The Following document is from the Office of General Counsel, Washington D. C. on behalf of the United States Forest Service.

This case involved the Gallatin National Forest, though not the Crazy Mountains portion of the Gallatin National Forest. I have included it as an example of what the Forest Service and the OGC used to do to defend our public lands and recognize the value of the land for recreation.

In this case, the privatizing landowner thought the value of the timber on the land would be significant, where OGC James Snow points out the greater value is the land with elk habitat and to recreationists.

Mr. Snow, very clearly calls it like it is. Here are some excerpts:

"For the record, let's make it clear what this dispute is all about... it is about private individuals shutting off lawful public access in order to expropriate public lands for their exclusive use and personal gain... In 1987, the former owner of the Ranch, Mr. James Hubbard, physically cut off access over the Donahue Trail thereby effectively expropriating four sections (approximately 2400 acres) of extremely valuable Federal land for exclusive private commercial outfitting for hunting. He also constructed roads and a gate in trespass on the Federal lands, and constructed fences in violation of the Unlawful Inclosures Act..."

Schofield

United States Department of Agriculture
Office of the General Counsel
Washington, D.C. 20250-1400

August 10, 1992

William P. Horn, Esquire
Birch, Horton, Bittner and Cherot
1155 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036

Dear Bill:

Thank you for your letter of July 10, 1992, wherein you make various proposals on behalf of your client, Point of Rocks Ranch, to resolve the current land ownership and access problems associated with the Donahue Trail.

We have sought for 7 years an amicable resolution of the access and trespass problems associated with Point of Rocks Ranch. These efforts began with the previous landowner, Mr. James Hubbard, and continued when your clients purchased the Ranch.

Since all our efforts to resolve this have thus far been unsuccessful, we were surprised when you petitioned Congressman Regula and the House Appropriations Committee for renewed negotiations. Nonetheless, we have always been willing to negotiate this matter and we were encouraged that House Report language referred to your client's willingness to discuss trail easements.

For the record, let's make it clear what this dispute is all about -- it is about private individuals shutting off lawful public access in order to expropriate public lands for their exclusive use and personal gain.

Your clients moved to Montana and purchased the Point of Rocks Ranch, a property consisting of intermingled checkerboard ownership with National Forest lands. Across the intermingled checkerboard was the Donahue Trail, an historic route of public access to the National Forests use of which has been documented for at least 60 years.

In 1987, the former owner of the Ranch, Mr. James Hubbard, physically cut off access over the Donahue Trail thereby effectively expropriating four sections (approximately 2400 acres) of extremely valuable Federal land for exclusive private commercial outfitting for hunting. He also constructed roads and a gate in trespass on the Federal lands, and constructed fences

Enclosure 11

in violation of the Unlawful Inclosures Act (43 U.S.C. §§1061-1066). Upon their purchase of the Ranch from Mr. Hubbard, your clients have continued blocking the Trail, perpetuated the trespasses on Federal land, and expropriated public land for their exclusive use.

We are very disappointed that your offer does not solve the real problems at hand. Despite your representations to the Appropriations Committee that the basis of renewed negotiations would be agreement on an access easement for the Donahue Trail, your latest proposal does not even mention easements. Instead, you merely provide land exchange proposals that had been previously considered and rejected by the Forest Service as not being in the public interest.

Attached is a more detailed analysis of your exchange proposals, and Forest Service counterproposals. However, some general comments are in order. Your principal exchange proposal[1] would merely ratify your clients' trespass and expropriation of sections 2, 10, 14 and 16. The Point of Rocks Ranch wants the Government to trade it some of the last remaining sections of forested elk winter habitat in this area in return for adjacent clearcut lands. To reduce the obvious disparity in values, your clients propose to allow the Federal Government to reserve title to the timber. However, the highest and best use of those Federally owned tracts is for hunting and recreation, not timber. Therefore, in addition to the negative public impacts of your proposals, there would also be a considerable disparity in valuation in your clients' favor.

Since 1985, the Forest Service has evaluated various land exchanges proposed by both the previous owner and your clients. When just looking at an ownership map, your proposal to swap adjacent sections may seem like a relatively simple solution, almost like moving squares on a checkerboard. However, there are important public resource values involved. The Forest Service does not believe that such a swap would be in the public interest because of the loss of prime publicly owned elk habitat which would be hereafter managed for private exclusive commercial hunting and recreation. We easily can predict a public outcry at any attempt to exchange away any Federal interest in valuable elk winter range. In particular, such an action would likely be strongly opposed by the State of Montana and wildlife interest groups.

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[1] We refer to this proposal as the "Donahue Exchange" whereby the Forest Service would convey sections 10 and 2 in exchange for sections 9 and 3 presently owned by Point of Rocks Ranch.

Since your exchange proposals are not viable, the obvious solution to the problem is the one referred to in the House Report. That solution is to reestablish the historic easement corridor for the Donahue Trail. It is significant that the Forest Service has amicably negotiated standard trail easements for the Donahue Trail with Plum Creek Timber Company and an adjacent ranch owner; the only hold-out in recognizing these prior public rights is Point of Rocks Ranch.

We begin from the basic premise that the Donahue Trail exists as a matter of law, and the public has a right to use it to get access to Federal land, particularly sections 2, 10 and 14. Contrary to your frequent assertions, there is no taking of private rights here. The rights are already established in the general public under Montana law. If the Forest Service does not assert those rights of public access, they will be asserted by others. In fact, by letter dated July 17, 1992, we have been notified of the intent of the Public Lands Access Association, Inc., to sue if the Donahue Trail is relocated off its historic right-of-way.

Through a negotiated easement, the Forest Service is willing to reestablish the Donahue Trail over its historic right-of-way, with possible minor relocations in section 16. The Forest Service will agree to maintain the Trail and regulate its use. We can not agree to bar traditional public uses especially during hunting season since that would be inconsistent with the public's rights in the Trail.

There may be one additional viable alternative and that is for the United States to acquire section 3 by purchase or exchange. As noted on the attached supplemental statement, acquisition funding would have to be appropriated by Congress and any exchange lands would have to come from those areas already identified as available for exchange by the Forest Service.

Finally, we must insist that your clients cease the current trespasses on the National Forest. This means that all unauthorized roads on Federal land must come under a Forest Service permit, and all gates and fences on or bordering Federal lands must be removed.

Along these lines, we note that on June 20, 1992, the District Ranger on the Livingston Ranger District received a much belated application from your clients for "temporary" road permits. The Forest Service had granted temporary road permits to Mr. Hubbard in the past and he subsequently failed to secure satisfactory permanent authorizations. Temporary permits are not suitable in this case, but the Forest Service will make long term authorizations consistent with existing policies and regulations. The District Ranger will be in touch with your clients as to

terms and conditions which must be met in order to grant the authorizations and abate the trespasses.

We are willing to meet at any time to discuss this matter further.

Sincerely,

James B. Snow

James B. Snow
Deputy Assistant General Counsel
Natural Resources Division

Attachment

Attachment

SUPPLEMENTAL STATEMENT BY THE FOREST SERVICE ASSESSING THE EXCHANGE PROPOSALS BY POINT OF ROCKS RANCH

Summarized below are the key components of the two exchange proposals from William P. Horn, counsel for Point of Rocks Ranch, contained in letters dated July 10, 1991 and July 10, 1992, and the reasons why both former Forest Supervisor Robert Gibson and current Forest Supervisor David Garber could not support the proposed land exchanges as a reasonable or realistic solution to the problems associated with Point of Rocks Ranch.

Finally, the Forest Service proposals for resolving the access and trespass problems are enumerated.

Point of Rocks Ranch Exchange Proposals-

1. Dry Creek Exchange Proposal:

Under this proposal by Point of Rocks Ranch, the Forest Service is being asked to convey sections 10, 2, and portions of section 16 for lands located approximately 10 miles north of the Donahue area in the Dry Creek drainage. The proposal would also include an assignment of an easement interest on the Dry Creek road and involves Forest Service abandonment of the Donahue Trail segments across sections 3,10,15, and 16.

Findings: This proposal would not resolve the issue of public and administrative access between Big Creek and Rock Creek drainages, and to the intermingled National Forest land between. Rather, it would remove some lands, further isolate over 1200 acres of residual National Forest System lands and thus result in complicating public use and management in this area.

National Forest lands in section 10 and portions of section 2 are the last remaining immediate areas of intact big game security and thermal cover at the upper elevational reaches of important big game winter range in this area. Most of the merchantable timber from the surrounding private lands has been harvested in large clearcuts, and the remaining areas are non-timbered open slopes. The eastern portion of section 2 is also important big game winter range.

Sections 17, 19, and a portion of 29 offered by Point of Rocks Ranch have scenic values, however overall they are not known to have unique or key wildlife values. Most of section 29 has been

subdivided and is occupied by numerous cabins and other private recreational developments. National Forest ownership within this subdivision would result in increased administrative costs.

The Forest Service currently has two road easements and one trail easement across section 29. The additional easement assignment offered on the Dry Creek Road, based on our understanding, has questionable marketable title and would likely result in the need for condemnation action by the Forest Service to secure rights for public use on this facility.

Exchanging out of section 10, 16, and 2 would be inconsistent with the Congressionally funded winter range acquisition program in the general area for the Northern Yellowstone Elk herd. This project has been ongoing since 1989 and is a cooperative effort with Yellowstone National Park, State of Montana Fish, Wildlife and Parks, Rocky Mountain Elk Foundation, and the Gallatin National Forest.

Overall, it is anticipated that such a proposal would be widely opposed as well as inconsistent with the Gallatin Forest Plan direction. Further, it would not eliminate the potential litigation by private individuals or groups to define and delineate the public's access right on the historic Donahue Trail.

2. Donahue Exchange:

Under this proposal by Point of Rocks Ranch, the Forest Service would again convey sections 10 and 2 and acquire Point of Rocks Ranch lands in sections 9, 3. The Forest Service would then construct approximately 3.5 miles of new trail to provide for north-south trail between Big Creek and Rock Creek drainages.

Findings: This proposal would involve conveying key wildlife habitat into private ownership for logged over lands. National Forest section 10 and portions of section 2 are the last remaining lands in the immediate area of intact big game security and thermal cover. The eastern portion of section 2 is also important big game winter range.

Most of the merchantable timber on Rocks Ranch lands in sections 9 and 3 has been harvested in large clearcuts. In addition to acquiring logged over lands for timbered lands, exchanging out of the federal lands would be inconsistent with the Congressionally funded cooperative winter range acquisition project in the general area for the Northern Yellowstone Elk herd.

This proposal would result in further isolating over 1200 acres of existing National Forest System lands thus complicating public use and management in this area.

The opportunity for construction of a new north-south trail would be provided under this alternative, however most of the 3 + miles of new trail would likely need to be relocated through cutover lands in sections 9 and 3. In addition to the cost of new trail construction, this action would significantly impact the recreational experience and opportunities for the public in this area. Currently the trail passes through approximately only one (1) mile of cutover lands in section 3.

Overall, this proposal would be inconsistent with the Gallatin Forest Plan direction and it is anticipated that it would be widely opposed by the public. Further, it would not eliminate the potential litigation by private individuals or groups to define and delineate the public's access right on the historic Donahue Trail locations.

Forest Service Proposals:

In light of the above, the Forest Service believes that the most cost effective and productive resolution lies in negotiating public easements over the historic Donahue Trail location, similar to the resolution negotiated with all other private parties involved with the Donahue/Rock Creek Trail system. The following "win-win" approach would resolve all issues in the area, both immediate and long-term.

The historical segments of the Donahue Trail are located across 3 sections of land currently owned by Point of Rocks Ranch. These are section 16, 15 and 3. The Forest Service's proposal focuses on each trail segment.

Section 16: This section consists of intermingled public and private ownership. The Forest Service believes that it is physically possible to relocate this segment of the trail totally on to existing National Forest System lands. However, this would involve construction of approximately 3/4 of a mile of new trail in the southern portion of section 16. We believe this action would be supported by the public and would remove this segment from further issue. The costs of relocation and construction should be borne by Point of Rocks Ranch.

Section 15: This section is entirely privately owned by Point of Rocks Ranch, subject to outstanding rights of record. This segment of the Donahue Trail and a portion of the Fisher Homestead access road were dedicated for public use in a 1950 deed reservation by a former owner. To clarify the intent of this dedication, the successor-in interest has formally conveyed this right-of-way to the Forest Service. Since this outstanding interest is of public record in Park County, we believe that the public's access rights across this section have been established. However, the Forest Service is willing to delineate the easement

corridor in the context of an easement grant from the owners of Point of Rocks Ranch with provisions for Forest Service maintenance and regulation for trail use only.

Section 3: This section is entirely privately owned by Point of Rocks Ranch, subject to outstanding public rights in the Donahue Trail. One alternative to remove this segment from contention would be for the Forest Service to directly purchase Section 3 through the Land and Water Conservation Fund Program or to acquire it through a land exchange for other federal lands that are designated or suitable for disposal. Under the direct acquisition scenario, Congress would have to appropriate funds specifically for this purchase. At this time, we have no indication of support for this alternative.

The Gallatin National Forest lands that have been identified as suitable for disposal and exchange are located on Wineglass Mountain, just south or Livingston, MT. This alternative was previously proposed by the Forest Service.

The preferred alternative that we believe would best meet the objective outlined above and is consistent with the Committee's provision, would be to negotiate a public trail easement across section 3. However, we do not believe that it would be acceptable to the public or appropriate to arbitrarily include use restrictions which are inconsistent with the current Gallatin Forest Travel Plan and historic public use.

Resolution of Mutual Long-Term Reciprocal Access Needs

Point of Rocks Ranch Needs: To provide for the longstanding access needs of Point of Rocks Ranch, the Forest Service would be willing to convey a Federal Land Policy and Management Act "Private Road Easement" on those unauthorized roads located across National Forest sections 4, 10, and 16.

Historically, these roads have been utilized as a motorized access system to landlocked Point of Rocks Ranch lands in conjunction with ranching, logging, and outfitting operations. These roads are as follows:

Section 10: The 1.2 miles of east-west road located across the southern portion of National Forest Section 10 connecting Point of Rocks Ranch sections 11 and 9.

The road segment constructed across NE portion of National Forest Section 10 which provides access to Point of Rocks Ranch section 3.

Section 4: The road segment constructed across SE portion of National Forest Section 4 which provides access between Point of Rocks Ranch sections 3 and 9.

Section 16: The road segment constructed across SW portion of National Forest Section 16 which provides access to Point of Rocks Ranch lands in section 16.

Gallatin National Forest Needs: Roaded access is needed to National Forest sections 10 and 2 to implement the long-term management goals and objectives for this area of the Forest. Therefore, as a reciprocal grant, Point of Rocks Ranch would convey a road easement to the Forest Service on one of the two existing roads in either Donahue or Stoughten Creek off highway # 89. It is understood that all final road locations will need to be mutually agreed to by both parties, and that the Forest Service would provide all needed centerline surveys and associated plats.

The Forest Service would attempt to offset values or payments associated the involved road easement conveyances. However, the Forest Service would make payment for any excess value associated with the easement conveyed to the United States of America. The Donahue Trail would be managed as the only public access facility in this immediate area.

The final component of the settlement proposal would be that Point of Rocks Ranch remove the gate closure (red gate) from National Forest lands in SW corner of Section 16 as well as the two unauthorized enclosures (wing fences) maintained at the common section corners of 2,3,10 and 11 and 3,4,9, and 10.

The Forest Service believes that the proposal outlined above is reasonable and has the potential to provide a long-term settlement of all issues and needs of both parties, as well as meet our main objective of eliminating any potential for litigation by all involved.

NRD:OGC:J.Snow/M.Lance:8/6/92

Fowler
Snow
Lance
Mark Lodine, OGC, Missoula
FS, R-1, Lands (Mr. Mike Williams)
FS, Lands, Washington (Ralph Bauman)
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