

CURRENT RULES FOR PERMIT RE-ISSUANCE

Between 2005 and 2015, all recreation residence Special Use Permits will expire and be subject to reissuance. There are new regulations in effect since the present special use term permits were issued for our cabins which introduce a number of new steps into the process.

SUMMARY

Two years before the permit expires, the Forest Supervisor must review the Forest Management Plan and make a determination that the recreation residence tracts are “consistent” with that Plan. If the Plan is more than 5 years old, some additional environmental updates may be needed. If the determination is that the tracts are in appropriate locations, then the next step is to look at each lot and determine if the improvements on (and off) the lot are authorized, and, if so, whether they are in “compliance” with the terms of the permit. The permit requires compliance with all “applicable” federal, state, and local laws and regulations. So far, determining what is authorized, determining how to treat items for which there is no authorizing paperwork, and determining compliance are all places where problems are arising in this process.

DISCUSSION IN DEPTH

Source of the Current Process

A new policy for administering recreation residences was published in a final form in the Federal Register on June 2, 1994. The policy’s language is now in the Forest Service’s Handbook and Manual. The Manual, Chapter 2721.23(e) contains most of the relevant language. For convenience, we have provided an extract of this policy at the end of this discussion. We also use examples from the El Dorado National Forest in Region 5 as this is the only forest that has completed the process so far.

I. CONSISTENCY WITH THE PLAN

The local forest plan is supposed to provide specific information indicating if a given cabin tract is intended to continue in recreation residence use. Some plans, however, have little reference to the recreation tracts themselves. In the absence of a discussion about conflicting uses in the location of a tract, it may be assumed that the recreation residence use will continue, but close attention will be needed to ensure this interpretation is made in the consistency determination. When your Forest Management Plan is updated, make sure that recreation residence tracts are specifically mentioned as appropriate uses of their present locations.

The “additional environmental documentation” that is called for if the plan is more than 5 years old, often can be pulled together from existing information on the forest. The analysis done on the Eldorado National Forest included soils hydrology reports (suggesting that retaining walls and rock be added to certain sections of roads to prevent soil being washed into waterways), species updates, geomorphic risks, and biological evaluations.

Once this material is amassed, the deciding officer, generally the Forest Supervisor, makes a decision. The format of the consistency decision in the Eldorado was a Decision Memo, published in the local paper and subject to two public meetings on the proposed decision. Where tracts in a forest are not in riparian zones, it is possible that a shorter process can be used, with the Forest Supervisor determining that the decision can be “categorically excluded” from the need to do any further environmental work. We shall see if that short process is used for any cabins whose permits expire in 2008.

Those whose Forest Plans call for the removal of certain cabins or tracts need to know that permit expiration will be the triggering event for this. Permit holders in such situations should have received 10 year notice of such termination. Such a determination made earlier than the continuation review, however, is not the end of the story.

The Manual’s language, shown in the extract below, provides a thorough discussion of what must be examined when it is not clear that cabin use is consistent with the plan. Generally, you have another opportunity to argue that your tract should be retained in its current location. You should argue the specific conditions of that tract. If your tract is consistent with the forest plan, then you proceed to the next step.

II. FACE OF THE PERMIT ISSUES

There are only a few of us whose permits already listed all the improvements on and off our lot. Most permits only contained express authorization for a cabin. When the cabin was initially authorized, the need for sanitation, either an outhouse or a septic system, was assumed. It also may have assumed the need for a propane tank and the associated underground piping. Water needs were also assumed, and so were the piping and wells. Seldom were there specific written authorizations for any of these improvements.

This history has been the subject of much debate. There are some administrators who recognize the history of cabin administration and have been diligent in making sure that all improvements, both on and off the lot, are listed on the “face” of the new permit to correct past administrative oversights and informalities. Other permit administrators have taken the position that if it isn’t in writing in the Forest Service file, then it is not authorized and the improvement must be removed. Often the permit holder will have copies of documents that have been lost from those files. Sometimes those files were “purged” in the past, with early documents sent off to archives whose location has changed over time.

We are currently encouraging the Forest Service to send clear instructions to their staff recognizing the real history of the program’s paperwork. This needs to be done in such a way as to leave the permit administrator with the necessary authority to correct the really egregious cases of noncompliance such as unauthorized tennis courts and swimming pools, to name only two examples. Nevertheless, some permit administrators have approved these items over the years. This makes setting a rule in this area even more difficult. We all know an egregious case when we see one. Defining a compliance process that works in all cases is the difficulty.

As a practical matter, we recommend that you go to your permit administrator with a list of all the items you want on the face of your new permit. Make this request in writing. Be sure to cover (these are examples, and not exclusive):

- the square footage of your cabin
- the square footage of your deck
- well
- water storage tank
- water lines
- satellite dish
- driveway
- walkways
- patios
- propane tank
- gas lines
- electrical lines
- outbuilding(s)
- sanitary system (outhouse, septic system, sealed vault)
- solar panels
- underground electric lines
- dock
- any off-lot improvements (such as the water tank, water lines, solar panels, or satellite dish)

See if you are going to have a problem with your permit administrator and start the discussion of what is authorized now, before you find yourself with an annual permit that requires you to remove an improvement, even one built at the same time as the cabin.

III. COMPLIANCE WITH THE TERMS OF THE PERMIT

Even if your improvement is authorized in writing, this is not the end of the process. Your next hurdle is to make sure that your improvements are in compliance with all “applicable” laws. The Forest Service’s position is that just because you obtained permission to add an improvement to the lot in the past does not necessarily mean you get to keep it forever. If you read the express terms of the permit you signed last time around, you will find language to support this.

Some of our applicable laws are already folded into the forest plan, such as the Endangered Species Act. Other applicable laws may vary from place to place, but there are certain requirements that apply to all of us.

- Clean Water Act. The enforcement of this federal law is delegated to the states. Many states have regional water boards and usually the county is left to enforce the regulations. Pit toilets could be an issue, but don’t assume that they will be prohibited. In many places where the use is seasonal, an existing pit toilet is a better environmental choice than tearing up the earth with a backhoe to install a vault. Remember that any earth displacement requires archeological and biological study, so a vault could be an expensive choice for both the permittee and the Forest Service. Some places are inaccessible to all but a shovel and

other places lack soil in which to dig, so each decision on this should be site specific. Often the appropriate government agency may not know about cabins such as ours, so you may have to educate its employees about the seasonal use, lack of electricity, lack of city water volumes, or the other specific circumstances of your lot and cabin use. Remember though, that the Forest Service is not the deciding agency on issues of water and sanitation. Keep in mind, however, that none of us would ever want to be polluting our forests with our septic systems or outhouses. Some of us already check our water quality each year. The results of those tests can be useful in convincing the county that there is no environmental degradation.

Regional or Forest-wide Guidelines. Some of our cabins are subject to a set of guidelines specifying the improvements and uses allowed under a recreation residence permit. Region 5, covering California, and Region 6, covering Washington and Oregon, have regional guidelines. In other areas there may be forest wide guidelines. You can find the Region 5 Guidelines at the following location: <http://www.fs.fed.us/r5/rwhr/rec-residence/management.html>

These guidelines attempt to describe what the cabin tract should look like on the ground. Most limit the size of structures and the colors of paint so that the improvements will fit into the look of the local forest. Some issues arose in the Eldorado National Forest as to what should happen when your improvement does not fit the current set of guidelines, even if it was authorized as it now sits at the time it was built.

IV. Conditional Approval

In Region 6, the language of the Guidelines specifically acknowledges that the current cabin may not comply with the current Guidelines. It states:

The construction, reconstruction, and maintenance standards define the appearance and structure that represent the recreation cabin experience in the northwest forest environment. It is recognized that many cabins now exceed or deviate from these standards. Existing improvements that exceed these standards, unless otherwise directed here, can currently remain. As opportunities develop during replacement, maintenance, and change of ownership of improvements, forests should bring improvements into compliance with these standards.

Thus, we have not seen many attempts to retroactively apply new rules to cabins in Region 6 at the time of compliance reviews. If you have such a problem, be sure to point out this language to your permit administrator.

Region 5 has no such clear language defining when the guidelines are to be applied. While NFH is working with the Regional Forest Service management in hopes that clarifying language can be sent to permit administrators in the field, until that occurs we have to live with the following language:

Policy. Authorized officers shall use all applicable standards and guidelines to administer recreation residence permits and evaluate proposals for modifications of permitted improvements.

The section with specific rules for cabin size and other improvements states that they are to be “immediately” applied at the time of destruction, substantial damage, or “major” structural repairs, but not at the time a new permit is issued to the same permittee.

In the current compliance determination process, it was decided that if your improvement would not be allowed if it were built now, then the improvement would be “conditionally” approved on the new permit. Then, if it is destroyed or “substantially damaged” at some time in the future, it would have to be rebuilt in compliance with the applicable guidelines. If a tree comes down in the middle of a deck that exceeds the allowable size, for example, then the permit administrator has the authority to limit the size of the new deck to that permitted in the applicable guidelines. The theory is that improvements will all be brought (eventually) into compliance with what the Forest Service has determined is the way a tract should look.

The difficulty arises when a permit administrator goes further than this to require immediate and retroactive application of the cabin guidelines. Sometimes this is asserted when the permit administrator determines that the improvement in question, such as a shed, needs “substantial” repair, thereby triggering the guidelines. Whether needed repairs are “substantial” is a subjective determination which has been abused more than once to achieve the removal of structures that otherwise would not need to be removed. We are working with Region 5 in an attempt to ensure that their Guidelines are more reasonably applied.

Issues have also arisen about the triggering language for the application of the guidelines. If a transfer is to a son, a daughter, or a family trust, is this a triggering event so that the extra shed, for example, has to be removed? This appears to be the case in some locations. Some of our members have argued that this is still “in the family” and this exemption should not be limited to transfers between husbands and wives. Some of our members have also posited that the Forest Service can make no removal requirements whatsoever to the existing improvements, as this would present an unconstitutional taking. So far, neither of those arguments have been convincing to the Forest Service.

We recommend that each forest now looking forward to permit issuance set up a group of permittees and Forest Service administrators to coordinate and advise in the process. Determine now, by walking through the tracts, what compliance looks like to the group. This might vary from forest to forest and even from tract to tract. If you know now what it is you may be required to do to get your new permit, you may just have time to do it. And the work of the group should be transmitted to all permittees to facilitate compliance.

A number of permittees on the Eldorado have been given annual permits to complete their work. We believe that annual permits are inappropriate and are working with the Region to see what can be done about this. There is already a

mechanism for enforcing completion of work listed on the Operation and Maintenance Plan. That mechanism should be used instead of issuing annual permits. There really is no justification for issuing annual permits.

We are also working with Region 5 to develop a mechanism for dispute resolution when compliance requirements seem unreasonable. Such review should include both the Forest Service and permittees. In this way, both the unreasonable permit administrator and the unreasonable permittee will be moderated by their peers in order to bring some degree of reasonableness back to the process.

Here's wishing us all lots of luck in this process. The goal is new 20 year permits for all cabins, with all the (reasonable) improvements on the face of the permit!

Questions or Comments?

The permit reissuance process continues to evolve, so watch for updates to this summary. If you have specific questions or comments, please contact Mary Clarke Ver Hoef, NFH Executive Director, at 1-800-669-9971 or nfh100@yahoo.com .

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EXTRACT OF FOREST SERVICE POLICIES PERTAINING TO PERMIT ISSUANCE

2721.23e – Recreation Residence Continuance

See FSM 2347.1 for the general policy on recreation residence use. *[This is the language that states that the use is a “valid” use and that it is the Forest Service policy to continue this use.]* Follow the direction in this section and the procedures in FSH 2709.11, section 41.23, in determining whether recreation residence term permits may be issued for a new term at current lots. The permit continuance process is depicted in FSH 2709.11, section 41.23c, exhibit 01.

The Forest land and resource management plan (Forest plan) provides direction for continuance of the recreation residence use (FSM 1920). As Forest plans are revised, availability for recreation residence use shall be explicitly addressed in the plan through delineation of management areas and associated management area prescriptions (FSM 1920).

Decisions to issue new recreation residence term permits following expiration of the current term permit require a determination of consistency with the current Forest plan. Make this determination by evaluating the extent to which continued recreation residence use adheres to the standards and guidelines, which apply to the appropriate management area. Address continuation of recreation residence use on a tract or group of tracts basis, not on individual lots.

1. Use Is Consistent With Forest Plan. When recreation residence use is consistent with the Forest plan, it shall continue. If the use has been analyzed sufficiently as part of a completed environmental assessment (EA) or environmental impact statement (EIS) completed within the 5 years prior to permit expiration, issue a new term permit upon expiration of the current term permit. Issue a record of decision or a decision notice and finding of no significant impact only if the use was not specifically approved in the appropriate decision document. If the use has changed and such change has not been analyzed sufficiently as part of a completed EA or EIS, complete the appropriate environmental analysis (FSH 1909.15). If the EA or EIS indicating the use is consistent with the Forest plan was completed more than 5 years prior to permit expiration, additional environmental documentation is necessary (FSH 1909.15, sec. 18.03). Initiate action to issue a new term permit two (2) years prior to permit expiration.

2. Use May Not Be Consistent With Forest Plan. When the lands currently authorized for recreation residence use are allocated to alternative public uses through amendment or revision of the Forest plan, and continued recreation residence use may be inconsistent with standards and guidelines, which apply to the appropriate management area, the Forest Supervisor shall conduct a project analysis of the alternative public use(s) (FSH 1909.15). This project analysis shall consider continuation of existing recreation residence use (through appropriate modification of the term permit provisions or amendment of the Forest plan to accommodate the use) or discontinuation of the use (see FSM 2347.1 for direction on recreation residence use continuance). Decisions reached by the project analysis must comply with National Environmental Policy Act (NEPA) requirements and are subject to appeal under Department of Agriculture appeal regulations at 36 CFR part 217 and 36 CFR part 251, Subpart C.

a. If the project analysis results in a decision to amend the Forest plan so that the recreation residence use may continue, modify the provisions of the current term permits as appropriate. New term permits may be issued following current permit expiration. Additional environmental documentation may be necessary (FSH 1909.15).

b. If the project analysis results in a decision to convert a lot to an alternative public use at some point in the future, grant the holder at least 10 years continued use from the date of the decision, unless the continued use conflicts with law and regulation, and identify the specific alternative public use(s) for which the land is being recovered. As provided by FSM 2347.1, the authorized officer may allow continued use of the lot until such time as conversion of the new use is ready to begin by issuing a new permit for the remaining period and amending the Forest plan if needed.

c. Review the project analysis decision 2 years prior to permit expiration to determine if there have been any changes in resource conditions that require another look at the decision. If the decision was made less than 5 years prior to permit expiration and the review shows that conditions have not changed, implement the project analysis-based decision. Affirmation of such decision is not appealable (36 CFR 251.83). If the decision was made more than 5 years from permit expiration and/or review indicates that resource conditions have changed, update the analysis to determine the proper action. Decisions arising from this new analysis are appealable.

The Forest Service Handbook 2709.11-Special Uses, Chapter 40 Section 41.23 contains similar language. It adds the following paragraphs:

3. Ensure the current use is in full compliance with the terms of the permit before issuing the new term permit.
4. Review and update the term permit provisions to ensure that the new permit contains those clauses necessary to comply with all current regulations of the Secretary of Agriculture and all present Federal, State or county laws, regulations or ordinances which are applicable to the area covered by the permit.