tracts may be used, or new tracts may be established at sites not needed in the foreseeable future for a higher public use. In-lieu sites should be comparable to the sites being recovered when possible, but holders cannot be guaranteed that the available sites will be entirely satisfactory. New recreation residence tracts will not be approved for other purposes. (See FSM 2721.23e.)

4. Although a few full-time residences are currently authorized by special-use permit, approve no new such authorizations, except in special situations to provide caretaker or other similar services where there is a demonstrated need, or for some other

documented purpose approved by the Forest Supervisor (FSM 2347.12).

5. Continue recreation residences as a valid recreation use of National Forest lands unless need for a higher public use has been documented and established at the same location.

6. Issue 20-year term permits and renew them every 10 years unless otherwise established by a future use determination report.

7. Give at least 10 years written advance notice if permits are not to be renewed at expiration, except when (a) final decision authority does not rest with the Forest Service, (b) there is a breach of the permit, or (c) the site has been rendered unsafe by catastrophic events such as flood, avalanche, or massive earth movement.

2347.11—Preventing Unauthorized Residential Use

In tracts where the determination has been made that the site should remain in National Forest ownership, convert unauthorized residence use into bona fide recreation residence use. Enforce this objective in most tracts by enforcing the terms of the special-use permit. In other situations where a recreation residence has been used as a principal place of residence for many years, consider issuing a new special-use permit or reissuing in the case of transfer or sale of improvements, contingent on a clear understanding that the use will return to a bona fide, vacation-type home.

2347.12—Caretaker Residences

2347.12a—Authority. Authorize caretaker use of a recreation residence with annual permits under the Act of June 4, 1897. Require applicants who currently have term permits to surrender them since yearlong occupancy cannot be authorized under the Act of March 4, 1915, the Term Permit Act.

2347.12b—Caretaker Residence Use.
1. The Forest Supervisor may authorize caretaker residence in limited cases where it is demonstrated that caretaker services are needed for the security of a recreation residence tract(s), and alternate security measures are not feasible or reasonably available. The need for a caretaker residence rarely can be justified where yearlong occupancy is already authorized in the tract.

2. Authorize one residence per recreation residence tract depending on factors such as size and layout of the tract. The affected tract association, or if there is no association, at least 60 percent of the affected holders, must document approval of request for a

caretaker residence. Issue the permit for an existing residence.

3. Require the applicants for caretaker use to document those caretaker services they will provide.

4. Coordinate applications for caretaker residence permits with local Governmental agencies to avoid creating unreasonable demands or burdens for such services as snow plowing, mail delivery, garbage pickup, school bus, or emergency services.

5. Determine the fees for caretaker residences through acceptable appraisal methods. These fees may be more than those charged for recreation residence use of a similar site in the tract.

6. A tract association may own caretaker residences; otherwise, the permit must contain a provision that automatically terminates authorization for yearlong use in case of change in ownership.

7. If a site ceases to be used as a caretaker residence, issue a new term permit for recreation residence use to the permit holder, if qualified, or to the purchaser of the improvements.

Title 2700—Special Uses Management

2721.23—Recreation Residences

This designation includes only those residences that occupy planned, approved tracts or those groups established for recreation residence use. (See FSM 2347 for basic policy on recreation residence use.)

2721.23a—Administration

The following direction relates directly to issuance and administration of special-use permits for recreation residences.

1. Issue special-use permits for recreation residences in the name of one individual or to a husband and wife. Upon reissuance or amendment, revise authorizations that are not issued to an individual or to a husband and wife, so that the responsible person is identified.

2. Issue no more than one recreation residence special-use permit to a single family (husband, wife, and dependent children).

3. Do not issue special-use permits for recreation residence use to entities such as commercial enterprises, trusts, nonprofit organizations, business associations, corporations, partnerships, or other similar enterprises, except that a tract association may own a caretaker residence.

4. To help defray costs and provide additional recreation opportunities, incidental rental may be approved for specific periods. Ensure that rental use is solely for recreation purposes and

does not change the character of the area or use to a commercial nature.

5. Authorize no more than one dwelling per site. In those cases where more than one dwelling (residence/sleeping cabin) currently occupies a single site, allow the use to continue in accordance with the authorization. However, correct such deficiencies, if built without prior approval, upon change of ownership or reissuance of the special-use permit.

6. When a recreation residence is included in the settlement of an estate, issue a new special-use permit, updated to reflect policy and procedural changes, to the properly determined heir, if eligible. Prior to estate settlement, issue a permit to the executor or administrator to identify responsibility for the use pending final settlement of the estate. When a recreation residence is sold, issue a new permit to the buyer, if eligible.

7. In cases where a tenure decision has been made and use beyond the expiration date will be permitted for a limited period of time, issue a term permit for an appropriate period of time, provided a permit cannot exceed maximum tenure limitations.

8. Issue recreation residence special-use permits for a maximum of 20 years.

a. New permits shall provide for renewal of 20-year permits 10 years before expiration unless termination or nonrenewal has been established.

b. At the end of the first 10 years after initial issuance, offer permittees, in writing, new 20-year permits that also include the provision for renewal at the end of 10 years, unless written notice of termination or nonrenewal has been given.

c. Continue to renew permits in this same manner unless permittees are given notice of nonrenewal or termination.

d. When an approved future use determination report has documented a higher public need for the site, the permit may be issued for between 10 and 20 years, depending on the time of the identified need.

e. If termination or nonrenewal has been established for less than 10 years, term or annual permits may be issued until use of the site(s) for the identified need is ready to begin.

f. Clearly specify the limited tenure in the permits. Notify existing and prospective permittees of the reasons, and reference the applicable future use determination report.

9. To the extent possible, issue all recreation residence special-use permits in a tract, or in logical groups of tracts, for the same term with the same expiration date.

10. The Forest Supervisor or Regional Forester may review termination or nonrenewal decisions at any time, using current Forest Service Manual and Forest Service Handbook policies and guidelines and considering any new or changed conditions. If review indicates that a site or sites will remain needed for higher public use at the termination date, the earlier decision may remain unchanged. If review indicates that a site is no longer needed, or is not needed as soon as estimated, amend the future use analysis report and provide for continuation of the recreation residence use by issuing a new permit.

11. In the event a recreation residence is destroyed or substantially damaged by a catastrophic event such as a flood, avalanche, or massive earth movement, conduct an environmental analysis to determine whether improvements on the site can be safely occupied in the future under Federal and State laws before issuing a permit to rebuild.

Normally, the analysis should be completed within 6 months of such an event. Allow rebuilding if the site can be occupied safely. If rebuilding is not permitted, make every effort to offer in-lieu sites to holders.

However, do not allow rebuilding of sites under tenure notice if the improvements are more than 50 percent destroyed.

12. At the time special-use permits are issued, advise permittees that they must notify the Forest Service if they intend to sell their improvements and they must provide the name and address of the prospective purchaser before finalizing a sale. Insofar as possible, advise a prospective purchaser of the terms and conditions of the special-use permit before the sale is final.

13. Usually, do not stay a fee increase pending completion of an appeal of the fee under the administrative review regulations. Any adjustments resulting from the administrative review will be made through credit, refund, or supplemental billing.

14. Recreation residences are a valid use of National Forest lands, therefore, undertake termination or nonrenewal of the use only for breach of the permit, or when need for higher public use of the site is clearly demonstrated. Recreation residences may represent a substantial investment and have the potential of supporting a large number of recreation person-days per acre compared with other uses. When considering termination or nonrenewal of recreation residence permits for an alternative use, be sure the clear weight of the evidence is on the side of the need for the proposed new use at that location.

Before approval, the Regional Forester should review proposed termination or nonrenewal notices, with supporting documentation and a summary of the public comments, and may modify them.

15. Insert a provision in all recreation residence special-use permits that makes it clear that if, at any time, occupancy becomes residential in nature to the exclusion of a home elsewhere, the special-use permit will be terminated.

2721.23b—Applications.

A new owner shall make application for the authorization to use existing improvements in accordance with 36 CFR 251.54.

2721.23c—Permit Preparation.

(FSH 2709.11, chapter 30)

1. Use form FS-2700-18, Term Special-Use Permit for Recreation Residence, to authorize recreation residences except use form FS-2700-4, Special-Use Permit, when:

a. Temporary use of a terminated or nonrenewed recreation residence is authorized and the term of continued use cannot be predicted.

b. Continuance of the recreation residence use is conditioned on the owner complying with specific Forest Service requirements before a term permit is issued.

c. The improvements are managed by a third party pending settlement of an estate, bankruptcy proceedings, or other legal action.

d. Yearlong occupancy is authorized by the Forest Supervisor, at which time the improvement ceases to be a recreation residence.

2. Include in the special-use permit all authorized improvements associated with recreation residence use, however, do not authorize use of more than the statutory maximum of 5 acres under a term permit. Authorize community or association-owned improvements, such as water systems, by a separate permit (form FS-2700-4). Include the following in all new, reissued, or revised special-use permits:

a. A description of the site, which is the tract name and site (lot) number when these exist.

b. A list of the authorized improvements.

c. A requirement that the recreation residence must be occupied at least 15 days annually. This is the minimum acceptable occupancy of a private recreational facility using National Forest System land year-round.

d. Standard clauses as required in FSH 2709.11, Special Uses Handbook.

2721.23d—Fee Determination (FSH 2709.11, chapter 30)

1. Use a fair market value system in determining annual rental fees for recreation residence sites. Redetermine the base fee at 20-year intervals.

2. Adjust the fee annually by the changes in the Implicit Price Deflator.

3. Use professional appraisal standards in appraising recreation residence sites for fee determination purposes.

4. Where feasible, contract with private fee appraisers to perform the appraisal.

5. Require appraisers to coordinate the assignment closely with affected permit holders by seeking advice, cooperation, and information from the holders and local holder associations.

6. Retain only qualified appraisers. To the extent feasible, use those appraisers most knowledgeable of market conditions within the local area.

7. Before accepting any appraisal, conduct a full review of the appraisal to ensure the instructions have been followed and the assigned values are supported properly.

Forest Service Handbook 2709.11 Special Uses

Chapter 30—Fee Determination

31—Recreation Residence Fees—
31.1—Base Fees and Indexing. Follow these procedures in determining the base (beginning) fee and subsequent fees under a 20-year cycle.

1. As the initial base, use the fees established between 1978 and 1982. (The

first year of the fee cycle will be the first year of the established fee, disregarding any phase-in that may have been provided.) Adjust the full base fee forward by applying the cumulative Implicit Price Deflator (IPD) index, beginning at the first year of the cycle. Use the overall IPD reported by the Bureau of Labor Statistics for the second quarter of the year preceding each fee year. New fees, established in this manner, will be phased in over a 3-year period (1987–1989) at the rate of one-third of the increase each year.

Use Exhibit 1 in determining the appropriate index adjustment.

2. Continue applying the index on an annual basis through the last year of the fee cycle. For term permits that restrict adjustments to 5-year intervals, apply the IPD index adjustments cumulatively at 5-year intervals. At the end of the current 20-year term, or earlier if agreed to by the permittee, revise permits to provide for annual indexing.

3. In those few cases where one or more additional sleeping structures (guest cabins, and so forth) have been added to a single lot, add to the base fee an additional charge equal to 25 percent of the fee established for a single residence use of the site or \$100, whichever is greater.

4. In situations where a definite tenure period has been established (that is, the special-use permit will not be renewed upon expiration), freeze the fee 10 years before the expiration date, and waive a portion of the fee each year during the remaining period proportionate to the reduced use period. For example, charge a holder with 9 years use remaining 90 percent of the frozen fee; with 8 years, 80 percent; and so forth (Section 31.2).

5. Reappraise the site toward the end of the 20-year cycle. Beginning in the twenty-first year (the first year of the next fee cycle) (1997 in the case of 1978 fees), put into effect the base fee for the next 20-year cycle by applying 5 percent to the newly determined appraised market value of the site for recreation residence purposes.

EXHIBIT 1.—IPD ADJUSTMENT FACTOR BY YEAR

Base fee year	1979	1980	1981	1982	1983	1984	1985	1986	1987	Overall adjustment
1978	1.101	1.092	1.095	1.067	1.050	1.032	1.038	1.033	1.026	1.67
1979		1.092	1.095	1.067	1.050	1.032	1.038	1.033	1.026	1.52
1980			1.095	1.067	1.050	1.032	1.038	1.033	1.026	1.39
1981				1.067	1.050	1.032	1.038	1.033	1.026	1.27
1982					1.050	1.032	1.038	1.033	1.026	1.19

The IPD factors for fee years 1979-1987 utilizes IPD for the second quarter of the preceding year.

The following two examples illustrate use of this table in determining the 1987 fee:

(1) A fee of \$412 that became established in 1982 (first year in the fee cycle) would be adjusted to \$490 in 1987 ($\$412 \times 1.19$). Because of the 3-year phase, the permittee would be charged \$438 for 1987, instead of the full amount.

(2) A 1980 fee of \$315 would be adjusted to \$438 ($\$315 \times 1.39$) with the actual 1987 charge limited to \$356.

31.11—Fee Credits. Provide permit holders any unused or remaining credits due them under provisions of the Appropriations Acts for fiscal years 1983 through 1986.

31.2—Fees on Nonrenewal. When permits are placed on tenure, freeze the annual fee at the level of the previous year. This will be referred to as the "base on tenure fee".

The permittee shall pay the fee based on the following structure:

Years remaining	Percent of Base on Tenure Fee
10	100
9	90
8	80
7	70
6	60
5	50
4	40
3	30
2	20
1	10

Upon expiration of the termination or nonrenewal (on tenure) notice period, the permittee shall have an option to:

- Remove the improvements.
- Release the improvements to the Forest Service.

On expiration of the on tenure period, and if termination or nonrenewal is still valid, the permittee shall return the property to a condition acceptable to the Forest Supervisor with rights of merit appeal.

Use the following fee determination procedures when a review of the termination or nonrenewal decision shows conditions have changed that warrant continuation of the recreation residence permit.

1. If a new 20-year term permit is issued, the Forest Service shall recover one-half of the sum of the year-by-year difference between the "base on tenure fee" and the fee actually paid. This amount shall be collected evenly over a 10-year period.

2. The new fee for the permit shall be the amount specified in item 1 until paid in full, plus the annual index adjusted

fee computed as though no tenure existed.

3. If neither item 1 nor 2 apply, and if the occupancy of the subject site is allowed to continue under an on tenure condition, there shall be no recovery of past fees and the new fee shall be determined by:

a. Computation of the fee as if no tenure notice was issued reduced by the appropriate percentage for the number of years of the extension provided (that is, a 6-year tenure period results in a fee equal to 60 percent of the new base on tenure fee).

b. If a site is allowed to continue on tenure past a 10-year period and is returned to a normal permit, the Forest Service shall recover fees as outlined in items 1 and 2, computed for the most recent 10-year period in which the permit was on tenure.

31.3—Appraisals. Use the following process to determine the fair market value of the recreation residence sites.

1. Use appraisals made by professional appraisers for determining the market value of the fee simple interest of the National Forest land underlying the site subject to a special-use permit, but without consideration as to how the authorization would or could affect the fee title of the site.

2. In consultation with affected special-use permit holders, select and appraise typical sites (rather than all individual sites) within groups that have essentially the same or similar value characteristics. Within such groupings, adjust for measurable differences between the sites. (Once properly established, typical lot classifications should rarely change.)

3. Ensure appraised values are based on comparable market sales of sufficient quality and quantity that will result in the least amount of dollar adjustment to make them reflective of the subject sites characteristics. Such characteristics include:

- Physical differences between subject site and the comparable sales.
- Legal constraints imposed upon the market by governmental police powers.
- Economic considerations evident in the local market.
- Locational considerations of subject site in relation to the market (sales) comparable.
- Functional usability and utility of the site.
- Amenities occurring to the site as compared with selected sales comparables.
- Availability of improvements (such as roads, water systems, and powerlines) provided by nonholder entities, including the United States. (Do

not adjust for improvements furnished by holders).

h. Other market forces and factors identified as having a quantifiable affect upon value.

31.31—Appraisers

1. Select fee appraisers who hold a current certification of competence from a nationally recognized professional appraisal organization. In the case of Forest Service appraisers, use those individuals who have received adequate training through professional appraisal organizations and who have satisfactorily completed the basic courses necessary to demonstrate competence.

2. Require appraisers to sign a standard agreement that states:

- The approved appraisal format to be used.
- The approved standard forms to be used.

c. A full, complete, and accurate definition of the appraisal problem.

d. The standards of professional competence, ethics, and practice to which the appraiser shall adhere.

e. Those requirements of the appraisal assignment that may be imposed under (1) statutes, (2) Federal regulations, (3) Forest Service policies and procedures, and (4) situations unique to the given appraisal assignment.

3. Require appraisers to contact affected permittees and offer to meet with them to discuss the assignment, answer questions specific to the assignment, and seek advice, information, and cooperation from the permittees and their local organizations. At such meetings, require that the appraiser give the permittees copies of the appraisal instructions, directions, and requirements. Failure to offer such a meeting with permittees at a location reasonably convenient to the permitted sites will void the appraisal. The appraiser must notify permittees of such a meeting at least 30 days in advance of the meeting. Send notices via U.S. mail to the address used for bills for collection. Use the notice to give the permittees advance information on the appraisal assignment.

31.32—Establishing Recreation Residence Site Value

Upon receipt of the appraisal report, conduct a review of the appraisal in conformance with the standards of the National Association of Review Appraisers.

2. Following review and acceptance of the appraisal, notify affected permittees of Forest Service acceptance of the report. In the notification, inform

permittees that they and other interested parties have 45 days in which to contest the appraisal. Charge only the cost of reproduction on requests for complete copies of the report(s) and supporting documentation.

3. Upon request, provide an opportunity for affected permittees 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.

a. Provide the permittee-employed appraiser with a copy of the standards used by the appraiser selected by the Forest Service; require the same, full standards, including a signed certification that ensures an understanding of the appraisal instructions and standards.

b. Subject the permittee-furnished appraisal to the same review requirements as the appraisal obtained by the Forest Service.

c. Give full and complete consideration to both appraisals. If the two appraisals disagree in value by more than 10 percent, ask the two appraisers to try and reconcile or reduce their differences. If necessary, seek a third opinion for consideration before determining the fee.

Title 2700—Special Uses Management

2721.23e—Analysis of Recreation Residence Continuance

(FSH 2709.11, channel 40)

Follow these instructions in determining whether recreation residence use may continue at current sites or whether the sites should be converted to a higher public use.

1. Analyze and consider the future use needs of recreation residence sites before renewing the authorizations for new terms. Before issuing a nonrenewal decision, ensure that the action is fully supported by a separate future use determination report conducted within the requirements of the National Environmental Policy Act and Forest Service analysis process. If done as part of the Forest Plan, the report will consist of a separate appendix to the plan.

2. Ensure that continuance of recreation residence uses conforms with the Act of March 4, 1915, authorizing issuance of term special-use permits for summer homes.

3. Base nonrenewal or termination decisions on the extent of the need for higher public use of the site. Higher public use or purpose refers to a higher priority use of the site by the general public that is timely, clearly needed, in public demand, and where other sites to satisfy the need cannot reasonably be made available. In meeting public needs,

give consideration to alternatives such as (a) availability of sites other than recreation residence sites to satisfy the public need, (b) feasibility of common, shared, or multiple uses that include recreation residences, and (c) increased feasibility of common or shared use through adjustment of site and tract size, configuration or boundaries, or location of improvements.

4. Coordinate continuance of recreation residence use with decisions contained in the Forest Land and Resource Management Plan. Document this future use study as an appendix to the plan, or as a separate document. Document the future use decision before renewing authorizations for new terms.

5. When permits are terminated or not reissued at expiration, make every reasonable effort to offer holders alternative (in lieu) sites at locations not needed in the foreseeable future for a higher public use (FSM 2347.1, and FSH 2709.11, Sections 41.23b and 41.23d).

6. In the event of a nonrenewal decision, give the holder at least 10 years continued use and identify the specific higher priority public purpose(s) for which the land is being recovered. Allow continued use of the site until such time as conversion to the new use is ready to begin.

2721.23f—Participation In Appeals

1. Notice of any recreation residence appeals that reach the Regional Forester, will be given to permittee representatives, including the National Forest Recreation Association Homeowners Division, who have expressed interest in being involved in the appeal. The purpose is, on a regional basis, to provide an opportunity for the permittee representative to intervene to reduce conflict between holders and the Forest Service. As necessary, specify a Forest Officer to work with the permittees.

2. Consider information submitted by permittee representatives within the context of the appeals process as provided in 36 CFR 211.18.

3. The Reviewing Officers may exercise their authority to extend time to give the permittees and other parties a reasonable time to submit their information, 36 CFR 211.18 (d) (2).

Forest Service Handbook 2709.11—Special Uses Handbook

Chapter 40—Special Uses Administration

41.23—Recreation Residences—

41.23a—Future Use Determinations.

(FSM 2721.23e). Before renewing special-use permits, analyze the future use of the recreation residence tract.

1. If the sites are not needed for higher public purpose within the next 20 years, document that decision and issue new 20-year term permits.

2. If the sites may be needed for higher public use within 20 years, conduct a future use study to determine whether or not the sites should be recovered for higher public purposes and, if so, when.

3. Document decisions to recover sites for a higher public use in a special-use determination environmental analysis report that is coordinated with the Forest plan but written separately from it.

4. If there is no foreseeable need for the recreation residence tract to remain in public ownership, encourage and facilitate an exchange of the sites (on a tract or group basis) for private lands suitable for National Forest purposes. Give priority to those proposals in which the offered private land would provide equal or greater benefits for the public need.

5. As appropriate, require conditions in National Forest land disposals to ensure the recreation residence use continues in a manner compatible with adjoining or nearby National Forest uses.

41.23b—Future Use Analysis

Procedures—1. Report. When nonrenewal is anticipated or could be recommended, prepare a detailed report that gives an objective and fully explanatory description and analysis of all relevant data, and any explanatory notes, charts, and maps needed to explore all reasonable alternatives. Follow the environmental analysis process and supplement the report by an action plan.

In developing the report, encourage and solicit information and comments from permittees and other interested parties. Provide them with 45 days to comment on a draft of the future use determination report and the supporting documentation.

To ensure Region-wide uniformity, submit the reports, recommending nonrenewal, including permittee comments, to the Regional Forester for review before the Forest Supervisor approves the nonrenewal.

Provide permittees and interested parties with copies of the final report and decision immediately after the decision date.

Consider the following aspects in the report:

a. *Recreation Use.* Discuss the relationship between the recreation residence use and other present and proposed uses of the site. Thoroughly describe elements of compatibility and

conflict. If there are current or anticipated conflicts, describe the feasibility of other sites to meet public use needs. Develop a full range of alternatives that at a minimum:

(1) Show ways to meet the public recreation needs without significant conflict with recreation residence uses, if possible, and how existing or potential conflicts can or cannot be mitigated.

(2) Examine the feasibility of common, shared, or multiple use that includes the recreation residences. Also examine the feasibility of adjusting site and tract sizes, configurations and boundaries, or relocation of site improvements to better accommodate such use.

(3) Examine the feasibility of alternative sites for general public use.

(4) Show how the current and/or future need for other planned recreation uses outweighs or is outweighed by the benefits of continued recreation residence use.

(5) Compare the potential recreation and financial losses to holders and their guests with the benefits that the public would gain from nonrenewal of the authorization.

b. *Other Resources.* Show in what way recreation residence occupancy is compatible or in conflict with other National Forest resources.

c. *Environmental Impacts.* Discuss the environmental impacts of continued recreation residence use, together with the impacts of any improvements necessary for their continued use, compared with the impacts of any proposed alternative public use.

d. *Health and Safety.* Examine whether the occupancy constitutes a hazard to the health and safety of the general public or the permittees. Explain specifically how and in what manner these hazards will occur and the opportunities for acceptable curative actions. Discuss whether health and safety standards can be met.

e. *Administrative Problems.* Explain if the occupancy creates untenable administrative problems or costs when related to the benefits provided the permittees and the general public, including fees, cultural benefits, barriers to environmentally harmful use, and other amenities or services attributable to the presence of the permittees' improvements.

f. *In-Lieu Site Availability.* Make every reasonable effort to locate and reserve in-lieu sites that could be offered the permit holder for building or relocation of his improvements. Such sites must be nonconflicting locations within or adjacent to the National Forest containing the residences. See FSM 2347.1 and FSM 2721.23e. Appropriate alternatives for consideration are

undeveloped lots or sites in, near, or adjacent to established tracts, or new tracts at sites not needed in the foreseeable future for a higher public use. Follow these procedures:

(1) If possible, offer in-lieu sites to holders at the time the termination or nonrenewal notice is given. If sites do not become available until later, offer them then.

(2) Give first priority to identifying and offering in-lieu sites in the same tracts or an expansion of that tract, where feasible.

(3) Following joint inspection of the site by the Forest Service and the permittee, allowing holders at least 90 days in which to accept or reject the offer.

(4) Ensure that holders clearly understand that the offer may not remain available through the entire tenure period.

(5) When holders accept such offers, reserve the offered sites. Do not charge a fee until the holder begins improving the site.

(6) Allow holders accepting offers to continue use of their current sites until the termination date. Inform the holders that they should be prepared to move to the in-lieu site during the 24 months prior to the scheduled occupancy removal, provided a supplemental review of the termination or nonrenewal action has been completed.

(7) Do not offer alternative sites for termination or nonrenewal actions stemming from noncompliance with special-use permit terms.

2. *Nonrenewal Factors.* Support nonrenewal factors by full consideration and documentation of the following specific factors and criteria:

a. The specific intended use or uses and the estimated time and budgetary feasibility of the need.

b. The need for the alternative use and the reason for its priority.

c. The reasons the public need cannot be met at an alternative location.

d. All reasonable alternatives to the conversion, including the possibility of combining or sharing public uses with recreation residence uses; and adjusting or altering lots or location of improvements to better accommodate common or shared uses.

e. The reasons any conflict between the recreation residences and the proposed alternative use cannot be resolved.

f. The need to develop and provide the public use needed in a cost effective manner.

3. *Higher Public Purpose.* Identify and consider whether or not there is clear need for higher priority use of the site that is of benefit to the general public, is

timely, in public demand, and where other sites to satisfy the need cannot reasonably be made available. Need and timeliness, for example, can be demonstrated by capacity use of similar nearby facilities.

Examples of higher public purposes include but are not limited to (1) public roads and other public rights-of-way where no reasonable alternatives exist, (2) legally mandated public safety or health requirements, (3) specific types of public recreation needs, (4) habitat requirements for rare or endangered species, and (5) commercial use developments serving National Forest programs, such as authorized resort accommodations, where no reasonable private alternatives exist. Determination of higher public purpose for commercial use must show a clear and convincing need and bear at least as great a burden of proof as those for other uses. Higher public purposes do not include unspecified public needs or uses, such as general Forest use or open space alone.

41.23c—*Nonrenewal Notification.* Provide permittees 10 years or more advance notice of termination or nonrenewal actions except in cases involving breach, or when the site has been rendered legally unsafe by catastrophic events such as avalanche, flooding, or massive earth movement, or where the Forest Service does not have final decision authority. In these exceptions, make an effort to provide as much notice as possible.

Include in a nonrenewal notice:

1. A description of the tenure action and the reasons for the decision.

Normally, use the same expiration date for all affected permittees in a particular group or tract.

2. Identification of the Forest plan and future use determination upon which the decision is based.

3. Appeal rights under 36 CFR 211.18.

4. A notice that the permittee should refrain from making costly repairs, improvements, or expenditures. Advise permittee that such expenditures will not be required unless they are necessary to protect public health or safety.

Refer to FSM 2721.23a for procedure when recreation residences are destroyed or substantially destroyed by catastrophic events.

41.23d—*Review of Termination and Nonrenewal Actions.* The Forest Supervisor or the Regional Forester may review termination and nonrenewal actions in process and should consider such reviews when circumstances or Forest Service direction have changed in a manner that could suggest

modification of the original decision (FSM 2721.23a).

1. Decisions resulting from such discretionary reviews are appealable under Administrative Review Regulations.

2. Reviews may be made of all categories of termination and nonrenewal decisions, and at any time up to the termination date.

3. Permittees should be asked to provide input for the reviews.

4. Extension of occupancy should be granted if the site is not immediately needed for higher public use.

41.23e—*Noncompliance*. Give a written notice and provide a reasonable opportunity for a holder to correct special-use permit violations before terminating the use for breach or noncompliance.

Where violations persist causing unacceptable environmental damage or conflicts and acceptable solutions

cannot be found, terminate the use in accordance with the permit terms, or if the authorization is near its expiration date, do not renew the authorization upon its expiration. In any case, do not allow violations to continue that are injurious to resources or the public health and safety.

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