

FS CONCERNS ABOUT LANGUAGE FOR THE TRUST:



United States
Department
of
Agriculture

Forest
Service

Washington Office

14th & Independence SW
P.O. Box 96090
Washington, DC 20090-6090

File Code: 2700

Date: May 22, 2002

Route To:

Subject: Living Trust as Holders of Special Use Authorization

To: Regional Foresters

This letter supersedes Tom Thompson's letter dated April 4, 2002, on this subject.

The issue of whether a living trust can be the holder of a special use authorization has been raised recently. These inquiries have focused on small, family owned, recreation-based businesses, such as outfitter/guides and resorts. As Federal tax and probate laws continues to change, this question will likely be asked more frequently.

In a March 7, 1995, letter to the Regional Foresters this office stated that, for recreation residences, authorizations could be issued to a living trust subject to certain conditions. This remains in place as written.

For other special uses (which include primarily commercial uses), it will continue to be the Forest Service's position not to allow special use authorizations to be held by a living trust.

While issuance of a permit to a living trust has certain tax, estate planning, and probate advantages for the trustee (in this case, most likely the person or entity operating the business governed by the permit), issuance of a permit to a living trust poses several countervailing problems for the Federal government. Some of which are stated below.

All trusts are complex and individually unique. The Forest Service and the Office of the General Counsel would need to review the trust documents to ensure that a valid trust was established, that the trustee had the power to enter into a permit that would bind the trust, and that the terms of the trust are not inconsistent with the terms of the permit. Unless the trust documents made the trustee individually responsible and/or unless the permit provides that if the trustee changes, the permit terminates, it would be harder for the agency to administer a permit held by a living trust because it would be more difficult to track and control selection of the person responsible for the permit. The persons or entity that creates the trust (the settlor) could select a corporation as trustee or the settlor could revoke the trust and select another trustee who might not be liable for the permit entered into by the previous trustee. Finally, every state has different trust laws, which would prevent complete standardization of the process and its review.

For these reasons, the Forest Service will not issue special use authorizations in the name of a living trust, except for recreation residences.

Should you have any questions, please direct them to the Lands or Recreation Special Uses program managers.

/s/ David G. Holland

DAVID G. HOLLAND

Director, Recreation, Heritage, and Wilderness Resources

Earlier Letters:

United States Forest Washington 14th & Independence SW
Department of Service Office P.O. Box 96090
Agriculture Washington, DC 20090-6090

File Code: 2720

Date: March 7, 1995

Route To :

Subject: Recreation Residence Term Permits

To: Regional Foresters

Recreation residence permit holders frequently ask that the term permit be issued to, or transferred to, a living trust rather than a named individual. The living trust may also be referred to as a family trust. We have prohibited this practice on the basis that the permit must name a specific individual as holder who is responsible for matters relating to permit administration (FSM 2721.23a). A trust typically does not name this individual.

We have reconsidered our special use authorization policy and concluded that recreation residence permits can be held by a living trust. However, an individual must be named as the trust representative and holder of the term permit. This individual would agree to act in behalf of the trust and to be responsible for the conditions imposed on the trust under the term permit's provisions. This can be a person specifically named in the trust as having the responsibility of the recreation residence. Our concern about identifying a specific individual to be responsible for the recreation residence, and the principal contact for the Forest Service, is thus addressed by requiring the trust's representative to be the holder of the permit.

Appropriate clauses to add to Section XI when preparing the recreation residence term permit (FS-2700-5a) for a trust are shown in the enclosure. These clauses may also be added to a current permit by amendment. The holder identification on page 1 of the term permit must contain the phrase "as representative of the XYZ Living Trust." We caution that this modification of policy is designed to allow trusts established solely for non-commercial, personal benefit to hold term permits for recreation residences.

This direction should be implemented immediately. Appropriate clarifying amendments to FSM 2721.23a have been initiated.

/s/

Sterling J. Wilcox, for

JACK WARD THOMAS

Chief

Enclosure

R6 X13 - Recreation Residence Term Permit Clauses For Living Trusts

1. This permit is being issued to the (Name) living trust. The representative of this living trust is (Name) who shall be considered the holder of this term permit. The holder shall advise the Forest Service of the individual(s) who is (are) the principal occupant(s) of the recreation residence, if other than the holder, whom the Forest Service shall contact regarding the recreation residence. The permanent address of the above designated individual(s) shall be provided to the Forest Service. The holder shall update the identification and address of the individual(s) as circumstances require. The holder warrants that the living trust is authorized to hold this permit to maintain a recreation residence on National Forest System lands.

2. Except as provided below, the Forest Service shall administer the permit in accordance with the terms of 36 CFR Parts 251 and 261 and applicable sections of the Forest Service Manual in the same manner as it would administer a permit held by an individual. The grantor, trustee, representative, and beneficiaries of the trust are jointly and severally liable compliance with the terms of this permit and for any damage to National Forest System (NFS) resources of any kind caused by the presence of the recreation residence on NFS land, or by their personal conduct. In case of conflict between the terms of this permit and the terms of any document or State law creating or otherwise relating to the trust, the permit terms shall control.

The Office of General Counsel Weights In:

United States Department of Agriculture

Office of General Counsel

Pacific Region - Portland Office
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Portland, Oregon 97204-2825
17 June 2004

Telephone:
Facsimile: 503-326-3807
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RE: Special Use Permit

Dear Mr. X:

This letter is in response to your letter to the United States Department of Agriculture Forest Service dated March 18, 2003, to your continued objections to providing more than the Oregon statutory trust certification and to our conversation this morning. As we discussed, the federal government is not automatically constrained by state law, and the "standard" certification simply does not contain enough information. That is why the entire trust document was requested. However, even following state law, the Oregon statute provides that a person can require additional information to be contained in a certification. I indicated to you that it may be sufficient to provide a certification that contained substantially all the following additional information:

1. That the Trustor was the holder of a special use permit issued by the United States Department of Agriculture Forest Service for _____ [insert the legal description of the summer home] in the _____ [insert name] National Forest.
2. That the Trustor was the owner of the recreational residence located thereon and has transferred the property into this Trust.
3. That _____ [insert actual person's name, cannot be "trustee"] has been appointed to be the trust representative and to apply for and hold a term special use permit for this property. That the terms of the trust require this person to act in behalf of the trust and to be responsible for the conditions imposed on the trust under the term permit's provisions.
4. That at such a time as the person identified in #3 above is unwilling or unable to be the trust representative and holder, the Trustee is authorized and required to appoint a new trust representative and holder who shall apply to the United States Department of Agriculture Forest Service to be the holder of a new special use permit for the remaining term.

I also explained to you that if a special use permit is issued to a holder in behalf of a living trust, two additional clauses will be added. You requested a copy of those clauses, and I have attached a copy for your information.

My aim in outlining the above is to assist you in your application process, so that you are more likely to have an application that will be approved. (See e.g. 36 CFR 251.54(e)(3).) You and your clients are never required to supply any information to the Forest Service, but because the information is sought to assist the Forest Service in determining whether the application, in their discretion, complies with applicable laws and regulations, a failure to provide the information increases the likelihood that your application for a special use permit will not be approved. In our conversation, I tried explain the Forest Service policy with regard to special use permits

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for recreation residences. I enclose the guidance documents I mentioned. I understand the regional office has already provided you by e-mail with documents from the Forest Service Manual and with sections from the Code of Federal Regulations for your use and reference. As you can see, and determine for yourself, the additional information listed above is a practical distillation of these documents, which in turn provide general guidance for determining compliance with the regulations you were provided.

However, you apparently have additional, different objections that I cannot address. You indicated that neither you nor your clients could be expected to simply accept and follow 'a government policy' without deciding for yourselves whether or not you personally agree with the reasoning behind a policy. That appears to be an objection more appropriately addressed at a political level. I can only note that the enabling statute provides the Secretary of Agriculture with broad discretion to regulate occupancy of the national forests, as do the regulations you were provided. The other documents you were provided describe general parameters which assist the forests in evaluating an application's compliance with the laws and regulations and in making each individual, discretionary, special use permit determination. Your clients have no entitlement to a special use permit simply because they own the personal property (residence) located on the government's land and they are subject to the criteria in the regulations.¹

Please let me know if this does not answer your answerable questions.

Sincerely,

cc: USFS R6 (Sauser)
Fremont NF(Moser)

MES/ljs:

¹ The information requested addresses parameters in the regulations, for example, 36 C.F.R. §251.54(e)(1)(iv) and 36 C.F.R. §251.54 (e)(5)(v).