



United States
Department of
Agriculture

Forest
Service

Southwestern
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File Code: 1570-1/2720/2340

Date: August 30, 1999

Don Van Camp
P.O. Box 761
Alpine, AZ. 85920

Re: Appeal #99-03-00-0044-A251, Luna Lake Boat Dock Permit,
Apache-Sitgreaves National Forests

Dear Mr. Van Camp:

This is my decision on the appeal filed May 21, 1999, concerning Forest Supervisor John Bedell's final decision to remove the trailer and deny residency in the Luna Lake permit area. This appeal review is conducted pursuant to 36 CFR §251, Subpart C. My review is based on the Administrative Record (AR) which was submitted by the Forest Supervisor on July 22, 1999.

The appeal indicates that the decision to remove the trailer and deny on-site residency fails to consider; the special use permit, previous statements allowing for residency, and agency policy regarding residency. The appeal also states that there is no basis for noncompliance and that the trailer be returned and the appellant be allowed to reside on-site year round. These issues are found in the appeal in paragraphs 5a, 5b, 6a, 6b, and 8 respectively.

ISSUE 1 - The decision fails to consider the special use permit (appeal paragraph 6a and attachment 5 of the appeal).

Response: The Luna Lake Marina is authorized by a Term Special Use Permit (FS-2700-5), dated May 26, 1995 (AR - Index F). The Special Use Permit through its terms, binds both the Authorized Officer and the holder of the permit. The permit designates those activities and facilities which are authorized to take place within the permitted area. The specific Term Special Use Permit issued on May 26, 1995, states:

"A boat dock and buildings located at Luna Lake; and for the purpose of operating a high quality boat dock and boat rental service and operating a high quality concession service which would include but not be limited to selling fishing tackle, food, drink, grocery items and firewood."

The permit does not specify on-site residency as an authorized activity or facility. The regulations at 36 CFR §251.54(d) provide that: "*No rights or use privileges are conveyed without a special use authorization.*" The regulations at 36 CFR §251.55(b) states in part: "*All rights not expressly granted are retained by the United States.*"



The permit does not expressly authorize residency therefore, it is within the Forest Supervisor's discretion as to whether or not on-site residency is appropriate.

ISSUE 2 - The decision fails to consider previous statements allowing residency, specifically Nancy Walls' letter of May 21, 1997, (appeal paragraph 5b) and Mr. Dyson's verbal approval (appeal paragraph 6a). The decision fails to consider Forest Service policy which allows temporary residency (see attached excerpt from the Forest Service Manual [FSM] 2341.5) referenced in the May 21, 1999, letter .

Response: Nancy Walls' letter (AR - Index I) and the verbal statement of Bob Dyson as well as, the letter dated November 16, 1998, from District Ranger Phil Settles (AR - Index N) are all discretionary acts within the administration of the permit. However, they are not permit amendments which authorize residency, as required by Clause 45 of the permit.

Forest Service policy found in the FSM 2341.5 allows the agency to consider on-site residency, however, this action is at the discretion of the authorized officer. The Forest Supervisor has the authority to approve, disapprove, and/or change the seasonal length of occupancy based upon site specific factors and public service needs. The Forest Supervisor's decision to have the trailer and residence removed from the permit area is within his discretion. The rationale for this decision is presented in the letter dated January 21, 1999 (AR - Index Q).

ISSUE 3 - There was no basis for citing noncompliance with the permit or regulation and appellant should be allowed to return the trailer to the permitted area and allowed year round residency.

Response: Clause 45 of the Term Special Use permit issued to Mr. Van Camp states:

"Clause 45. IMPLIED PERMISSION (X3): Nothing in this permit shall be construed to imply permission to build or maintain any structure not specifically named on the face of this permit, or approved by the authorized officer in the form of a new permit or permit amendment."

The letter dated January 21, 1999, (AR - Index Q) states that year round occupancy is not permitted and that the trailer and residence must be removed. Because the trailer and residence had not been removed as of April 8, 1999, further direction was sent in the form of a Notice of Noncompliance (AR - Index Z).

The permit does not expressly authorize on-site residency (AR - Index F). Therefore, it is within the Forest Supervisor's discretion to decide the issue of whether on-site residency is appropriate.

DECISION: After review of the appeal and the administrative record I affirm the Forest Supervisor's decision to deny on-site residency. Your request to return the trailer to the permitted area and your request for year round residency is denied.

In accordance with 36 CFR §251.87(e) and §251.100, the Chief of the Forest Service has the discretion to review this decision. The Chief has 15 days from receipt of this letter to elect discretionary review of this decision.

Sincerely,

/s/James T. Gladen
JAMES T. GLADEN
Appeal Reviewing Officer
Deputy Regional Forester

Attachment

cc:
WO, Recreation Staff
Apache-Sitgreaves NFs
Alpine RD (Phil Settles)
R3, Recreation (Beckley, Holbrook)
R3, Appeals & Litigation

FSM 2341.5

"Occupancy" within a permit is directed by the Forest Service Manual which states:

"2341.5 - Permittee Employee Housing. Some special recreation uses, such as ski areas and year-round resorts, may require on-site housing for the permittee and/or employees of the permittee to adequately protect property and provide for public safety. The authorized officer shall carefully evaluate the need and justification for permittees housing within a permit area and shall make the determination in compliance with the appropriate environmental analysis and documentation requirements set forth in FSM 1950 and FSH 1909.15.

An authorized officer may approve permittee housing within a permit area if the following conditions are met:

1. Provisions of permittee housing is consistent with the management direction and guidelines of the forest land and resource management plan for the area.
2. There is a clear and convincing need for 24-hour, on site property protection, round-the-clock public safety, and/or intermittent emergency service at other than normal operating hours and the commuting time between the permit area and the nearest private property available for permittee housing exceeds one hour.

Ownership of permittee housing for the holder of the permit or employees of the holder must be vested in the holder."