



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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May 1, 1968

Mr. William J. Carney, Jr.  
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500 Equitable Building  
Denver, Colorado 80202

Dear Mr. Carney:

Further reference is made to your letters of November 24 and December 18, 1967, wherein you suggested, for the reasons stated therein, our consideration of the graduated rate fee system which the Forest Service, U. S. Department of Agriculture, proposes to adopt with respect to national forest special use permits for commercial public service enterprises. The Forest Service, we understand, is still in the process of formulating its final regulations and expects to implement the graduated rate fee system on or about July 1, 1968, except for winter-sports area permits, the proposed rate structure for such permits being scheduled for re-examination and reevaluation. As counsel for a group of national forest ski area operators you are concerned with the application of the graduated rate fee system to winter-sports areas.

In the review draft of the graduated rate fee system, distributed for comment July 1967 to public service enterprises on national forest lands, the Forest Service stated the objectives of the new system "are fees that will be fair to both the Government and the permittees and which will allow reasonable charges to National Forest recreationists." The new system preserves the current system's general concept of a fee based on a percentage of sales, but introduces a variation in that the fee rate is graduated as the volume of sales relates to the permittee's investment, the Gross Fixed Assets (GFA). For example, the graduated minimum rate schedule for winter sports set forth in the review draft of July 1967, which the Forest Service is reconsidering, is as follows:

"Graduated Rate Fee Schedule  
Winter Sports

Sales To Assets	Applicable Rate
First 25% of GFA	1%
Second 25% of GFA	3%
Third 25% of GFA	6%
Fourth 25% of GFA, or Balance of Sales	8%
<sup>1/</sup> Sales over 100% of GFA - Special Rate	12%

<sup>1/</sup> The Special Rate is used when sales exceed 100 percent of GFA for 5 or more consecutive years. Starting with the fifth year and each year thereafter, 12 percent is charged for any portion of sales in excess of 100 percent of GFA, unless total qualifying sales fall below 75 percent of GFA. Sales less than 75 percent of GFA start a new 5-year period during which time any sales in excess of 100 percent of GFA would be included at the 8 percent rate."

In explaining the graduated rate and the concepts involved, the Forest Service draft states:

"The new System preserves the current system's general concept of a fee based on a percentage of sales. It recognizes the fact that a permittee is entitled to a reasonable return on his investment. It also recognizes that returns to the permittee have a direct relationship to the ratio of sales to investment. The System further recognizes that all businesses have a point where income and expenditures are in balance and profit begins to accrue and while these 'breakeven' points vary between kinds of businesses, they are normally predictably consistent within any one kind of business.

"And finally the System recognizes that it is appropriate for the Government to share in increased profits generated by increased use by the public."

As you indicate in your correspondence, the authority to prescribe conditions and fees for permits to use and occupy land within the national forests is vested in the Department of Agriculture, the agency administering the national forests. 16 U.S.C. 497. You nevertheless bring the matter to our attention as you are of the view the proposed regulations, considered discriminatory as to efficient operators, may, in providing a graduated fee rate related to investment, constitute a violation of section 321 of the Economy Act of 1932, 47 Stat. 412, 40 U.S.C. 303b; and as they are so ambiguous and inconsistent, particularly with regard to Gross Fixed Assets, as to make it impossible for our Office in the performance of its audit function "to determine whether the Forest Service is administering this system reasonably, and is collecting a reasonable amount of rent from winter sports areas located on National Forest lands."

Section 321 of the Economy Act, as pertinent herein, states:

"Except as otherwise specifically provided by law, the leasing of buildings and properties of the United States shall be for a money consideration only, and there shall not be included in the lease any provision for the alteration, repair, or improvement of such buildings or properties as a part of the consideration for the rental to be paid for the use and occupation of the same."

In juxtaposition to that provision there is for consideration the statutory authority for the granting of the permits involved:

"The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety \* \* \*."  
16 U.S.C. 497.

While it may be argued that the statutory grant of authority to the Secretary of Agriculture does not contain a specific exemption from section 321 of the Economy Act, we invite your attention to the Senate report on National Park Service Concession Policies, accompanying the bill enacted as Public Law 89-249, to which you referred. With reference to section 7 of that act, specifically providing that section 321 of the Economy Act shall not apply to leases, permits, and contracts granted by the Secretary of Interior for the use of lands and improvements in areas administered by the National Park Service, the Senate Committee on Interior and Insular Affairs, stated:

"Section 7 confirms the position which the Secretary has heretofore taken with respect to the nonapplicability of section 321 of the act of June 30, 1932 (47 Stat. 412, 40 U.S.C. 303(b)), to concession contracts. Section 321 provides that leases of buildings and properties of the United States shall be for a money consideration only." S. Rept. No. 765, 89th Cong., 1st sess., p. 6.

In any event, taking cognizance of the broad regulatory authority of the Secretary of Agriculture with respect to commercial construction on national forest lands, we are of the opinion that it would be an unwarranted extension of section 321 to view it as inhibiting any consideration of the permittee's investment for the purpose of determining the fair amount of fees to be charged. That the graduated rate may stimulate investment is in keeping with the national forest statutory purpose and not necessarily contrary to the rather limited purpose of section 321 of the Economy Act. The use of the graduated rate does not invariably mean a reduction in the ultimate fee to be charged. And we may add that the hypothetical situation you present, of an increase in gross investment with no increase in gross revenues, resulting in a reduction of fees, does not warrant condemnation of the graduated rate fee system under the guise of being violative of section 321 of the Economy Act, but rather is a matter for consideration by the Department of Agriculture in its formulation of controlling regulations.

You are advised that upon review of the proposed graduated rate fee system in the light of your comments we find no substantial basis for questioning the legality of its use under the provisions of section 321 of the Economy Act, and as the Forest Service since your letters to us has modified and refined its regulations and, particularly

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with regard to winter-sports areas, is still in the process of doing so, we are not at this time in a position to comment on the tentative administrative instructions. You may be sure however of our interest in the fee structure and the regulations that the Forest Service may promulgate; and that we shall in the performance of our statutory functions submit such comments and suggestions to the Service as appear warranted.

Very truly yours,

FRANK H. WEITZEL

Assistant Comptroller General  
of the United States