

To: Interested Parties
Re: Critique of Alleged Ethics Violations As Basis for
Changing Status Quo at Chief Joseph Pass
By: George Corn
Date: 8/8/2012

The opinion memo issued in February of 2012 by USDA Attorney Jack Fisher, a Forest Service Ethics Specialist is the legal basis and justification for the sweeping changes at Chief Joseph Pass proposed by Beaverhead Deer Lodge Supervisor Dan Myers. According to Mr. Fisher's opinion it is unethical for Forest Service personnel to continue operating as they had with the club. In his words, he issued his opinion because he has a "... duty to protect (and in this case correct) our employees from criminal and administrative sanctions. In addition, we also have a duty to the agency, not to place it in a compromising public position where remedial administrative action as a result of negative media attention must be taken." He goes on to cite federal rules from the Code of Federal Regulations (CFR) that, under the facts as he sees them, are violated (a full copy of his opinion memo is attached.)

It is hard to imagine, or take seriously, the claim that a Forest Service employee could be disciplined, much less prosecuted, for working with the Ski Club at Chief Joseph Pass. And if "negative media attention" requires "remedial administrative action" whenever the agency is caught in "a compromising public position" then the work of the Forest Service would grind to a halt.

Moreover, a legal opinion is nothing more than one lawyer's opinion of how the law, rules or regulations apply in a particular instance. It is not a judge's ruling and generally does not carry the force of law; meaning it can be disregarded. Legal opinions can easily be wrong and even shopped for predetermined opinions. This is particularly true, as is the case here, when an opinion is based, not on law or even case law, but on interpretations of federal rules, ethical rules and administrative law, areas justly famous for ambiguity, vagueness and elasticity.

Because of this, Supervisor Myers and other Forest Service officials were asked to have another of their lawyers involved to see if the opinion was valid, or if there was another interpretation or point of

view. They did not ask for this second opinion and, in fact, embraced Mr. Fisher's opinion.

The Club tried to work with the Forest Service and has spent countless volunteer hours in meetings since the issuance of Mr. Fisher's opinion letter. In mid July it became apparent that Supervisor Meyers and the Forest Service intended to make the public pay for what the volunteers were doing for free. Since they cited the opinion memo as justification, and since they had not sought a second opinion from Federal lawyers, it was apparent the Club was going to have to look into it.

From the onset it seemed odd that a single complaint should motivate the Forest Service to abandon an agreement that has been functioning smoothly for 12 years. One complaint in 12 years is a remarkable thing in an era when government agencies field frequent complaints about everything under the sun. It was disconcerting that a single complaint could bring to light so many ways in which the Forest Service's relationship with the Club allegedly violates Federal ethics regulations according to Mr. Fisher. Also, given the squishiness of the subject, it was suspicious when Supervisor Myers did not ask for a review of the opinion he received from Mr. Fisher.

Before getting into the details of Mr. Fisher's memo it is worthwhile to look into what the USDA Office of Ethics does.¹ A USDA Office of Ethics newsletter from 2009, exploring the role of the Office of Ethics, sums up the Office's function as, "We simply read the tea leaves [for USDA employees] at the intersection of one's outside interests/affiliations and their public duties."²

In reviewing Federal ethical regulations, or the various offices and officers that specialize in their interpretation, it's apparent that they are meant to prevent Federal employees from using their position to enrich themselves, their friends or their family, or otherwise promote their own agenda. It is fair to say that Federal ethics regulations and ethics officers

¹ It is worthwhile because it is ironic and unethical that Fishers "ethics opinion was issued without affording the club the basics of the due process: notice and the opportunity to be heard. Fisher's response to this was that the opinion in his memo was directed to protect FS employees. Need I say that ethics are about substance not form? Apparently so.

² http://www.usda-ethics.net/newsletters/newsletter_200902.pdf

are meant to prevent corruption or the appearance of corruption. As the newsletter's explanation of the USDA Office of Ethics' role makes clear, Federal employees have an outside life and a firewall must be maintained between that personal life—with its loyalties to certain beliefs and people—and the obligations of a public employee.

I can appreciate this function and am glad that there are people keeping an eye on that firewall. However, there is no allegation, nor any basis for one, that anyone at the Forest Service has a personal relationship with the Club and is improperly using his or her position with the Forest Service to give the Club inappropriate concessions. If the Office of Ethics patrols “the intersection of one's outside interests/affiliations and their public duties,” then it has moved well outside its established responsibilities in this case.

A little bit of history helps to illuminate the absurdity of claiming that the Forest Service's relationship with the Club violates Federal ethical regulations. The Bitterroot Cross Country Ski Club was started by Gordon Reese, for whom the cabin in contention is named. Gordon never really set out to start a club; he just wanted to create some cross-country ski trails at Chief Joseph Pass for public use. Gordon approached the three National Forests responsible for Chief Joseph Pass area to see if cross-country ski trails, which he believed would be public good, would be permitted. The Forest Service officials agreed, so long as it didn't cost them anything, that a cross-country ski area would be a good use of the area at Chief Joseph Pass. Gordon was encouraged to form a club because the Forest Service officials preferred working with a club rather than an individual. Thus the Bitterroot Cross Country Ski Club was formed, at the urging, if not the behest, of the Forest Service for the ease of administration.

But irrespective of how the club came to be, since its inception the Club has done nothing but develop, repair and maintain for the Forest Service the cross country ski trails and cabin at Chief Joseph. The Club does not have any paid employees; no one is compensated for the time, materials or money they give to the Club. All of the volunteer time, materials, equipment and money donated to the Club is given to the Forest Service. The Club doesn't have any political views or agenda. The sole purpose of the Club is to make sure the ski trails are groomed, the bathrooms are cleaned, and the cabin maintained for free public use.

When the Club spearheaded the community effort to build the cabin, the arrangement made with the Forest Service was that the use of the cabin would be free to the public in the winter months with Club members participating in a lottery for 60 nights during the winter season. This allotment to Club members fortunate enough to draw a night was recognized as critical to ensure the care of cabin by day users, the care of day users themselves and as necessary to maintain the cabin which is a modern three story log cabin with propane gas for cooking, solar panels and a modern wood burning stove for heat. The cabin is on the Continental Divide at 7,200 feet and can only be reached by ski, snowshoe or snowmobile for 5 to 6 months of the year. The Club cuts, splits, hauls and stocks all the wood necessary to heat the cabin during the winter and summer.

The Club's arrangement with the Forest Service is far from unusual. The Forest Service frequently relies on volunteers, both individuals and organizations, to develop and maintain recreation areas. Camp Ground Hosts are routinely given free camping privileges and other fringe benefits for the work they do to maintain campgrounds. Because the Forest Service relies so heavily on volunteers, it strives to acknowledge and reward volunteer efforts.³ It frequently gives token gestures of thanks to its volunteers such as free campground stays, water bottles, hats and free passes to fee areas. So here the Forest Service could simply designate the 60 nights of hosting at the cabin as an award given to its volunteers, which would put it well within accepted Forest Service practice. Given these practices, it is puzzling why Mr. Fisher characterizes those nights as an ethical violation.

That brings us to Mr. Fisher's memo, the Forest Service's justification for changing the status quo. The first flag that Mr. Fisher raised in his memo regarded the Club's use of the Gordon Reese Cabin as a prize in a raffle. Each year, the Club sells raffle tickets where the top prize is a night at the cabin with a chef to make dinner for the winner. The raffle has been done annually since the cabin was built and all proceeds from it are used to maintain the cabin and the ski trails. It should be noted here that the cabin does not belong to the Club; it

³ Volunteers in the Forest Service: A Coordinator's Desk Guide, pp. 73-75.
<http://www.fs.fed.us/l-d/pubs/pdf09672814/pdf09672814dpi72pt03.pdf>

belongs to the Forest Service. So if you're keeping track here, the Club's raffle is raising money for a Forest Service building so that tax dollars do not have to be spent maintaining it. Mr. Fisher, however, expressed concern that this practice might violate a couple of Federal regulations.

The first regulation Mr. Fisher cites is 5 C.F.R. 2635.704 which states:

An employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes... Authorized purposes are those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation.

The second regulation he cites is 5 C.F.R. 2635.101(b) which is a generic list of the basic obligations of government service:

- (1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.
- (2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.
- (3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.
- (4) An employee shall not, except as permitted by subpart B of this part, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.
- (5) Employees shall put forth honest effort in the performance of their duties.
- (6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.
- (7) Employees shall not use public office for private gain.
- (8) Employees shall act impartially and not give preferential treatment to any private organization or individual.
- (9) Employees shall protect and conserve Federal property and

shall not use it for other than authorized activities.

(10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

(12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

While the list is demonstrative of what Federal ethical regulations and the USDA Office of Ethics are meant to regulate, it is not clear which obligation from the list prohibits using a night at the cabin as a prize in a raffle. Perhaps it is the part in (14) about avoiding any actions that create the appearance that an ethical standard is being violated, the idea being that allowing the Club to raffle off a night at the cabin could create the appearance that the cabin was being used for an unauthorized purpose in violation of § 2635.704.

Notice, though, that 2635.704 defines authorized purposes as “those purposes for which Government property is made available to members of the public.” On one hand you could say that the cabin is being used as a prize in a gambling activity. But the raffle didn’t really use the cabin except that the winner was going to have a meal cooked for them and spend the night in it, both purposes for which the cabin is made available to the public.

Also notice that 2635.101(b)(14) requires that the appearance of an ethical violation be determined from the point of view of a reasonable person armed with the relevant facts. What reasonable person, knowing