

# Location, Location, Location: Forest Service Administration of the Recreation Residence Program

*Dan Gildor\**

Introduction .....	994
I. History and Legal Background of Program Administration .....	996
A. History of the Recreation Residence Program .....	996
B. Current Recreation Residence Policy and Guidelines .....	1002
C. Problems with Program Administration .....	1006
II. Reforming the Recreation Residence Program .....	1007
A. Constraints on Reform.....	1008
1. The Politics of the Recreation Residence Program.....	1009
a. Client Politics.....	1009
b. Popular Sympathy.....	1013
2. Personhood As a Trigger.....	1014
a. The Personhood Concept.....	1014
b. Personhood as Applied to the Recreation Residence Program.....	1015
B. Possible Paths of Reform.....	1017
1. Litigation as an Option to Clean Up the Program.....	1018
a. Laches .....	1020
b. Waiver.....	1022
2. Conversion to Life Estates.....	1024
3. Implementing Liability Rules.....	1028

---

Copyright © 2002 by the Regents of the University of California

\* J.D. Candidate, University of California at Berkeley School of Law (Boalt Hall), 2002; M.A. Political Science, Stanford University, 1993; B.S. Massachusetts Institute of Technology, 1990. The author would like to thank Marcia Abrams for suggesting this topic, Robert Infelise for his guidance throughout law school, and Nate Brodeur, Dave Owen, and the entire ELQ staff for getting this Comment to press.

4. Self-Monitoring and Enforcement..... 1030  
 5. Centralizing Program Administration ..... 1031  
 Conclusion ..... 1033

INTRODUCTION

The Forest Service’s Recreation Residence Program authorizes the public to construct recreational cabins, subject to various permit terms, on Forest Service land.<sup>1</sup> The cabins are located on lots within formally established tracts designated for the construction of recreation residences. Currently, there are 15,200 outstanding cabin permits with 20-year terms.<sup>2</sup> California, which comprises Forest Service Region 5, has 6,314 cabin permits on 269 tracts—forty percent of the national program.<sup>3</sup> The cabin program draws more people per acre of National Forest land than any other use of the forest system.<sup>4</sup> Most of the tracts are located in areas of high recreation use—along shorelines of lakes, rivers, and other riparian areas.<sup>5</sup> Construction of private cabins on such prime land conflicts with alternate public uses for that land.<sup>6</sup> Many tracts are also found in areas with sensitive archeological values or endangered species.<sup>7</sup> Many permit holders ignore permit restrictions and

---

1. See generally U.S. FOREST SERVICE, FOREST SERVICE MANUAL §§ 2721.23, 2347.1 [hereinafter FOREST SERVICE MANUAL] (outlining Forest Service policy and procedures for managing the Recreation Residence Program).

2. Over the years, more than 19,000 recreation residences have been constructed. USDA, STRATEGY FOR INVENTORY AND HISTORIC EVALUATION OF RECREATION RESIDENCE TRACTS IN THE NATIONAL FORESTS OF CALIFORNIA FROM 1906-1959 6, 13 (2001) (on file with author) [hereinafter EVALUATION OF RECREATION RESIDENCE TRACTS].

3. Informational Memo—Recreation Residences, Memorandum from Pacific Southwest Region to Brad Powell, Regional Forester, USDA 1 (May 24, 2000) (on file with author) [hereinafter Informational Memo].

4. *Cabin User Fee Fairness Act of 1999: Hearing on H.R. 3327 Before the Subcomm. on Forests and Forest Health of the Comm. on Resources*, 106th Cong. 40 (Mar. 23, 2000) [hereinafter *Hearing on H.R. 3327*] (statement of Mary Clarke Ver Hoef, Chair, Governmental Liaison Committee, National Forest Homeowners). The cabin program provides more recreation visitor days per acre than any other use of the National Forest System.

5. Informational Memo, *supra* note 3, at 1. For instance, along Lake Almanor, which borders Lassen and Plumas National Forests, some of the last remaining publicly owned lakefront is a recreation residence tract. (The Forest Service only owns 13% of the lakeshore.) Because the public is reluctant to access the beachfront with the cabins present, the Forest Service for over 20 years has wanted to convert that shorefront to a public picnic area and campgrounds. Conversation with Marcia Abrams, Office of General Counsel, USDA (Feb. 20, 2001).

6. See Informational Memo, *supra* note 3, at 1.

7. *Id.* at 1, 2. For instance, in the Cleveland National Forest, unauthorized water diversions, decorative ponds with non-native fish and invasive vegetation, and large, soil-compacted or paved parking areas adversely impact the listed Arroyo Toad. *Id.* at 2. All of these practices violate terms of the recreation residence permits. Such

develop unauthorized improvements, engage in full-time occupancy, and fail to maintain the "natural" integration of their cabin to the forest.<sup>8</sup> Some cabins are occupied without a valid permit, while others are used for illegal activities, forcing the Forest Service to rely on law enforcement support during inspections.<sup>9</sup> Many permit holders have become entrenched over time, resorting to political pressure to block Forest Service attempts to shift recreation residence tracts to other uses. Instead of being a public gateway to the national forests, the program has become a bastion of property rights advocates and an obstacle to greater public enjoyment of the national forests.

While originally responsive to recreation demands, the program is no longer responsive to maintaining natural and historical resources and promoting public recreation in the national forests. Lacking the time and budget to enforce the permits, the Forest Service often has been unable to deal effectively with noncompliance. This has resulted in damage to environmental, historical, and archaeological resources. The Regional Forester in Region 5 recently stressed that "[i]mmmediate actions are needed to clean up [noncompliance]."<sup>10</sup> Forest Service attempts to enforce permit terms, however, often result in political interference.

With many permits expiring in the coming years, now is a good time for the Service to revisit the program. This Comment analyzes the program in light of the legal, political, and equitable constraints that limit the Forest Service's ability to manage the program. The Comment concludes that while litigation is a readily available option to remedy violations, the Forest Service will achieve greater success in reducing violations by converting the permits to life estates, changing enforcement to include a fine structure, co-opting permit holder associations to provide

---

discrete and gross permit violations merely hint at the extent of the problems throughout the entire program. For instance, a recent survey concluded that roughly half of the lots in California have archaeological or environmental resources that are impacted by unauthorized improvements and developments. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at App. 1. The great challenge for the Forest Service is to overcome the lack of information regarding violations and permit compliance created by slack enforcement.

8. See generally USDA, NATIONAL RECREATION RESIDENCE REVIEW AND ACTION PLAN (Sept. 1993) (on file with author) [hereinafter NATIONAL RECREATION RESIDENCE REVIEW].

9. See Informational Memo, *supra* note 3, at 2. Some cabins house suspected methamphetamine labs. Conversation with Marcia Abrams, *supra* note 5. A dead body was even found in one cabin during an inspection. Informational Memo, *supra* note 3, at 2.

10. See Informational Memo, *supra* note 3, at 2 (emphasis added).

self-monitoring and enforcement, and centralizing program administration.

## I

## HISTORY AND LEGAL BACKGROUND OF PROGRAM ADMINISTRATION

A. *History of the Recreation Residence Program*

The national forests were born from the conservation movement of the late nineteenth and early twentieth centuries.<sup>11</sup> That movement stressed "thoughtful, scientific management of natural resources."<sup>12</sup> At that time, recreation was a secondary, incidental use of the forests<sup>13</sup>—the national forests were established primarily to manage their extractive use.<sup>14</sup> Consequently, publicly-funded recreation was not seen as a legitimate use of the forests.<sup>15</sup> Facing growing demand for recreational opportunities from the "back to nature" movement, the nascent Forest Service squared its mission with the demand for recreation by emphasizing "simple, low-keyed, rustic, recreational experiences."<sup>16</sup>

The Forest Service did not create the idea of recreational use . . . rather the public came in of its own accord, each year in increasing numbers, and the Forest Service, recognizing that recreation was a resource, like timber and water, used its best efforts to see that it was so handled as to make the greatest returns to the national welfare.<sup>17</sup>

The Forest Service emphasized permitted recreation as a means of satisfying the growing recreational demands with minimal obligation on the part of the agency.<sup>18</sup>

From its inception, the Forest Service had the authority to grant permits for recreation residences.<sup>19</sup> Under the terms of its

---

11. See EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 17-18.

12. *Id.* at 17.

13. *Id.* at 18.

14. "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." Act of June 4, 1897, ch. 2, § 1, 30 Stat. 34, *codified as amended*, 16 U.S.C. § 475 (1994); *see also* United States v. New Mexico, 438 U.S. 696, 707 (1978) (holding that recreation and aesthetic values are secondary uses of the National Forests).

15. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 19.

16. *Id.* at 18.

17. E. A. Sherman, Outdoor Recreation on the National Forests 1 (1925) (unpublished manuscript, on file with the Forest History Society, Durham, NC).

18. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 19.

organic statute, the Secretary of Agriculture "may make such rules and regulations and establish such service . . . to regulate their [the national forests] occupancy."<sup>20</sup> Permits issued under this authority were "terminable at the discretion of the Forester and not for any definite period."<sup>21</sup> Because permits could be reviewed annually and terminated, the system lacked long-term security for permit holders.<sup>22</sup> Permittees argued that they needed longer tenure to justify their investment in constructing recreational cabins.<sup>23</sup>

In part as a result of permittee lobbying,<sup>24</sup> Congress passed the Occupancy Permits Act on March 4, 1915 (also called the Term Permit Act),<sup>25</sup> authorizing the Secretary of Agriculture to "permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores."<sup>26</sup> Rather than introducing a new and primary recreational use of the national forests, the Occupancy Permits Act did nothing more than

19. Act of June 4, 1897, ch. 2, 30 Stat. 35, *codified as amended*, 16 U.S.C. § 551 (1994).

20. *Id.* As early as 1905, the Attorney General advised the Secretary of Agriculture of the Secretary's authority under the Organic Act to grant revocable permits "for many purposes, including summer homes and camping grounds." *Wilson v. Block*, 708 F.2d 735, 756-57 (D.C. Cir. 1983) (citing 25 Op. Att'y Gen. 470 (1905)). This permit authority was upheld by the Supreme Court in *United States v. Grimaud*, 220 U.S. 506 (1911). In *Grimaud*, the Court reviewed the constitutionality of the authority of the Secretary to require permits for stock grazing on a forest reservation and to charge fees for such permits. *See id.* at 518, 522.

21. FOREST SERVICE, USDA, THE USE BOOK: REGULATIONS AND INSTRUCTIONS FOR THE USE OF THE NATIONAL FOREST RESERVES 64 (1906).

22. In a letter from the Secretary of Agriculture to Congress read during debate over the Occupancy Permit Act, *see infra* note 25 and accompanying text, the Secretary stated:

There is at the present time some hesitancy on the part of persons who want to use national-forest land upon which to construct summer residences, hotels, stores, and other structures involving a large expenditure, because of the indefinite tenure of the permits which the present law provides for. . . . In justice to those who desire to construct more substantial improvements, it is believed that the present law should be amended to give persons a better right than the revocable permit now authorized.

H.R. Rep. No. 1023, 63d Cong., 2d Sess. 2 (1915); 52 Cong. Rec. 1787 (1915).

23. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 37.

24. "Congress recognized that the permanent structures necessary for recreational use of the national forests would not be built unless private parties could obtain secure tenure." *Wilson*, 708 F.2d at 757.

25. Pub. L. No. 63-293, ch. 144, 38 Stat. 1101 (Mar. 4, 1915), *codified as amended*, 16 U.S.C. § 497 (1994).

26. 16 U.S.C. § 497(b) (1994).

legitimize existing recreation homes.<sup>27</sup> Recreation, therefore, remained a secondary use, with its status not always certain.

For the Forest Service, permitted recreation was useful in helping manage the forests. Permittees were often seen as people with a stake in proper forest management. Although not originally conservationists, permittees frequently gained a conservation ethic after acquiring permits and occupying cabins for a number of years.<sup>28</sup> Permittees became useful to the Forest Service to help manage fires,<sup>29</sup> and permit fees were seen as a source of income.<sup>30</sup>

In fact, during the early years of the program, "the Forest Service actively promoted summer home occupancy."<sup>31</sup> The popular press carried articles heralding summer homes in the national forests, including articles in such mainstream press as *The Saturday Evening Post*<sup>32</sup> and *Good Housekeeping*.<sup>33</sup> Articles even recommended the best ways for individuals to obtain permits.<sup>34</sup> The public responded well to the romantic portrayal of how "[m]any a business man has gained healthful and keen enjoyment in clearing a small area and erecting thereon a cabin in accordance with his purse and ability."<sup>35</sup> Such romanticism, fueled by the "back to nature" movement, dramatically increased

27. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 24.

28. *Id.* at 18.

29. The El Dorado National Forest stated:

A residence occupied under the restrictions imposed by a permit not only reduces the fire risk as compared to transient camping, but makes of the permittee a volunteer fire fighter whose interest in forest problems is increased by reason of close contact with them and financial investment in a forest.

El Dorado National Forest, Forest Service, USDA, Recreation Plan and Policy Statement 25-L (1926) (unpublished manuscript on file with Eldorado National Forest, Forest Service, USDA, Placerville, CA).

30. "The summer home business promises to become an important source of revenue." William B. Greeley, *Report of the Forester*, in ANNUAL REPORTS OF THE DEPARTMENT OF AGRICULTURE 19 (1920). In 1920, the Chief Forester reported that "such secondary use is becoming a very material source of revenue . . . [and] within a few years the revenues obtained . . . will pay the entire cost of protection and administration." *Id.*

31. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 19.

32. Thoda Cocroft, *Summer-Home Sites in the National Forests*, SATURDAY EVENING POST, Apr. 1930, at 214, 218.

33. Yes, a *Summer Home in a National Forest!*, GOOD HOUSEKEEPING, Apr. 1960, at 172.

34. One article in *American Forests* suggested that "[a]utumn weekends are especially desirable times to investigate the possibilities of a national forest summer home." M. D. Bellomy, *National Forest Summer Homes*, AMERICAN FORESTS, Sept. 1996, at 51.

35. HAROLD C. BRYANT, OUTDOOR HERITAGE 347-48 (1929).

the demand for recreation. Because there was no legal support for recreation as a primary use for the forests, however, the Forest Service was forced to resort to a permit process, the only available tool that allowed the Service to address the growing demand for public recreation without making it a primary use of the Forest System.<sup>36</sup>

Initially after enactment of the Occupancy Permit Act, the Forest Service still issued recreation residence permits under the Organic Act.<sup>37</sup> Because those permits did not have specific expiration dates, they were often misinterpreted as lasting in perpetuity, contributing to the prevalent myth of the "99 year lease" that surrounds current recreation residence permits.<sup>38</sup> Even today, the two permitting authorities continue to exist in parallel.<sup>39</sup> Starting in the 1920s,<sup>40</sup> however, with publication of guidelines for administering the Recreation Residence Program under the Occupancy Permit Act, the Forest Service began to issue more recreation residence permits. Despite instructions and policies to site recreation residence tracts in less desirable locations,<sup>41</sup> most cabins were built on sites with great scenic and

36. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 26. In contrast to a permit system, the Forest Service can enter into contracts with timber harvesters to cut timber, producing a very different property right. Because recreation is not a primary use, the only mechanism available to the Service to satisfy the demand is a permit system, resulting in a much more ambiguous property right.

37. Initial fees for permits under the Occupancy Permit Act were to be not less than \$10 while the minimum fee for the terminable permits under the Organic Act could be as low as \$5. *Id.* at 39. Consequently, many people obtained terminable permits because they were cheaper. *Id.*

38. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 38.

39. In fact, the Forest Service often uses a combination of term special use permits and revocable permits to permit a single recreational facility like a ski resort. See *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983) (using a term special use permit covering 24 acres for the ski lodge and other permanent facilities in combination with an annual revocable permit for 753 acres for the ski slopes); *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970). In *Wilson*, the court held that the 1915 Term Occupancy Act "neither limited the Secretary's power to issue revocable permits . . . nor prohibited him from issuing revocable and term permits simultaneously." *Wilson*, 708 F.2d at 757. Together, the two statutes confer

[b]road authority . . . for the Secretary to issue use permits under such regulations as he may make and upon such terms and conditions as he may deem proper. This grant of authority seems clearly valid in view of Congress' power over public lands and the conditions that may be imposed on their use.

*Sabin v. Butz*, 515 F.2d 1061, 1066 (10th Cir. 1975).

40. See California District, Forest Service, USDA, Recreation and Special Use Administrative Guide (1924) (unpublished manuscript on file with the Pacific Southwest Region, Forest Service, USDA, Vallejo, CA).

41. "Land of little or no value for general public use may be wholly satisfactory and desirable for summer residential purposes and toward such tracts the growth of

recreational potential because rangers used guidelines, established by Frank Waugh,<sup>42</sup> that placed recreation residences on par with other major forest uses of timber production and conservation of water resources.<sup>43</sup> Competition from better recreation opportunities provided by the newly created National Park System had driven Waugh to treat recreation as comparable to other forest uses.<sup>44</sup> His guidelines consequentially specified that "the territory usually desired for permanent camps is tree covered, and lies in canyons, along mountain streams, or beside mountain lakes."<sup>45</sup> Waugh used the popularity of existing recreation sites along the Columbia River and in the canyons above Los Angeles to justify his recommendation that recreation residences be sited on prime locations.<sup>46</sup>

By the 1930s, however, recreation residences started to fall out of favor with the Forest Service. Experience revealed that the recreation residence tracts could have been put to much higher uses.<sup>47</sup> Moreover, by the 1950s, revenues had fallen out of step with inflation—administration of the permit program cost the

---

summer home development should be directed." Recreation in Relation to National Forest Management 2 (unpublished manuscript on file with the USDA, Forest Service, Pacific Southwest Region, Vallejo, CA) (1920s). In one list of nine recreation priorities in the 1920s, recreation residences were listed last. *Id.* In 1937, on another list, recreation residence were 11th and were "permitted only on slopes which exceed 15% . . . and on such slopes which are not and which will not be [sic] needed even remotely for uses of a higher priority." Frank M. Sweeley, Major Factors for Consideration in National Forest Recreation in Region 3 (1937) (unpublished manuscript on file with the Pacific Southwest Region, Forest Service, USDA, Vallejo, CA).

42. Frank Waugh was a consultant hired by the Forest Service to study recreation facilities on National Forests and to make recommendations on how to develop and administer those facilities.

43. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 25.

44. See Frank A. Waugh, Recreation Uses on the National Forests: A Study of their Extent and Character with a Discussion of Public Policies and Recommendations as to Methods of Development and Administration 111-12 (1917) (unpublished manuscript on file with USDA, Forest Service, Pacific Southwest Region, Vallejo, CA).

45. FRANK A. WAUGH, LANDSCAPE ENGINEERING IN THE NATIONAL FORESTS 7-21 (1918).

46. *Id.* at 130.

47. A 1939 forest recreation plan for the Santa Barbara National Forest (now Los Padres National Forest) stated:

Public camps and picnic grounds in this vicinity are over crowded and large groves of native oak are endangered by excessive trampling of ground. Little used cabin site[s] in the same canyon take up many valuable sites much needed for expansion and use by a much greater number of people.

Los Padres National Forest, Forest Service, USDA, Los Padres National Forest Recreation Plan 2 (1939) (unpublished manuscript on file with the Eleanor Childers Archive of Forest History, Los Padres National Forest Heritage Center).

Forest Service more than it was receiving in fees.<sup>48</sup> In 1964, Congress established the Public Land Law Review Commission<sup>49</sup> to review public land uses and occupancy. In 1970, the Commission published its recommendations, including that public lands should not be made available for private vacation home purposes and that such existing uses should be eliminated.<sup>50</sup> The report found that "locations which are suitable and desirable for vacation homes are also likely to be suitable and desirable for present or future public recreation sites."<sup>51</sup> Under the Occupancy Permit Act, the Forest Service is supposed to exercise its authority "in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests."<sup>52</sup> Conflicts between recreation residence land use and other more desirable public uses spurred the Forest Service to establish in 1968 a moratorium on the development of new recreation residence tracts.<sup>53</sup> In 1976, the Forest Service extended the moratorium to include a prohibition on the development of new lots within existing tracts.<sup>54</sup> The moratorium, coupled with the expiration and non-renewal of existing permits, has decreased

---

48. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 33. A 1963 report by the General Accounting Office highlighted that the fees charged by the Forest Service for the recreation residence permits were substantially less than the fees charged for comparable private lands. COMPTROLLER GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS OF THE UNITED STATES: REVIEW OF RECREATION AND OTHER SELECTED LAND USE ACTIVITIES 16-17 (1963). This led to a perception that the general public was subsidizing the permit holders. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 33. Throughout the 1990s, the General Accounting Office continued to report that "fees for many of these permit holders are lower than they should be on the basis of current market conditions." General Accounting Office, U.S. Forest Service: Fees for Recreation Special-Use Permits Do Not Reflect Fair Market Value (Letter Report, GAO/RCED-97-16, Dec. 20, 1996), *available at* <http://www.access.gpo.gov/c/s.dll/getdoc.cgi?dbname=gao&docid=fr97016.txt>.

49. The Commission was chartered by an act of Congress in 1964, Pub. L. No. 88-606, 78 Stat. 982, to provide a comprehensive review of the nation's public land laws and determine the extent to which they should be revised. *Id.* § 2. The commission released its recommendations in 1970.

50. PUB. LAND LAW REV. COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO CONGRESS 223-24 (1970).

51. *Id.* at 224.

52. 16 U.S.C. § 497 (1994).

53. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8, at 6.

54. *Id.* "[T]here are no longer opportunities to establish new residential tracts . . . [N]o additional National Forest private recreation residence sites are planned." USDA, Private Recreation Residences on National Forest System Lands (1979) (unpublished manuscript on file with the Pacific Southwest Region, Forest Service, USDA, Vallejo, CA).

the number of outstanding permits from a peak of nearly 20,000 permits<sup>55</sup> to 15,200 permits today.<sup>56</sup>

### B. Current Recreation Residence Policy and Guidelines

Over the years, Forest Service policy and guidelines regarding recreation residences have become more detailed, specific, and comprehensive. The Forest Service, driven by a perpetual need to update its appraisal process to update permit fees,<sup>57</sup> began developing its current guidelines in 1987.<sup>58</sup> In 1994, the Forest Service adopted a final rule revising its policy<sup>59</sup> by

---

55. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8, at 6.

56. Conversation with Marcia Abrams, *supra* note 5, at 1.

57. In 1952, Congress enacted the Independent Offices Appropriations Act, 68 Stat. 290, 31 U.S.C. § 483a, which mandates a fair market value approach to the fees collected for the recreation residence permits. The Forest Service reviews and periodically adjusts the fees. In 1963, following the review by the General Accounting Office that found that recreation residence fees were too low, *see supra* note 48, the Forest Service appraised permit sites and raised fees. The fees were reassessed in 1968. Both of these appraisals resulted in substantial fee increases. In response to hearings held by the House Subcommittee on Forests of the Committee on Agriculture in 1967, the Forest Service adopted a 3-year phase-in for the increases. Recreation Residence Authorizations: Proposed Fee Policy Changes, 49 Fed. Reg. 21,775, 21,776 (May 23, 1984). By the time that the increases were fully implemented, however, the fees were again below market value. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 44. In the meantime, the number of appeals of fee increases continued to rise despite Forest Service attempts to encourage greater permittee participation in the appraisal process. Proposed Fee Policy Changes, *supra*, at 21,776.

In 1981, in consultation with the National Forest Recreation Association and others, the Forest Service adopted more policy changes, discontinuing the three-year phase-in for increases and adopting the Consumer Price Index in determining fee adjustments. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 44. Congress, however, effectively suspended these policies in 1983 and 1984 by including in the Forest Service's Appropriations Act language that restricted the amount that the Forest Service could increase fees and requiring the Forest Service to credit over \$2 million to permittees. *Id.* In response, in 1984, the Forest Service proposed to change certain procedures for determining the annual rental fees for the recreation residence permits. This kicked off a ten-year rulemaking process that ceased in 2000 with passage of the Cabin User Fee Fairness Act of 1999 (incorporated into the Forest Service Appropriations Act, Pub. L. No. 106-291, 114 Stat. 922, 1014, *codified at* 16 U.S.C. §§ 6201-6213 (2000)).

58. Recreation Residence Authorizations: Proposed Policy, 52 Fed. Reg. 206 (Jan. 2, 1987).

59. Recreation Residence Authorizations: Notice, Adoption of Final Policy, 59 Fed. Reg. 28,714 (June 2, 1994). The Forest Service actually initially proposed some of the policy changes in 1984. Proposed Fee Policy Changes, *supra* note 57, at 21,780. The policy proposed renewing expiring recreation residence permits for 20 years provided that no higher public need for the recreation residence tract is identified in a Forest Land Management Plan or amendment, and encouraging land exchanges in areas where there is no foreseeable expectation of public use (these exchanges would convey the land into private ownership). *Id.* at 21,780-81. The Forest Service subsequently proposed further changes to the administration of

amending the Forest Service Manual and Forest Service Handbook.<sup>60</sup> The 1994 policy declares that recreation residences "are a valid use of National Forest System lands."<sup>61</sup> It also declares that the Forest Service will

[c]ontinue to authorize those existing facilities now occupying National Forest land under special use authorization that (a) are consistent with management direction given in the Forest Land and Resource Management Plan . . . , (b) are at locations where the need for an alternative public purpose has not been established, (c) do not constitute a material, uncorrectable offsite hazard to National Forest resources, and (d) do not endanger the health or safety of the holder or the public.<sup>62</sup>

---

recreation residence permits in 1987, giving direction on tenure and renewability of the permits and describing procedures to be followed when the recreation residence lot was needed for a higher purpose. Recreation Residence Authorizations: Proposed Policy, 52 Fed. Reg. 206 (Jan. 2, 1987). The rule became final in 1988. Recreation Residence Authorizations: Notice of Adoption of Final Policy, 53 Fed. Reg. 30,924 (Aug. 16, 1988). This rule, however, was appealed to the Assistant Secretary of Agriculture for Natural Resources and Environment, who found that certain portions of the policy exceeded agency authority. Recreation Residence Authorizations: Notice, Adoption of Final Policy, 59 Fed. Reg. 28,714 (June 2, 1994). Specifically, the Assistant Secretary remanded:

(1) the nonrenewal provisions relating to or requiring a showing of higher public purpose where the lands occupied were deemed needed for other than recreation residences; (2) those provisions requiring automatic permit renewal 10 years prior to expiration unless nonrenewal had been established; and (3) those provisions requiring the offering of "in-lieu" lots to permittees who had received notice of nonrenewal or termination.

*Id.* The remainder of the policy was to be designated interim pending reformulation of the remanded policies. *Id.* On September 20, 1989, the Forest Service gave notice that it was seeking comments on the revised policy. Recreation Residence Authorizations: Advance Notice of Proposed Policy, 54 Fed. Reg. 38,700 (Sept. 20, 1989). Following public comment, notice of the proposed reformulated policy was published on October 10, 1991. Notice of Proposed Policy; Request for Comment: Recreation Residence Authorizations, 56 Fed. Reg. 51,260 (Oct. 10, 1991).

60. The rule modified chapters 2340 and 2720 of the FOREST SERVICE MANUAL, *supra* note 1, and Section 2709.11 of the Forest Service Handbook. Notice, Adoption of Final Policy, 59 Fed. Reg. 28,714, 28,726-41 (June 2, 1994) [hereinafter Forest Service Handbook].

61. FOREST SERVICE MANUAL, *supra* note 1, § 2347.1. Recreation residences "are an important component of the overall National Forest recreation program . . . . They may provide special recreation experiences that might not otherwise be available. It is Forest Service policy to continue recreation residence use and to work in partnership with holders of these permits to maximize the recreational benefits of these residences." *Id.*

62. *Id.* § 2347.03(2).

The policy also restates the moratorium on the development of new tracts and lots.<sup>63</sup>

Under the current policy, the Forest Service may issue permits for a maximum term of 20 years<sup>64</sup> and must give permittees 10 years written advance notice if a new permit will not be issued following expiration of the existing permit term.<sup>65</sup> The Forest Service can revoke permits before expiration when (1) revocation is in the public interest; (2) there is an uncorrected breach of permit provisions; (3) the site has been rendered unsafe by catastrophic events such as flood, avalanche, or massive earth movement; or (4) revocation is otherwise provided for in 36 C.F.R. § 251.60.<sup>66</sup> Expired permits should be reissued only after a determination of consistency with the current Forest Plan.<sup>67</sup>

The policy also outlines restrictions on permit holders. Permittees are required to maintain their sites to protect the natural forest environment<sup>68</sup> and no construction can occur without prior approval of the Forest Service.<sup>69</sup> Permittees may not preclude the general public "from full enjoyment of the natural, scenic, recreational, and other aspects of the National Forests."<sup>70</sup> Permittees must occupy the residence at least 15 days

---

63. The manual instructs the Forest Service to "[d]eny applications for construction of new facilities except where they would replace similar existing facilities." *Id.* § 2347.03(4).

64. *Id.* § 2347.1(3).

65. *Id.* §§ 2347.1(4), 2721.23a(10); Forest Service Handbook, *supra* note 60, Region 5 Supplement § 2709.11 c. 41.23a(6)(a).

66. FOREST SERVICE MANUAL, *supra* note 1, § 2347.1(5). 36 C.F.R. pt. 251, subpt. B (2001) governs special uses on national forest lands. All uses of National Forest System lands except those regarding the disposal of timber and minerals and the grazing of livestock are designated "special uses." 36 C.F.R. § 251.50(a). Consequently, recreation residences constitute special uses. 36 C.F.R. § 251.53(d) (listing the Occupancy Permits Act as an authority for these regulations). Section 251.60 governs termination, revocation, and suspension of special use permits. Permissible grounds for such an action are: (1) noncompliance with applicable statutes or regulations or the terms and conditions of the authorization; (2) failure of the holder to exercise the rights or privileges granted; (3) fulfillment of any criteria that would allow the Forest Service to deny an application for a special use authorization, *see* Section 251.54(h)(1)); and (4) the consent of the holder. 36 C.F.R. § 251.60 (2001).

67. FOREST SERVICE MANUAL, *supra* note 1, § 2721.23e. If the use is consistent with the Forest Plan, the use shall continue. If the use is not consistent and the Forest Plan is not amended to make the use consistent, continued use may be authorized until such time as the conversion to a new use begins. *Id.*

68. *Id.* § 2347.03(6).

69. Forest Service Handbook, *supra* note 60, Region 5 Supplement § 2709.11 c. 41.23g.

70. FOREST SERVICE MANUAL, *supra* note 1, § 2347.03(3); Forest Service Handbook, *supra* note 60, Region 5 Supplement § 2709.11 c. 41.23f(7) ("Within

annually<sup>71</sup> but cannot occupy the residences full-time.<sup>72</sup> While permittees can rent the residence, they can only do so with prior written approval by the Forest Service and for no more than 14 days per year.<sup>73</sup>

Only one building is allowed on the lot—guest cabins or sleeping quarters are not authorized, nor can the permittee convert storage or other outbuildings to sleeping quarters or guest cabins.<sup>74</sup> The buildings are subject to restrictions on architectural design, size, height, use of decks and porches, building materials, paint colors, and outbuildings.<sup>75</sup> Common household pets are allowed, but they must be under physical control when outdoors and cannot be left outside unattended.<sup>76</sup> If the site is more than fifty percent destroyed by a catastrophic event such as a flood, fire, avalanche, or earthquake, the permittee cannot rebuild if an alternative public use for the location has been established prior to the incident.<sup>77</sup> The permits are non-transferable, but can be reissued for the remainder of the term to heirs and purchasers of lot improvements.<sup>78</sup> If a permit holder wishes to sell lot improvements, the holder is required to notify the Forest Service.<sup>79</sup> Upon expiration or termination prior to expiration, the permit holder is supposed to remove his improvements and restore the lot to a condition acceptable to the Forest Service.<sup>80</sup> These restrictions (plus others) are all listed in the terms and conditions section of the special use permit.

---

recreation residence tracts, the general public may access National Forest System lands by walking across the permitted lot or parking in areas not under permit.”)

71. FOREST SERVICE MANUAL, *supra* note 1, § 2721.23a(8).

72. *Id.* § 2347.11; Forest Service Handbook, *supra* note 60, Region 5 Supplement § 2709.11 c. 41.23f(1) (“Do not allow holders to use their recreation residence as their principal residence.”).

73. FOREST SERVICE MANUAL, *supra* note 1, § 2721.23a(5); Forest Service Handbook, *supra* note 60, Region 5 Supplement § 2709.11 c. 41.23f(3).

74. FOREST SERVICE MANUAL, *supra* note 1, § 2721.23a(6); Forest Service Handbook, *supra* note 60, Region 5 Supplement § 2709.11 c. 41.23f(4).

75. Forest Service Handbook, *supra* note 60, Region 5 Supplement § 2709.11. c.41.23g(2).

76. *Id.* Region 5 Supplement § 2709.11, c. 41.24f(5).

77. FOREST SERVICE MANUAL, *supra* note 1, § 2721.23a(13).

78. *Id.* § 2721.23a(7); *see also* Family Finance Fund v. Abraham, 657 P.2d 1319, 1322 (Utah 1982) (citing FOREST SERVICE MANUAL, *supra* note 1, § 2716.1 and the permit itself to conclude that permits are not transferable though lot improvements may be).

79. FOREST SERVICE MANUAL, *supra* note 1, § 2721.23a(14).

80. *Id.* § 2721.23j. Alternatively, the holder may relinquish the improvements to the Forest Service. *Id.*

### C. Problems with Program Administration

As straightforward as the recreation resident program seems, administration of the program has largely failed to preserve the forest's natural environment or contain permittee efforts to expand cabins. In 1990, the Forest Service undertook a study of the Recreation Residence Program nationwide.<sup>81</sup> The review examined permit administration at twenty-one national forests and covered forty ranger districts and eight Forest Service regions.<sup>82</sup> Teams of four people visited over 5,500 recreation residence lots over a period of ten months.<sup>83</sup>

The study found several problems rampant throughout the administration of the program. Fifty-four percent of the sampled lots had at least one unauthorized improvement.<sup>84</sup> Full-time occupancy was also widespread.<sup>85</sup> For example, 100% of the fifty cabins in the Tujunga Tract in the Angeles National Forest are currently suspected as having full-time occupancy resulting from unauthorized rentals,<sup>86</sup> and 50% of the cabins in the Santa Barbara Ranger District are suspected to be occupied year-round.<sup>87</sup> Other problems include nonpayment of fees,<sup>88</sup> unauthorized construction,<sup>89</sup> unauthorized rentals,<sup>90</sup> failure to submit operation and maintenance plans,<sup>91</sup> and substandard appearance.<sup>92</sup> For example, "size creep" is a problem—cabins originally 400-1,200 square feet in size may be replaced by

---

81. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8, at 5.

82. *Id.*

83. *Id.*

84. *Id.* at 18. These typically include storage tanks, driveways, patios and decks, and sheds and other out-buildings. Others include off-site improvements like tract roads, bridges, water systems, boat docks, and piers. Many permittees are unwilling to seek permits for these off-site improvements because of concerns about personal liability. *Id.* Consequently, they construct these improvements without Forest Service authorization.

85. *Id.* at 26 ("Several southern California national forests have major problems of full-time occupancy. A few other national forests near urban areas also have troubles.").

86. Informational Memo, *supra* note 3, at 1.

87. *Id.*

88. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8, at 11.

89. Forty-eight percent of the sampled sites had recent, unauthorized construction. *Id.* at 20.

90. *Id.* at 27.

91. *Id.* at 10. Fewer than 20% of the sampled sites in the study had such plans.

92. Forty-two percent of sampled sites were rated as having a poor or fair visual appearance. *Id.* at 16. Fifty percent exhibited poor structural conditions, including safety hazards, unauthorized improvements, and poor maintenance. *Id.* Fifty-four percent exhibited poor lot conditions, such as excessive landscaping, debris, and fire hazards. *Id.*

cabins 3,000 square feet or larger.<sup>93</sup> One “cabin” even houses security and domestic staff.<sup>94</sup>

Such permit violations damage the environment, adversely affecting endangered species and archaeological resources.<sup>95</sup> As one review of the program stated, “When all is said and done, the recreation residence phenomenon has had a substantial impact on . . . the recreating public[] and the landscape.”<sup>96</sup> For instance, in the Cleveland National Forest, unauthorized water diversions, decorative ponds with non-native fish and invasive vegetation, and large, soil-compacted or paved parking areas adversely impact the listed Arroyo Toad.<sup>97</sup> In California alone, roughly half of the lots have archaeological or environmental resources that are impacted by unauthorized improvements and developments.<sup>98</sup> Moreover, 3,000 square foot mansions on a lakefront obscure scenic views and very likely inhibit picnickers from crossing the lot to access the shore.<sup>99</sup>

These violations largely arise from the Forest Service’s inability to adequately administer the program. The 1990 study found that official permittee files were often incomplete,<sup>100</sup> inspections are untimely,<sup>101</sup> permit enforcement is low and declining,<sup>102</sup> and that impacts upon sensitive archeological resources, endangered species, and historical preservation are either ignored or not addressed.<sup>103</sup> The study concluded that permit administration lacks management attention, administration budgets are nonexistent, staffing is declining, and specialized training is the exception.<sup>104</sup>

## II

### REFORMING THE RECREATION RESIDENCE PROGRAM

In reforming the Recreation Residence Program, the Forest Service can pursue any number of goals. For instance, it could

---

93. *Id.* at 22.

94. *Hearing on H.R. 3327, supra* note 4, at 18 (statement of David R. Mead, President, Sawtooth Forest Cabin Owners Association).

95. *See* EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 34.

96. *Id.*

97. Informational Memo, *supra* note 3, at 2.

98. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at App. 1.

99. Conversation with Marcia Abrams, *supra* note 5.

100. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8, at 10.

101. *Id.* at 2.

102. *Id.* at 13. “There is a lack of strategy and clear process within the region to deal with trespass, noncompliance, and full-time occupancy.” Informational Memo, *supra* note 3, at 2.

103. Informational Memo, *supra* note 3, at 2.

104. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8.

seek to terminate the program. However, because recreation residence cabins are, under current Forest Service policy, a valid use,<sup>105</sup> the Forest Service would have to engage in rulemaking to change that status. Such a rulemaking would very likely encounter political opposition (even though the program delivers limited recreational opportunities) and subsequent overruling by Congress should it withstand judicial review.<sup>106</sup> Alternatively, the Forest Service could seek a more limited goal of terminating the permits of permit violators in order to end their violations and deter other permittees from committing similar violations.<sup>107</sup> Doing so in just a few cases should provide leverage over other violators and send notice that the Service will get "tough" if needed. Still, such a "get-tough" attitude will have to first survive the political backlash it will engender.

#### A. Constraints on Reform

Reform of the Recreation Residence Program is constrained in two related ways. First, permit holders can exercise political leverage against the Forest Service, blocking any reform that does not directly benefit them. Second, equity considerations arising from personhood notions of property restrict the Forest Service's range of potential reform options as these equity considerations often trigger political interference.

---

105. FOREST SERVICE MANUAL, *supra* note 1, § 2347.1 ("It is Forest Service policy to continue recreation residence use and to work in partnership with holders of these permits to maximize the recreational benefits of these residences.").

106. See *infra* Part II.A.1.

107. 36 C.F.R. § 251.60(a)(1)(II)(B) (2001). "A special use permit is not a lease, but is merely an authorization to use certain land upon payment of a fee. It creates a tenancy at will and may be revoked at any time, for any reason." *Mountain States Telephone and Telegraph Co. v. United States*, 499 F.2d 611, 616 (Ct. Cl. 1974) (citing *U.S. v. Industrial Communications System, Inc.*, No. 69-1070-JWC (E.D. Cal. 1971); see also *In re Kam Dam Marina, Inc.*, 20 B.R. 414, 416 (1982) ("all rights . . . in the premises and in the . . . installations of buildings and piers thereon under the use permit terminated because of the . . . violations of its provisions. . . . [I]t appears that the act of the government in terminating the . . . permit was clearly warranted and called for because of the . . . prolonged violations of its express conditions."). Such a revocation is considered final agency action immediately subject to judicial review. 36 C.F.R. § 251.60(a)(1)(ii) (1994).

Often, however, litigation is necessary to actually eject the violators after their permits are revoked. Either the permittee challenges the revocation (as in the cases above) or the permittee ignores the revocation and must be ejected by court order. In either case, litigation often clouds the seemingly simple administrative process.

## 1. *The Politics of the Recreation Residence Program*

### a. *Client Politics*

The Forest Service is a politically harried federal agency,<sup>108</sup> and the administration of the Recreation Residence Program is closely watched. Forest Service objections to permit violations are commonly overridden through high-level political intervention.<sup>109</sup>

This can easily be explained through the lens of "client politics." The Recreation Residence Program is a government program that benefits a small segment of society. Only a few who, through family inheritance or intelligent past investment, currently hold recreation residence permits are able to enjoy the benefits of a summer home on prime forest service land.<sup>110</sup> The costs to the general public to provide these benefits, however, are diffuse.<sup>111</sup> Given this lopsided breakdown of burdens and benefits, client politics can be expected to dominate.<sup>112</sup>

---

108. See Robert F. Durant et al., *Public Policy, Overhead Democracy, and the Professional State Revisited*, ADMIN. & SOC'Y, Aug. 1, 1995, at 165 (describing how, according to James Q. Wilson's analytical model, see *infra* note 112, the Forest Service is the type of agency that is highly susceptible to political interference).

109. *Hearing on H.R. 3327*, *supra* note 4, at 18 (statement of David R. Mead, President, Sawtooth Forest Cabin Owners' Association). In one instance, the overrides allowed one "cabin" to be expanded to support one outsized main dwelling as well as additional structures that from time to time housed security and domestic staff. *Id.*

110. Because there are only 15,200 permits currently issued, see *supra* note 2 and accompanying text, and because a family can have only one permit, see FOREST SERVICE MANUAL § 2721.23a(2), only 15,200 families in the whole country should benefit from the program. A family is defined as a husband, wife, and dependent children. *Id.*

111. In 1993, recreation residences occupied only 10,000 acres out of 192 million acres of national forest land. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8, at 5. It could be argued that, in light of that ratio, the public sacrifices few, if any, recreational opportunities. Recreation residence tracts, however, are often located on prime, high-value land (lake shores, canyons, etc.) where the presence of the cabins chills the public's use. Still, while the public does sacrifice some recreational opportunities, the burden is greatly diffused among the general population (i.e. many people incur small costs).

112. Client politics occur where the benefits of a prospective policy are concentrated but the costs are widely distributed. James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 369-70 (James Q. Wilson ed., 1980). Because the benefit is concentrated on some group, that group will more easily overcome the problem of collective action and will organize and lobby. In contrast, since the costs are distributed at a low per capita rate over a much larger segment of the population, the general public will not overcome its collective action problems and will remain unorganized, yielding the political field to the smaller group. *Id.*

In contrast to client politics, *interest group politics* occur where a small group benefits at the expense of a comparably small group while the general public does not see itself as affected by a regulation. *Majoritarian politics*, on the other hand, result

Such clientelism is readily apparent in the lineup of witnesses testifying before the congressional committees considering legislation impacting the Recreation Residence Program. In 2000, the House Subcommittee on Forests and Forest Health of the Committee on Resources held a hearing on The Cabin User Fee Fairness Act of 1999. Two witnesses represented organizations of permit holders, two witnesses were appraisers, and only one witness (whose testimony was interrupted and cut short by a floor vote) was from the Forest Service.<sup>113</sup> In a 1998 hearing on similar legislation, of the seven witnesses testifying before the House Committee on Agriculture, six represented permit-holder organizations and only one was from the Forest Service.<sup>114</sup>

The ease with which permit holders can mobilize is also evident in the public comments made on proposed Forest Service rulemakings affecting the Recreation Residence Program.<sup>115</sup> Of the nearly 3,200 comments received by the Forest Service in response to its 1987 proposed rulemaking, 96% were from permit holders or permit-holder associations.<sup>116</sup> In response to its 1991 rulemaking,<sup>117</sup> 73% of the comments received by the Forest

---

when the costs or benefits of a contemplated regulation are widely distributed and most of society is expected to gain or pay. In such a case, interest groups have little incentive to form because no definable segment of society expects to capture a disproportionate share of the benefits. Finally, *entrepreneurial politics* occur when a proposed policy will confer general but small benefits at a cost to be borne chiefly by a small segment of society. In this case, the incentive to organize is strong for opponents of the policy but weak for the beneficiaries. The opponents can leverage multiple access points in the political system, requiring the efforts of a skilled entrepreneur who can mobilize latent public sentiment, associate the legislation with widely shared values, and put the opponents of the policy publicly on the defensive. *Id.* at 367-72.

113. *Hearing on H.R. 3327, supra* note 4. The two permit-holder association witnesses were David R. Mead, President of the Sawtooth Forest Cabin Owners' Association, and Mary Clarke Ver Hoef of the National Forest Homeowners' Association. *Id.* The appraiser witnesses were Richard M. Betts from Betts & Associates, and Carl J. Schultz of The Appraisal Foundation. *Id.* The Forest Service witness was Paul Brouha, Associate Deputy Chief, U.S. Forest Service. *Id.*

114. *Recreational Cabin Fees, Hearing on H.R. 3765 Before House Comm. on Agric., 105th Cong. (1998)* [hereinafter *Hearing on H.R. 3765*]. The six permit-holder association witnesses were Paul Allman, American Land Rights Association; Bob Ervin, Executive Director, National Forest Homeowners Association; Jay Anderson, Sawtooth Forest Cabin Owners Association; William Hayward, June Lake Permittee Association; Mary Helen Sherrett, Vice President, Mt. Hood Forest Homeowners Association; and Stephen Lunt, Oregon Forest Homeowners Association. *Id.*

115. For a list of these proposed rulemakings, see *supra* notes 58-59.

116. *Hearing on H.R. 3327, supra* note 4, at 102 (statement of Paul Brouha, Associate Deputy Chief, U.S. Forest Service).

117. See Notice of Proposed Policy; Request for Comment: Recreation Residence Authorizations, 56 Fed. Reg. 51,260 (Oct. 10, 1991).

Service were from permittees, friends or family of permittees, or permittee associations.<sup>118</sup> Permit holders, as the incentives encouraging them to organize might predict, readily mobilize and establish themselves as a largely unopposed political force.<sup>119</sup>

Self-selection of congressmen onto congressional committees, moreover, ensures that the permit holders have a captive congressional audience.<sup>120</sup> In 2000, of the sixteen members of the House Subcommittee on Forests and Forest Health, eight were from western states.<sup>121</sup> Of the 15,200

---

118. Recreation Residence Authorizations: Notice, Adoption of Final Policy, 59 Fed. Reg. 28,714 (June 2, 1994).

119. One commentator noted: "given the substantial emotional and financial investments involved, the higher income, better than average education and perhaps more general awareness of the second home permittees, associations of owners clearly have great potential for strong defensive reaction to any threat of the status quo." Donald J. Berg, *Second Homes on the National Forests: Changing Patterns and Values of Recreational Land Use in California* 164 (1975) (unpublished Ph.D. dissertation, University of California at Berkeley).

120. See generally DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974). Mayhew analyzes congressional behavior by positing the simple and fairly realistic assumption that congressmen are interested in getting reelected. *Id.* at 13. From that assumption, Mayhew derives behavioral characteristics that congressmen evince. For instance, congressmen will utilize the committee system to benefit their reelection efforts. See *id.* at 85 ("Committee membership can be electorally useful in a number of different ways."). Committees enable an individual congressman to claim credit for enabling or blocking particular legislation, *id.* at 60-61, as well as to take positions that capture the public attention. See *id.* at 85-87. To take advantage of the benefits of the committee system, congressmen self-select onto committees which most directly provide those benefits. See Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 151-52 (1988). These incentives and behaviors combine to ensure that organized groups are more likely to be heard. MAYHEW, *supra*, at 130.

An alternative theory by Keith Krehbiel, however, takes issue with the notion that congressional committees are composed of preference outliers. See Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POL. SCI. REV. 149 (1990). Assuming some distribution of preferences among congressional members, some members' preferences lie on the tails of that distribution. These preferences deviate strongly from the mean preference and reflect the specific and finely-tuned preferences of those members' constituencies. *Id.* According to Weingast and Marshall, self-selection stocks congressional committees with these preference outliers. Weingast & Marshall, *supra* at 145-46. Krehbiel, however, suggests that congressional committees are organized by principles of incomplete information and serve as an information-gathering tool for the larger House or Senate floor rather than as soapboxes for individual congressmen. See KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 4-6 (1991). Accordingly, congressional committees may be composed of preference outliers but only because those members are expert at the issues with which the committee deals, not because the members want to curry favor with constituents. *Id.*

121. On the larger House Committee on Resources, twenty-seven of fifty-two members were from eleven western states (Alaska, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming). Assuming a uniform assignment to committees based on the distribution of representatives

recreation residence lots, over 64% are located in California (6,314),<sup>122</sup> Washington, Oregon, and Idaho (~3,400 combined).<sup>123</sup> The concentration of recreation residences in the West and the over-representation of western interests on relevant congressional committees combine to present a nearly insurmountable political roadblock to any legislative effort to change the Recreation Residence Program to the detriment of permit holders.<sup>124</sup>

Furthermore, these congressman, in serving their constituencies, stake out extreme positions opposing the Forest Service.<sup>125</sup> For instance, Rep. Doolittle,<sup>126</sup> sitting on the House Committee of Agriculture stated:

[T]he *eco-Marxists* seem to dominate our policy in the area of public lands and environmental policy these days. Obviously the Forest Service has decided they don't like permittees and are doing everything they can to eradicate them from the

---

overall, those eleven states (96 representatives) should account for no more than eleven committee members. See U.S. Census Bureau, U.S. Dep't of Commerce, Apportionment Population and Number of Representatives, by States: Census 2000, at <http://www.census.gov/population/www/censusdata/apportionment.html>. Consequently, congressman with recreation residence permit holders as constituents are over-represented by a factor of almost three.

122. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 13.

123. *Hearing on H.R. 3327*, *supra* note 4, at 10 (statement of Rep. George Nethercutt, R-WA).

124. To accomplish any program reform detrimental to permit holders, a political entrepreneur would have to circumvent that roadblock. Wilson, *supra* note 112, at 370-71 (where costs of a change to the status quo will be borne by a small group while benefits are widespread, general, and diffuse, a political entrepreneur is necessary to shepherd the change through Congress). An entrepreneur's task is usually made easier by scandal or crisis, and through alliances with third parties such as the press. *Id.* The ease with which permit holders can portray themselves to the press as the elderly, teachers, and other such "mom and apple pie" types, see *infra* text accompanying note 128, might prevent the press from becoming an ally of the political entrepreneur, as the press typically sides with the individual against big government because such stories often will generate greater circulation than stories about permit holders taking advantage of the public. See Center for Media and Public Affairs, *What Do the People Want from the Press?*, available at <http://www.cmpa.com/Mediamon/mm050697.htm> (last visited Jan. 15, 2002) (noting the public's desire for the media to act as a watchdog against powerful interests such as the government). Alliances with eastern representatives also do not seem likely, as such an issue would not benefit those representatives in their efforts to stake positions or secure reelection. Of course, if a crisis or scandal occurs, then perhaps a political entrepreneur could use it to her advantage. Such a crisis or scandal might revolve around endangered species or the use of cabins as drug houses. See *supra* text accompanying note 9.

125. MAYHEW, *supra* note 120, at 85-87.

126. John Doolittle is a Republican from the Fourth Congressional District in California. The Fourth District encompasses the western slopes of the Sierra from Lake Tahoe south to Yosemite and incorporates four national forests: the El Dorado, Stanislaus, Tahoe, and Inyo National Forests.

forests. I don't feel that way; I don't think the Congress feels that way. *Once again, we have a large bureaucracy careening pretty much out of control and doing whatever it likes.*<sup>127</sup>

With Rep. Doolittle sitting on the committees that directly oversee the Forest Service and to which any legislation concerning the national forests is referred, it is likely that any action by the Forest Service to further restrict the permit holders will be met with more hostile political rhetoric.

### b. *Popular Sympathy*

Geography is not the only powerful political force working in favor of permit holders. The permittees also have another political trump card: the historically romantic portrayal of the back-to-nature movement that plays so well in the popular press. One congressman, in a typical statement, suggested that the permit holders "are part of the West's rich cultural heritage. These permittees are often retired folks on fixed incomes who have loyally served our Nation in peacetime and war."<sup>128</sup> Another frequent characterization is that the "primary users of these cabins are retired, the elderly, the disabled, teachers."<sup>129</sup> It is hard to describe a more sympathetic group. Any changes to the Recreation Residence Program adversely affecting permit holders are easily characterized as undemocratic and unfair.<sup>130</sup> Spun this

127. *Hearing on H.R. 3765, supra* note 114, at 73 (statement of John Doolittle, R-CA) (emphasis added).

128. *Id.* at 8 (statement of Rep. Helen Chenoweth, R-ID).

129. *Id.* at 64 (statement of Paul Allman, American Land Rights Ass'n); *see also* New Mexico Agriculture, *Another Win Over CARA Land Grab*, at [http://www.nmagriculture.org/another\\_win\\_over\\_cara\\_land\\_grab.htm](http://www.nmagriculture.org/another_win_over_cara_land_grab.htm) (last visited May 4, 2001) ("Most cabin owners are retired. Many are former teachers. If the Forest Service had been successful, cabins would only have been affordable by the rich.").

130. When the Forest Service raised fees for recreation residence permits in 1997 based on congressionally mandated appraisal procedures, the political response was that "[w]e do not want . . . to have people priced out of the markets so that we only have millionaires or people of means who are able to use these Forest Service lands." *Hearing on H.R. 3765, supra* note 114, at 8 (statement of Rep. Helen Chenoweth, R-ID). This statement was made despite the reality that more than 58% of permittees would have experienced either a decrease or a relatively moderate increase in their annual rental fee. Less than 3% would have experienced dramatic fee increases of more than five times the current fee being paid. The remainder would have seen less dramatic but still significant increases that, on average, would have resulted in an approximate tripling of their annual rental fee. *Id.* at 103 (statement of Paul Brouha, Associate Deputy Chief, National Forest System). These increases seem reasonable: the last appraisals were conducted twenty years ago. Moreover, existing legislation would have required that any increases over 100% be phased in over a three-year period and that any increases implemented in FY 2000 only be implemented to the extent that they do not exceed FY 1999 fees by \$2000. Dep't of Interior and Related Agencies Appropriations Act, § 343, Pub. L. No. 105-83, 111 Stat. 1543 (1998);

way, with a token sympathetic retiree taking the point position in front of the cameras, few reelection-minded, position-staking western congressmen will fail to respond to the plight of the permittees.<sup>131</sup>

Undoubtedly, the current status quo in the Recreation Residence Program benefits permit holders.<sup>132</sup> Given the political landscape, it seems likely that permittees will continually be able to organize and influence Congress (which is listening with open ears), especially in light of the general public's collective action problem. Consequently, any reform that jeopardizes the status quo will likely be overturned politically unless the shift away from the status quo benefits permit holders.

## 2. *Personhood As a Trigger*

Related to the political barriers facing the Forest Service are theoretical considerations that suggest that any action to eject permit holders wholesale would be unjust. One such theoretical consideration is the concept of personhood as it relates to property.<sup>133</sup>

### a. *The Personhood Concept*

The main themes of personhood are that "(1) Property can be involved with a certain kind of contextuality that plays a role in self-constitution; and (2) Property may be involved with a certain kind of stability in the dynamic dialectic that also plays a role in self-constitution over time."<sup>134</sup> "When an item of property is involved with self-constitution in this way, it is no longer wholly

Consolidated Appropriations Act, § 342, Pub. L. No. 106-113, 113 Stat. 1501 (2000). In light of these facts, the fee increases could hardly be termed undemocratic or unfair, yet that is how they were described in the press. See e.g., *Forest Service Cabin Owners Raise Roof; Bills to Overhaul Appraisal System Could Wipe Out Revenue from Higher Fees*, WASH. POST, Mar. 27, 2000, at A12.

131. See Wilson, *supra* note 112, at 370-71. Such sympathy, for example, was strongly evinced by the former Chairwoman of the House Subcommittee on Forests and Forest Health, who adamantly stated that she "will not be a party to any policy that deprives the middle class of their historic right to recreate on our national forests." *Hearing on H.R. 3765*, *supra* note 114, at 8 (statement of Rep. Helen Chenoweth, R-ID).

132. Lack of enforcement and agency inertia benefit the permit holders by enabling them to operate without the oversight and controls that could otherwise be imposed by the Forest Service. See generally, Informational Memo, *supra* note 3.

133. Margaret Jane Radin first developed this concept in *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

134. Margaret Jane Radin, *The Colin Raugh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood*, 74 OR. L. REV. 423, 426 (1995).

'outside' the self, in the world separate from the person; but neither is it wholly 'inside' the self, indistinguishable from the attributes of the person."<sup>135</sup>

In 1982, Margaret Jane Radin published her seminal work on property and its relationship with personhood.<sup>136</sup> In her article, Radin argues that aspects of personhood in property require that "[w]here we can ascertain that a given property right is personal, there is a prima facie case that that right should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people."<sup>137</sup> "Since personal property is connected with the self in a morally justifiable and constitutive way, to disconnect it from the person (from the self) harms or destroys the self."<sup>138</sup> Consequently, if it can be established that the property right given to permit holders is "personal," that right should be more strongly protected against invasion by the government than if it were not "personal." Under the theory, then, Forest Service policy separating permit holders from their personal property would not be just.

*b. Personhood as Applied to the Recreation Residence Program*

When items are personal, they are not interchangeable with like items or with money. They cannot be replaced with a like item or with money without affecting self-constitution. Personal items are not understood instrumentally, as means to satisfy the owner's needs and desires. Their significance, at least, is not wholly captured by this kind of understanding. They are not valued, or not only valued, in market terms of exchange. Thus, they are noncommodified, or incompletely commodified.<sup>139</sup>

In contrast, property items held only for investment are "just like money" and "are understood as outside the self" without

135. *Id.*

136. Radin, *supra* note 133.

137. *Id.* at 1014-15.

This case is strongest where without the claimed protection of property as personal, the claimants' opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened, and probably also where the personal property rights are claimed by individuals who are maintaining and expressing their group identity.

*Id.* at 1015.

138. Radin, *supra* note 134, at 428.

139. *Id.* at 429.

"blur[ring] the boundaries of the self or subject."<sup>140</sup> Moreover, not all close object relations should be considered as encompassing personal property. For instance, property that is the subject of a fetish is not personal property "because the particular nature of the relationship works to hinder rather than to support healthy self-constitution."<sup>141</sup>

With regard to the permit holders' summer cabins, "[o]ne may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss."<sup>142</sup> Not surprisingly, according to permit holders, such a loss would occasion great pain.<sup>143</sup> Many of the cabins, they claim, are still owned by the original family, passed down from generation to generation.<sup>144</sup> This is significant, for "[p]eople and things become intertwined gradually."<sup>145</sup> Permit holders, "over the generations, have made substantial financial and emotional investments in their homes."<sup>146</sup> "Because of the nature of the cabin experience, these cabins are overwhelmingly also a family experience."<sup>147</sup> This experience "creates personal integrity and lasting memories"<sup>148</sup> through the hardship and challenges

140. *Id.* at 426. "One's expectations crystallize around certain 'things,' the loss of which causes more disruption and disorientation than does a simple decrease in aggregate wealth." Radin, *supra* note 133, at 1004.

141. Radin, *supra* note 133, at 968-69.

142. *Id.* at 959.

143. *Hearing on H.R. 3327, supra* note 4, at 3 (testimony of Rep. George Nethercutt, R-WA) (relating a conversation with retired teacher who will probably have to sell his cabin because of increased assessments— "He said it breaks my heart to lose this tradition of ownership.").

144. *Id.*

145. Radin, *supra* note 133, at 988.

146. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 33-34.

147. *Hearing on H.R. 3327, supra* note 4, at 40 (statement of Mary Clarke Ver Hoef, Chair, Governmental Liaison Committee, National Forest Homeowners).

148. *Id.* at 21 (statement of David R. Mead, President, Sawtooth Forest Cabin Owners' Association). The forest experience involves a tremendous sense of privilege and pride:

It is a privilege for my wife and me to enjoy our retirement in the forest each summer, for however long we are able to drag food, water and goods up that last 150 feet between the lane and our front door. It has been far more than a mere privilege to raise our children in harmony with the Sawtooth Valley—it was a remarkable opportunity to expand their lives beyond day-to-day urban life in Twin Falls. . . . [The children] return with the grandchildren like homing pigeons to the family cabin in the Sawtooths. Their values, and the experiences of so many of their friends that they bring along to stay at the cabin are permanently measured against the "native, natural state" experience in the Sawtooth National Forest that creates personal integrity and lasting memories.

endured while in the forests.<sup>149</sup> The argument that permits constitute the personal property of the permit holder is especially strong given that the special use authorization terminates upon change of ownership.<sup>150</sup>

Applying Radin's standard, then, the Forest Service should be restricted in its ability to invade the permit holders' property rights.<sup>151</sup> For instance, the Forest Service should not be able to terminate the program wholesale. Moreover, the Service should not convert recreation residence tracts to other uses unless those other uses absolutely cannot be located elsewhere. Personhood, therefore, should further restrict the reform options available to the Forest Service in its effort to gain control of the Recreation Residence Program, as any action that appears to violate a permittee's personal property would likely trigger political interference.

### B. Possible Paths of Reform

In light of the political and theoretical constraints on the Forest Service, the Service is limited in the avenues it can pursue in its attempt to reform the Recreation Residence Program. To change the status quo successfully, the Service could focus on egregious violators or make a Pareto-superior move, whereby all affected parties are at least made no worse off

---

149. "There is no electricity. We use kerosene lanterns. We have no phone. My wife and I, and the kids and the grandkids, carry water to the cabin in a bucket from a small stream over the hill." *Id.* at 17 (statement of David R. Mead, President, Sawtooth Forest Cabin Owners Association).

In light of the context in which these statements are made—congressional hearings on a subject in which the permittees are particularly interested—it is highly likely that they are spun to be as emotionally appealing and sympathetic as possible. The Forest Service, lacking demographic data about the permit holders, however, has little ability to counter such spin—after all, the Recreation Residence Program is supposed to provide rustic experiences and such descriptions seem appropriate. Moreover, since the personhood interest in property is fundamentally subjective, the Forest Service is in no position to question the veracity of the alleged emotional connections. Consequently, it is politically irrelevant whether these characterizations are generally accurate.

150. 36 C.F.R. § 251.59 (1994); FOREST SERVICE MANUAL, *supra* note 1, § 2721.23a(7).

151. This claim, however, is weakened by the unique private-public nature of the property rights. While the permit holder owns the permit and the improvements, the land under the improvements remains public land. Such a relationship closely mirrors that of a landlord and tenant living in the same household. According to Radin, in such a situation, "[i]f the prevailing pattern of leaseholds in a given time and place is that both landlord and tenant occupy the land at the same time, then the need for sanctity of the home would not favor the tenant." Radin, *supra* note 133, at 995 n.127.

by suggested reforms. Only such moves would avoid the political intervention that would otherwise defeat any attempt to reform the program. Any successful reform, moreover, should avoid violating personhood rights. The moves that potentially meet these criteria include: 1) ejecting *selected* open and notorious permit violators through litigation; 2) converting the terminable special-use permits to life estates; 3) implementing a structure of fines (as opposed to, or in addition to, permit termination) for noncompliance; 4) co-opting the permit holders to enforce permit conditions on behalf of the Forest Service; and 5) centralizing administration of the program within the Forest Service.

### *1. Litigation as an Option to Clean Up the Program*

At least in the case of open and notorious permit violations, the Forest Service can initiate litigation against violators to terminate the permit and have the violating improvements removed.<sup>152</sup> To paraphrase the U.S. Supreme Court, litigation is equivalent to launching a missile to kill a mouse.<sup>153</sup> A few successful suits should provide the Forest Service with enough leverage against other violators to enable the Service to deter future violations.

Such a strategy, moreover, is less susceptible to the political risks discussed earlier. By "picking off" individual permit holders whose violations are blatant, the Forest Service should be able to neutralize the sympathy that permit holders as a group receive. Furthermore, such permit holders would be less likely to garner political support in light of their blatant violations. Litigation also has the advantage of bringing in the Department of Justice, which should be able to better withstand any political pressure that would otherwise inure to the Forest Service.<sup>154</sup>

There is also not much risk regarding the injustice such a suit might engender through a violation of the permit holder's

---

152. Such open and notorious violators, who have shown no respect for the law in the past, are not the type to simply fold their tents and go home when told to do so. Rather they will simply continue to use their "property" until such time as they are physically ejected under court order. As such, in order to terminate the permits of these violators, litigation will more than likely be necessary.

153. *Lucas v. S.C. Coastal Comm'n*, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).

154. By law, the Department of Justice (DOJ) must represent the Forest Service in litigation. Of course, DOJ lives in its own political universe and faces its own budgetary constraints. Consequently, it is unlikely that DOJ would dedicate substantial resources to such suits. However, because such suits are readily decidable at summary judgment, the Forest Service should be able to convince DOJ to instigate a few selected lawsuits.

personhood because there can be no personhood vested in the permit violator's property. For example, personhood cannot attach to stolen goods, nor does it attach to illegal contraband or the instrumentalities of a crime.<sup>155</sup> In the former situation, personhood does not attach because the property properly belongs to another. In the latter case, ownership of the property is outright illegal. In the case of a permit holder that violates the terms of his permit, the same logic dictates that the illegal nature of his actions dissolves any personhood claims. By violating the terms of the permit, it is the permit holder, not the Forest Service, that consciously extinguishes his right to the property and any personhood he might have claimed. Accordingly, litigation to eject the violator does not violate any personhood claims because there can be no such claims.<sup>156</sup>

Lastly, such suits are not subject to much litigation risk. For example, evidence of the grounds for ejection is readily obtainable—an inspector only needs to take some photographs of unauthorized improvements. Courts, moreover, tend to defer to the Forest Service regarding the administration of the special use permit program because the authority given to the Forest Service under federal law to manage the permit program is broad and expansive.<sup>157</sup> It is also not likely that the permit holders will

---

155. Radin, *supra* note 133, at 998.

156. *Id.*

157. In reviewing a challenge of the Forest Service's denial of a special use permit, the Tenth Circuit stated that:

[i]t should be pointed out also that the Secretary in administering these federal lands is representing the interests of the United States as a proprietor. This, as well as the broad terms of the statute, enhances the power and authority of the Secretary on behalf of the government to manage in the interest of the government and in the interest of all of the people. The nature of the duties that are being performed tends to show that the review of the Secretary's decision, insofar as it is a value judgment, tends to be narrow.

Sabin v. Berglund, 585 F.2d 955, 957 (10th Cir. 1978). The Ninth Circuit concurs, stating that courts should not review Forest Service decisions denying recreation residence permits because "the statute is, with respect to the proper recipient of a special use permit, drawn in such broad terms that there is no law to apply." *Ness Investment Corp. v. USDA*, 512 F.2d 706, 715 (9th Cir. 1975). According to the court in *Ness Investment Corp.*,

Agency expertise and knowledge is deeply involved in the decision to award a special use permit. . . . The federal courts have no such expertise, nor, in this case, do the courts have any standards by which acceptance or rejection of a particular applicant could be tested. . . . Congress did not intend for the federal courts to redetermine the question of who was qualified to receive a permit. [citation omitted] We hold that the decision here involved was committed to agency discretion by law and that federal courts have no jurisdiction to review such a decision.

be able to invoke any equitable defenses, such as laches and waiver, because those defenses generally cannot be applied against the federal government or in favor of those with "dirty hands."

a. *Laches*

Laches is a defense to an action in equity. "The fundamental premise of laches is that those who sleep on their rights surrender them; if you snooze, you lose."<sup>158</sup> Therefore, under a laches theory, because the Forest Service has not diligently pursued its claims against permit holders, those claims may be lost.

The defense of laches requires proof of "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."<sup>159</sup> At first blush, it does seem as though the Forest Service has unreasonably delayed pursuing enforcement of permit terms and conditions. In many cases, violations, though of an ongoing nature, began many years previous to an ejection action.

If the Forest Service has unreasonably delayed enforcement actions, prejudice surely would have accrued to permit holders at this point. Prejudice often "ensues when a defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed."<sup>160</sup> Given the delay in enforcement, many permit holders likely continued to perform unauthorized construction of improvements over the years, believing that the Forest Service's delay implied that no enforcement actions would be forthcoming. At this point in time, with many of the permit violations starting more than ten years ago, laches might apply to an ejection action by the Forest Service.

Laches may not be applicable, however, given the longstanding, general rule that "[w]hen the United States sues to enforce a public right or to protect a public interest the defense of laches is not available."<sup>161</sup> This has been especially true for

---

*Id.* at 716.

158. *Am. Int'l Group, Inc. v. Am. Int'l Bank*, 926 F.2d 829, 835 (9th Cir. 1991). The doctrine is "derived from the maxim that those who sleep on their rights, lose them." *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999).

159. *Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)).

160. *Hot Wax*, 191 F.3d at 824.

161. *United States v. New Orleans Pac. Ry. Co.*, 248 U.S. 507, 518-19 (1919); *United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("It is well settled that the United States is not . . . subject to the defense of laches in enforcing its rights.");

suits "by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people."<sup>162</sup> Such a suit "stands upon a different plain in this and some other respects from the ordinary suit to regain the title to real property or to remove a cloud from it."<sup>163</sup> For instance, in *Utah Power & Light*, the Supreme Court considered suits by the United States to enjoin the occupancy and use of forest reservation land by various electrical generators. The generators had constructed diversion dams, reservoirs, pipe lines, power houses, transmission lines, and some subsidiary structures without seeking any grant or license from the government. These works had been constructed, at the earliest, 20 years before the suit was brought, with most constructed 15 years earlier. The Court rejected the defendants' claim that the suit must fail because "agents in the forestry service and other officers and employees of the government, with knowledge of what the defendants were doing, not only did not object thereto, but impliedly acquiesced therein until after the works were completed and put in operation."<sup>164</sup> The Court held that "laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest."<sup>165</sup>

Such a seemingly concrete rule has, however, been questioned recently by the Seventh Circuit. Following dictum in the Supreme Court's decision in *Occidental Life Ins. Co v. EEOC*,<sup>166</sup> the Circuit stated, also in dictum, that "laches is generally and we think correctly assumed to be applicable to suits by government agencies as well as by private parties."<sup>167</sup> A district court in Illinois has subsequently held that it could not dismiss the defendants' laches defense as inadequate as a matter

---

*Chesapeake & Delaware Co. v. United States*, 250 U.S. 123, 125 (1919) ("That the doctrine of laches is not applicable to the government was announced by Mr. Justice Story on the circuit in 1821 and afterward in 1824 authoritatively, upon principle, in *United States v. Kirkpatrick*, 9 Wheat. 720 (1824)."); *United States v. Beebe*, 127 U.S. 338, 344 (1888) ("The principle that the United States are not bound . . . by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established [sic] past all controversy or doubt.").

162. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917).

163. *Id.*

164. *Id.*

165. *Id.*

166. 432 U.S. 355, 373 (1977).

167. *Nat'l Labor Relations Bd. v. P\*I'E Nationwide, Inc.* 894 F.2d 887, 894 (7th Cir. 1990). After stating that laches could apply to a suit by the federal government, the court went on to say that the elements establishing laches were not met in the case: "The delay was not unreasonable here, and there was no harm." *Id.*

of law in a suit brought by the SEC to enjoin a nationwide "Ponzi" scheme.<sup>168</sup>

However, even if a court follows the Seventh Circuit and finds that a defense of laches can be asserted against the federal government in a suit brought by it, the court would still have to refuse to apply the doctrine in ejectment cases because the violating permit holders have unclean hands: "It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been that behavior of the defendant."<sup>169</sup> Here, a permit holder would be denied equitable relief against the Forest Service's action because she has willfully violated the terms of her permit and failed to remedy the situation when given notice of the violation.

Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants, this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case, it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public.<sup>170</sup>

Consequently, as suits for ejectment concern the public interest, a court is unlikely to allow permit holders to assert a defense of laches given their unclean hands.

#### b. Waiver

In a suit seeking a court order ejecting a permit holder from his recreation residence, the permit holder likely will also try to assert that the government has waived its right to bring suit for permit violations because the Forest Service has either explicitly or implicitly condoned the violation. Essentially, the permit holder will argue that the Forest Service is estopped from

---

168. SEC v. Randy, 1995 WL 616788, \*5 (N.D. Ill. 1995). A Ponzi scheme is a form of pyramid scheme that defrauds investors by paying off old "investors" with money from new "investors" enticed to join the scheme through promises of repayment plus interest. Investors continually reinvest their payouts to increase their returns. With no real source of funding other than new investors, the organizer eventually runs off with the pool of accumulated money. See Securities and Exchange Comm'n, How to Avoid Ponzi and Pyramid Schemes, available at <http://www.lectlaw.com/files/inv01.htm> (last visited Dec. 6, 2001).

169. Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814 (1945) ("[H]e who comes into equity must come with clean hands.").

170. *Id.* at 815.

bringing suit over unauthorized improvements given the permit holder's reliance on the Service's acquiescence in the construction of those improvements.

As is the case with laches, however, courts are reluctant to estop government actions:

When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.<sup>171</sup>

This is especially true where the government is bringing suit to prosecute a violation of the law. As the Supreme Court said in *Utah Power & Light*, "it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."<sup>172</sup>

In the Ninth Circuit, a party asserting estoppel against the federal government bears additional burdens above and beyond the standard elements of estoppel.<sup>173</sup> "First, 'estoppel against the government must rest on affirmative misconduct going beyond mere negligence.' [citations] 'Furthermore, estoppel will apply only where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability.'"<sup>174</sup> "Neither the failure to inform an individual of his or her legal rights nor the negligent provision of misinformation constitute affirmative misconduct. [citations omitted] In any event, estoppel against the government is unavailable where petitioners have not lost any rights to which they were entitled."<sup>175</sup>

---

171. *Heckler v. Cmty. Health Serv. of Crawford County*, 467 U.S. 51, 60 (1984) (citing *INS v. Hibi*, 414 U.S. 5, 8 (1973); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383 (1947)).

172. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) (holding that the Forest Service is not estopped from seeking the removal of electrical generator facilities more than ten years after they were constructed without a permit). Nevertheless, the Court has repeatedly declined to adopt a rule that estoppel may not run against the government in any circumstance: "We have left the issue open in the past, and do so again today." *Heckler*, 467 U.S. at 60.

173. The standard estoppel elements are reliance upon conduct in a manner that changes one's position for the worse. *Heckler*, 467 U.S. at 2223; *Mukherjee v. INS*, 793 F.2d 1006, 1008-09 (9th Cir. 1986).

174. *Id.*; *Sulit v. Schiltgen*, 213 F.3d 449, 454 (9th Cir. 2000).

175. *Sulit*, 213 F.3d at 454.

Given that the Ninth Circuit has jurisdiction over the states that contain the majority of recreation residence permits,<sup>176</sup> it is unlikely that a permit holder will be able to estop the Forest Service. The Service has not engaged in any affirmative misconduct in dealing with the permit holders. Moreover, even if the Service has implicitly agreed to overlook the permit violations, the holding in *Utah Power & Light* undermines the foundation for estoppel.<sup>177</sup> Additionally, the inaction by the Forest Service has neither caused the permit holders to lose any rights to which they were entitled nor resulted in any serious injustice. Finally, applying estoppel will unduly damage the public interest in the national forests.

Just as the defendants in *Utah Power & Light* attempted to impose laches on the government and failed, so too did they fail to estop the government from bringing a suit enforcing the government's rights. The current situation for the Forest Service is very similar to that which it faced in *Utah Power & Light*. In that case, the government sued electrical generators for removal of their unauthorized and unpermitted construction several years after construction. Here, the Service would be suing recreation residence permit holders for removal of their unauthorized and unpermitted improvements. In light of such applicable, though dated, precedent, a court today will likely decline to apply estoppel against the Forest Service.

Litigation, therefore, appears to be a relatively risk free action that the Forest Service can take to cure present and deter future permit violations. As long as the Service focuses on egregious violators, it should be able to steer around the political and personhood constraints discussed above. Selective litigation could provide much needed leverage vis-à-vis permit holders.

## 2. *Conversion to Life Estates*

Rather than engaging in litigation to eject permit holders, the Forest Service might instead consider enhancing the personal nature of the property rights by converting the permits into life estates.<sup>178</sup> Under this approach, the Forest Service would respect

---

176. The Ninth Circuit encompasses the western states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, which account for 76% of existing recreation residence permits.

177. See *supra* text accompanying note 172.

178. A life estate is one in which the owner owns the estate for the duration of his or her life. At death, unless otherwise specified, the estate reverts to the estate's grantor. In the present case, the United States would grant the permit holder a life estate in the recreation residence lot. The permit holder would then be able to "use

the personhood considerations discussed earlier by strongly and irretrievably linking the property to the life of the permit holder. As personhood ties property to the person, the personhood theory only requires that the property remain personal through the life of that person. At death, personal property loses its special place. Therefore, by converting recreation residence permits to life estates, the Forest Service would honor personhood connections while still achieving the objective of removing residences that conflict with other public uses.

The Forest Service, however, has no current authority to convert the permits to life estates, and would require new congressional authorization to do so. While it is not generally Forest Service policy to convey public lands into private estates,<sup>179</sup> the Service does have some current, limited authority to do so.<sup>180</sup> For instance, under the Small Tracts Act of 1983,<sup>181</sup>

---

the land in the same manner as the owner of a fee simple, except that he must do no act to the injury of the inheritance." CAL. CIV. CODE § 818 (West 1982).

179. In fact, federal policy is just the opposite—consolidate federal land holdings by acquiring private inholdings. For instance, the National Park Service is authorized to use donated and matching funds to consolidate federal land ownership within existing boundaries of any national park. 16 U.S.C. § 452a (2000). In Yosemite National Park, the Departments of Interior and Agriculture are authorized to obtain complete title to any patented lands within the boundaries of the park through timber and land exchanges "for the purpose of eliminating private holdings . . ." 16 U.S.C. § 51 (2000). Courts have recognized that it is quite clear that Congress favors acquisition of private lands within the boundaries of the national parks. See *United States v. 0.37 Acres of Land, More or Less Situated in the County of Flathead, State of Montana*, 414 F. Supp. 470, 472 (1976). In addition, the Land and Water Conservation Fund authorizes, more generally, the acquisition of private inholdings within wilderness areas and national forests. 16 U.S.C. § 4601-9(a)(1). See generally *Land and Water Conservation Fund Act of 1965*, Pub. L. No. 88-578, Title I, 78 Stat. 897 (Sept. 3, 1964).

However, disposal of federal lands, especially Bureau of Land Management lands, does occur. In 1970, the Public Lands Review Commission, while expressing its opposition to "wholesale disposal" of public lands, also stated that "wholesale retention [of public lands] in Federal ownership for its own sake or for historic reasons was not a sound policy." PUB. LAND LAW REV. COMM'N, *supra* note 50, at 48. The Commission concluded "that limited disposals of national forest lands would be appropriate in certain circumstances." *Id.*

180. See Small Tracts Act of 1983, Pub. L. No. 97-465, 96 Stat. 2535, *codified at* 16 U.S.C. § 521c-521i (1994) (authorizing the Secretary of Agriculture to sell all right, title, and interest of the United States in certain National Forest System lands); see also 36 C.F.R. pt. 254 (2001). In contrast with the Forest Service, the Bureau of Land Management has more general authority to sell tracts of public lands. See Federal Land Policy Management Act, 43 U.S.C. § 1713 (1994) (authorizing the sale of public land tracts by the Bureau of Land Management). The National Park Service also has broad, separate authority under 36 C.F.R. pt. 17 (2000) to convey to the highest bidder freehold and leasehold interests in property within the National Park System acquired by the Secretary of Interior after the creation of the original National Park System. See also 16 U.S.C. § 4601-22(a) (1994).

181. Pub. L. No. 97-465, 96 Stat. 2535, *codified at* 16 U.S.C. § 521c-521i (1994).

the Forest Service can convey parcels interspersed with, or adjacent to, lands transferred out of federal ownership under the mining laws, as well as parcels which are encroached upon by improvements occupied or used under claim or color of title where no advance notice was given to the users that the improvements encroached upon such public parcels.<sup>182</sup> The Small Tracts Act, however, does not authorize the Forest Service to convey the recreation residence lots into private holdings, for it would be absurd to claim that the permit holders had no advance notice that they were on Forest Service lands.

Aside from the authority mentioned above to convey land into private holdings, the Forest Service does have extensive authority to convey land into private ownership through land exchanges.<sup>183</sup> This authority applies to recreation residence tracts.<sup>184</sup> Land exchanges allow the Forest Service to accept land of equal or greater value outside the National Forest System in return for conveying title to national forest land.

This authority, however, does not serve the interests of either recreation residence permit holders or the Forest Service. The Forest Service has no interest in obtaining title to small, dispersed tracts of land that would not necessarily be near a national forest or serve any public purpose. Similarly, the permit holders' personhood would not be served because they would be exchanging one piece of property for another. To honor the permit holders' personhood interests, recreation residence lots need to be conveyed into private ownership outright in the form of life estates, not exchanged for other pieces of property that are also an integral part of the permittees' personhood.

Consequently, if the Forest Service seeks to reform the Recreation Residence Program by converting permits to life

---

182. *Id.* § 3(1), (2), *codified at* 16 U.S.C. § 521e (1994).

183. See General Exchange Act of 1922, 42 Stat. 465, *amended by* 16 U.S.C. §485 (1994) ("When the public interests will be benefited thereby, the Secretary of Agriculture is authorized in his discretion to accept . . . any lands . . . and in exchange therefore may patent not to exceed an equal value of" forest service land in the same state.); Federal Land Policy and Management Act of 1976 § 206(a), 90 Stat. 2755, *codified at* 43 U.S.C. § 1716(a) (1994) ("a tract of public land or interests therein within the National Forest System may be disposed of by exchange"); Forest Service Omnibus Act of 1962, 76 Stat. 1157, *codified at* 16 U.S.C. § 555a (1994) ("Where lands under the jurisdiction of the Forest Service . . . are being administered under laws which contain no provision for their exchange, the Secretary of Agriculture may convey such lands" in exchange for other land.); see also FOREST SERVICE MANUAL c. 5430 (codifying Forest Service policies on exchanges).

184. FOREST SERVICE MANUAL, *supra* note 1 § 2721.23g ("Proposals to convey recreation residence tracts into private ownership by land exchange may be considered at any time.").

estates, it will need explicit authorization from Congress. When the Service seeks that authorization, permit holders will be able to exert political pressure to kill the idea if they wish to do so. Permit holders should not, however, oppose such a reform, for it will not tend to make them worse off. Conversion would give the permit holders title to the property and more rights than they currently have, even under any protective covenants.<sup>185</sup> The current permit system grants possessory interests but only in those improvements described in the permits.<sup>186</sup> In comparison, a life estate grants much more extensive interests.<sup>187</sup> In addition, in many cases, a life estate would result in a longer tenure than that of the current permits, which are scheduled to expire in 2008. Lastly, reversion of the life estate to the Forest Service would put permit holders in no worse position than expiration and non-renewal of their permit.<sup>188</sup> Overall, then, the permit

---

185. The Public Land Law Review Commission suggested including protective covenants in federal deeds conveying public land in order to preserve important environmental values on those lands. PUB. LAND LAW REVIEW COMM'N, *supra* note 50, at 266. Even with covenants similar to current permit conditions, a property interest under a life estate will be greater than an interest under the permit system, as enforcing the covenants cannot lead to loss of the underlying property interest. Under the permit system, the entire property interest may be lost upon violation of permit conditions. The Forest Service, moreover, has no interest in imposing more burdensome requirements on life estate holders in the form of covenants than they currently impose on permit holders in the form of permit terms. Consequently, the greater property interest under a life estate should appeal to permit holders.

186. A permit for a recreation residence "gives the permittee possessory interests in the land described in the permit." *Oregon Summer Home Owners Ass'n v. Johnson*, 1972 WL 727, \*5 (Or. Tax 1972); *Oregon Summer Home Owners Ass'n v. Johnson*, 510 P.2d 344, 346 (Or. 1973) ("the interest transferred by the Forest Service permit is a possessory interest comparable to that transferred [in a] grazing lease").

187. *See, e.g.*, CAL. CIV. CODE § 818 (1982). In fact, Paul Allman of the American Land Rights Association expressed great interest in the conversion of permits to leaseholds, arguing that leaseholds would give permit holders more rights than they currently have. *Hearing on H.R. 3765, supra* note 114, at 67. Given that a life estate grants even greater rights than a leasehold, permit holders presumably would also favor a conversion of permits to life estates.

188. Permit holders cannot object that a life estate makes them worse off by preventing them from transferring permits through inheritance because, under the permit system, the Forest Service can always opt to expire and not renew permits, also preventing the permits from passing through inheritance. *See* FOREST SERVICE MANUAL § 721.23a(10). Consequently, there is no difference between these two systems with respect to inheritance.

Even if it is assumed that the permit holders lost the possible benefit of passing the permit on to future generations, that loss is more than compensated by the increased rights and certainty obtained with a life estate. For one, those future benefits do not directly accrue to current permit holders—the benefit accrues more directly to future generations who are actually the ones made worse off. Secondly, any of those future benefits would be sharply discounted in comparison to the

holders should not oppose such conversions, thus insulating such a move from possible political intervention.

The Forest Service will also benefit from a conversion of permits to life estates. Life estates would be easier to manage than the current special-use permits as the Forest Service would not have to deal with permit renewal, or monitoring and enforcement of permit conditions. The potential for adverse environmental impacts could be mitigated through protective covenants.<sup>189</sup> Over the long run, all recreation residence tracts would revert to public ownership, effectively ending what has been a troublesome administrative program.<sup>190</sup> By converting the special-use permits to life estates, the Forest Service will be better able to achieve its goal of reforming the Recreation Residence Program, just over a longer time horizon.

### 3. *Implementing Liability Rules*

Two types of rules apply to the resolution of legal disputes over property entitlements: property rules and liability rules.<sup>191</sup> A property rule protects an entitlement "to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller."<sup>192</sup> In contrast, under a liability rule, "someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it."<sup>193</sup>

The Recreation Residence Program currently grants each permit holder an entitlement to spend time in the national forests. If the public wants to revoke such use of the national forests prior to the permit's natural termination, the public must pay for the permit holder's improvements in the form of

---

present, concrete benefits of the life estate. Consequently, it cannot be said that current permit holders are made worse off by a conversion to life estates.

189. See *supra* note 185.

190. That recreation residences get phased out does not conflict with the Forest Service policy that recreation residences are valid uses, see *supra* note 105—just because an activity is a valid use does not mean that it must be undertaken in a national forest. Moreover, throughout the duration of the life estates, those recreation residences remain valid forest uses. This is a radically different situation than one where the Forest Service unilaterally declares that recreation residences no longer are valid uses.

191. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

192. *Id.* at 1092.

193. *Id.*

damages.<sup>194</sup> On the other hand, when the permit is not renewed or the permit is revoked for noncompliance with the permit terms, the permit holder must remove all improvements.<sup>195</sup> In this case, the public maintains an entitlement to the land in its natural state. According to the property rule/liability rule framework, the first rule above is a liability rule similar to standard eminent domain rules—where government takes property, it must pay just compensation for it. The second rule is a property rule, where the public maintains the entitlement and the permit holder must pay for his improvements by removing them.<sup>196</sup>

When a permit holder violates the terms of his permit, he sacrifices his entitlement and the public reasserts its own primary entitlement. Currently, the public's entitlement is only protected by an absolute property rule—upon violation, the permit is revoked and the improvements removed.

A liability rule, however, could also be used to protect the public's entitlement. Such a rule would involve fines and penalties against the permit holder for violations. In fact, the Forest Service's 1991 study found that many staffers would favor a monetary fine system for open and notorious violations and repeat offenders.<sup>197</sup> Not only would such a system be more efficient to administer than a litigation-based property rule system,<sup>198</sup> it could provide some income to the cash-strapped agency and would provide a more tangible deterrent to permit violations. Fines and penalties could be specified directly in the permit, highlighting for permit holders the very real possibility of incurring real liability (as opposed to a potential, but unlikely, injunction) that will hit them in their pocketbook. To improve enforcement, then, the Forest Service could implement a liability

---

194. FOREST SERVICE MANUAL, *supra* note 1 § 2347.1(5); *see also* Recreation Residence Authorizations; Notice, Adoption of Final Policy, 59 Fed. Reg. 28,714, 28,740 (June 2, 1994).

195. FOREST SERVICE MANUAL, *supra* note 1 § 2721.23j. The permit holder may instead relinquish the improvements to the Forest Service upon approval by the Forest Supervisor. *Id.*

196. Property and liability rules can also be distinguished by the level of absolutism involved. A property rule is absolute; for example, the permit holder must remove improvements on revocation or termination of the permit. A liability rule, by contrast, is less absolute—the permit holder is compensated for removing the improvements, and that compensation is a matter of degree rather than an all-or-nothing proposition.

197. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8, at 13.

198. Unlike a property rule, a liability rule would result in lower litigation costs and other transaction costs that arise as a result of political interference with litigation.

rule involving fines and penalties. Such a liability rule system would work in conjunction with the current property rule, which invokes the authority of courts in equity.

#### 4. *Self-Monitoring and Enforcement*

Currently, permit holders have a mutual interest in cooperating against the Forest Service—each permittee has an incentive to stay quiet about possible violations of another permit holder because such silence could buy reciprocal silence when that permit holder chooses to violate the terms of her permit. Such implicit cooperation among permittees can even become explicit as permit holders join residence associations. These permit-holder unions often operate to the detriment of permit administration. Such cooperation among permit holders may be altered by co-opting these residence associations<sup>199</sup> or, alternatively, by increasing the use of caretakers. Either of these steps would increase self-enforcement, thereby reducing the Forest Service's administrative burden.

The Forest Service originally promoted the formation of recreation residence permittee cooperative associations to help relieve recreation residence administrative burdens.<sup>200</sup> However, these associations have often turned on the Forest Service and become effective political pressure groups that influence Forest Service policy. If the Forest Service could, however, co-opt these associations, it could once again shift some of the burden of monitoring and enforcement to the associations and individual permit holders. For instance, the White River Recreation Association offers a \$500 reward for information leading to the arrest and conviction of anyone unlawfully entering or causing

---

199. The Forest Service's 1993 study suggested that permittee associations can facilitate permit administration. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8, at 9, 50-51.

200. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 23. One commentator noted that

[h]olders of summer-home permits often formed cooperative associations to provide common facilities and services, including community docks, boathouses, water systems, telephone and power services, and buildings for community meetings . . . watchman services, delivery of supplies, and fire protection. Associations also afford a medium through which forest users can advise the Forest Service of their needs and by round-table discussion arrive at an amicable solution of common problems.

WILLIAM C. TWEED, RECREATION SITE PLANNING AND IMPROVEMENT IN NATIONAL FORESTS, 1891-1942 3 (1980).

damage to cabin property.<sup>201</sup> The Forest Service could similarly sponsor rewards through the associations to report unauthorized activity. Early permits also required permittee conformance with any association rules that applied to a particular tract.<sup>202</sup> In cases such as these, permittee associations aid the Forest Service by providing permit holders with an incentive to monitor and report violations to the Service.

Another alternative for increasing self-enforcement might be to expand the use and authorization of caretaker residences.<sup>203</sup> A year-round caretaker could essentially act as a watchdog within each recreation residence tract. By providing the caretaker with year-round occupation, reduced fees, and prestige-based awards,<sup>204</sup> the Forest Service could recruit permit holders to become caretakers and report violations by other permit holders. By separating caretakers from other permittees using a divide and conquer strategy, the likelihood that permit holders will cooperate to defy the Forest Service would be greatly reduced. Because caretakers will be excepted from the permit requirements regarding improvements (and reasonably so, given the requirements engendered by year-round occupancy), the incentive to remain silent when they observe permit violations by other permittees is diminished. In this way, the Forest Service can employ the permit holders' own self-interest to overcome social pressures. Continual presence and monitoring by a caretaker, moreover, will tend to discourage permit holders from committing violations. Through caretakers, therefore, the Forest Service would be able to shift some of the burden of monitoring the residence program onto the permit holders themselves.

##### 5. Centralizing Program Administration

The Forest Service's 1993 study of the Recreation Residence Program made several findings regarding the internal direction

---

201. White River Recreation Ass'n. *The Role of W.R.R.A. in the Upper White River Valley*, at <http://www.wrra.net/about/> (last visited Mar. 20, 2001).

202. EVALUATION OF RECREATION RESIDENCE TRACTS, *supra* note 2, at 50.

203. Caretaker residences are annual permits authorized by the Forest Service "in limited cases where it is demonstrated that caretaker services are needed for the security of a recreation residence tract and alternative security measures are not feasible or reasonably available." FOREST SERVICE MANUAL, *supra* note 1, § 2347.12a-b. Currently, a tract association (or at least 60% of the affected permit holders where there is no association) must document approval of the caretaker residence. *Id.* § 2347.12b(1).

204. Examples of prestige-based awards are plaques or certificates honoring the caretaker's service, presidential thank you letters, and badges.

and staffing of the program.<sup>205</sup> The study found that: (1) recreation residence permit administration lacks management attention; (2) recreation residence administration budgets are almost nonexistent and ranger district staffing is declining; (3) program reviews are few and ineffective; and (4) formal training rarely occurs.<sup>206</sup> The study found that the Forest Service reacted to permit administration rather than planned for it.<sup>207</sup> It also found that staff often fears not being supported by upper management.<sup>208</sup>

In part, these problems are due to the fact that the individual forests administer the program in a decentralized manner. As highlighted by the study, there is no national standard for inspections and no two forest units used the same inspection form.<sup>209</sup> According to the study, district and supervisor office staff spend one-half to one person-day respectively on each permit in a year.<sup>210</sup> In a forest with less than 250 sites,<sup>211</sup> no forest staff are devoted full time to the permit program. Consequently, staff cannot give their full attention to program administration. Conversely, in forests with more than 250 sites, staff are overworked and unable to give each permit enough attention constraints. In either situation, permit administration suffers.

Centralizing administration so that staff are fully dedicated to permit administration should achieve some economies of scale and efficiencies.<sup>212</sup> For instance, centralization could reduce duplication of effort between forests and result in a more

---

205. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8, at 7-8.

206. *Id.* To this day, administration of the Recreation Residence Program suffers from inconsistent and non-systematic applications of policies. In an informational memo to the Regional Forester of Region 5 dated May 24, 2000, the Service admitted that the "Region needs to pursue a consistent, systematic approach to deal with permit non-compliance and illegal activities." Informational Memo, *supra* note 3, at 2.

207. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8, at 7.

208. *Id.* at 13.

209. *Id.* at 12.

210. *Id.* at 7.

211. Assuming a work year consisting of fifty work weeks of five work days, a staff member could administer at most 250 permits a year at one person-day per permit.

212. The 1993 study, however, suggested that approval authority be delegated to the lowest possible level. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8, at 13. The argument for doing so lies in the belief that it is best to apply local knowledge. With the Recreation Residence Program, consistency and efficiency are likely to be stronger administrative values than consideration of local conditions. Ideally, a centralized structure would take account of local conditions while synthesizing those conditions into a more global outlook.

consistent application of Forest Service policy.<sup>213</sup> Moreover, by occupying personnel full time, centralization results in a consistent level of training and expertise in program administration. Centralizing permit administrators in a single office will also foster communication among administrators so that each will be more aware of what is occurring in other forests. In fact, putting administrators in the same office as forest managers would tend to alleviate the staff fear of a lack of upper management support. Budgeting will also be easier, as administrators would be occupied full time and effort could be more easily accounted for and tracked. Overall, centralizing permit administration would coordinate the program and make it easier to manage. Centralization also provides a single focal point for handling issues and problems. For instance, such a focal point would facilitate consultation issues with the Fish and Wildlife Service for endangered species concerns and with state historical preservation officers for preservation issues. Centralized management would enable the creation of liaison officers whose responsibility would be to work with state and federal agencies to improve permit review and approval processes.<sup>214</sup>

Centralization, moreover, has the additional benefit of being wholly internal to the Forest Service. The change would require no external approval, avoiding exposure to politics and objections of permit holders. Therefore, centralization is an option that the Forest Service should strongly consider in its efforts to reform the Recreation Residence Program.

#### CONCLUSION

The Recreation Residence Program has evolved over time, shaped by conflicting priorities and demands. Today it represents an obstacle to greater public enjoyment of the national forests. Throughout, management of the program has been hamstrung by a combination of politics and legitimate personal property considerations. As the current set of permits reaches maturation and becomes subject to reauthorization, the Forest Service should take advantage of this opportunity to set the course for the program into the future.

In an effort to realign the program with its original goals, the Forest Service can choose from a menu of five options: (1)

---

213. A national inspection form or standard is one example of reducing duplication between forests. See text accompanying *supra* note 209.

214. NATIONAL RECREATION RESIDENCE REVIEW, *supra* note 8, at 9.

selectively ejecting the most egregious permit violators, (2) transforming the permits to life estates, (3) imposing a schedule of fines and penalties for violations, (4) encouraging permit holders to take a more active role in self-monitoring and enforcement, and (5) centralizing program administration.

The most radical and ambitious option is to phase the program out through a conversion to life estates. While the other options maintain the program, this option terminates it. If the Forest Service decides that the Recreation Residence Program is no longer worthwhile, it may seek to phase it out. Such a phase-out would best be accomplished by a conversion of permits to life estates. Conversion is more respectful of personhood and less politically susceptible than other potential methods of terminating the program.

It is not likely, however, that the Service will terminate the program given the program's long history. The Service can, however, manage the program more effectively. Among the reform options available to it, the Forest Service can most easily centralize program administration. This option is entirely internal to the Service and does not require the cooperation or involvement of any other party. Consequently, it is the proverbial "low-hanging fruit" and should actively be pursued within the Service. Similarly, adopting a schedule of fines and penalties would be very effective at encouraging compliance while imposing little cost on the Service—the fines could even be used initially to fund greater enforcement. Not only are fines relatively easy to administer, they directly impress upon permit holders the extent of their obligations and duties under the permits without incurring the large transaction costs associated with litigation. Consequently, the Forest Service should also attempt to institute a system of fines and penalties for permit non-compliance. Only if these strategies fail to increase compliance should litigation be used. Whichever option the Service chooses, it should attempt to balance respect for the personal property nature of recreation residences and the competing recreational interests of the general public.