Chapter 6

Technical Issues

This chapter addresses the following technical subjects:

- ☐ Insurance.
- ☐ Bonding.
- ☐ Collection Agreements.

Insurance

By law and policy, the holder of a special-use permit must indemnify the United States for any losses incurred by the United States associated with the holder's use and occupancy. Generally, the holder is required to obtain insurance to cover these losses. Requirements vary, depending on the type of insurance, regional specifications, and the type of use and occupancy authorized by the permit.

The two main types of insurance are liability insurance and casualty insurance. Liability insurance covers losses arising from injury to persons and damage to third-party property, i.e., property other than that of the insured and additional insured. Casualty insurance covers losses arising from damage to personal and real property owned by the insured and additional insured. The FS must ensure that insurance coverage is adequate before issuing a permit.

Master Policy Review

The national master policy list is maintained by the Gifford Pinchot National Forest in Region 6. The master policy list consists of liability insurance policies that have been approved by the FS for national use (casualty insurance policies are not included on the master policy list at this time). Each of these policies is assigned a national policy number, which should appear on the certificate of insurance issued for that policy. Even if a policy is on the master policy list, the policy should be checked for endorsements and exclusions that may reduce or eliminate coverage required for the use and occupancy authorized by the permit. Policies that are not on the master policy list require more detailed review. Consider obtaining local OGC review if the insured use and occupancy has a significant degree of risk, or the insured property has appreciable value.

A good tool for reviewing liability insurance policies is the Region 5 *Liability Insurance Companion*, prepared by the agency's Pacific Southwest Region in January 1990. Check for the following in reviewing an insurance policy.

- ☐ The United States should be named as an additional insured, and the additional-insured provision should provide for the required amount and type of insurance coverage for the United States.
- ☐ The policy should have a master policy number.
- ☐ The policy and the permit should be issued to the same person.
- ☐ All activities authorized by the permit should be covered by the policy. Exclusions and endorsements are common, and need to be checked by someone who understands the holder's operation.
- ☐ The area covered by the policy should match the permitted area.
- ☐ The policy period should cover the entire operating season.
- ☐ The policy should meet Regional and national requirements. Authorized officers may set higher coverage limits, depending on the

nature of the authorized activity and the degree of attendant risk.

- ☐ The policy should require 30 days' prior written notice of cancellation (other than for nonpayment of premiums, which should require 10 days' prior written notice).

- ☐ The policy should be an occurrence policy, rather than a claims-made one. Under an occurrence policy, a claim can be made after the policy period has expired, as long as the loss occurred while the policy was in effect. Under a claims-made policy, a claim must be made while the policy is in effect. Claims-made policies are unacceptable unless they have an extended reporting period. Check Section V of the policy to see if the insured has at least 60 days to report claims after the policy has expired.

- ☐ A violation of a warranty in the policy should not void coverage.

- ☐ If claims are reduced by the cost of defending them, coverage should be increased commensurately.

Liability Insurance

Permit Clause 111.1.1 of FS-2700-4h requires the holder to obtain liability insurance for any losses arising out of the holder's use and occupancy of National Forest System lands. See also FSM 2713.32 and 2721.41.

Under FSM 2713.32, the minimum amount of liability insurance coverage is $100,000 for injury or death to one person, and $200,000 for injury or death to two or more people. Check for any Regional supplements that may have increased these amounts. If there is a need, higher limits may be required. The actual amount of liability coverage should be determined by the authorized officer, and in many cases may be significantly higher than the minimum requirements in national policy. In exercising that discretion, the authorized officer should consider:

- ☐ The level of inherent risk associated with the use and occupancy.

- ☐ The potential for an incident that may cause injury or death arising out of the use and occupancy.

- ☐ If such an incident were to occur, the potential for injury or death to only one person, versus the potential for injury or death to more than one person.

Examples of accidents at concession campgrounds could include trees felled by wind damaging automobiles or killing people; a swimmer attacked by an alligator at a developed swim area; and a bear attack at a concession site. In cases involving death, multimillion-dollar claims are not uncommon.

Casualty Insurance

Permit Clause 111.1.2 of FS-2700-4h requires casualty insurance for Government property covered by the permit, including the land and Government-owned improvements. The types of loss to be covered include but are not limited to fire suppression costs, damage (including vandalism) to Government-owned improvements covered by the permit, and to the extent provided in clause III.I.2, costs associated with the release or threatened release of hazardous material.

To ensure the rapid repair or replacement of essential visitor facilities, the holder will normally need to purchase either full-replacement or current-value coverage. Full-replacement coverage pays up to the dollar limit in the policy for the cost to restore or replace the damaged or destroyed property, without deduction for physical depreciation. Current-value coverage pays up to the dollar limit in the policy for the current value of the damaged or destroyed property, taking into account physical depreciation.

Full-replacement coverage provides the greatest protection to the Government and the public for repair or replacement of needed facilities. However, full-replacement coverage may be expensive. Review the concession feasibility analysis (or concession revenue, for existing concessions) to determine whether the concession income can support full-replacement coverage. Current-value coverage may be an acceptable alternative, depending on the circumstances. In the event of

catastrophic loss, the site will be evaluated for rebuilding. (See FS-2700-4h, Clause III.E.)

To determine an appropriate amount of coverage, evaluate which facilities are essential to the concession, and the risk of damage to multiple improvements, such as toilet and shower buildings. Determine replacement values for essential improvements. Document the basis of property damage insurance, and attach a list of facilities and their replacement values to the permit.

Historic structures may be prohibitive in cost to reconstruct in kind. Insurance premiums may exceed what could reasonably be expected to be paid by the holder. In some cases, it may be best to replace an historic structure with a modern building, which can accommodate the functions and capacity of the original structure.

The minimum amount of casualty insurance coverage should be the value of the most expensive building at the site. The authorized officer should require a higher amount where there is a high risk of loss associated with the use and occupancy that could exceed **the minimum.**

Combined-Single-Limit Policies

Many liability insurance policies offer coverage that does not have separate limits for personal injury or death to one person, personal injury or death to more than one person, and third-party property damage. Rather, all three types of loss in the aggregate are subject to a single limit. A claim of up to that limit can be made for either type of loss, or both types of loss combined. The insurance provided by such policies is known as combined-single-limit (CSL) coverage.

For CSL policies, the minimum amount of coverage should equal the amount of coverage desired for personal injury or death to more than one person plus the amount desired for third-party property damage. Evaluate the risk associated with both types of loss, and establish an amount of coverage that is adequate for both. Thus if $200,000 is desired for personal injury or death to more than one person and $100,000 is desired for third-party property damage, the CSL minimum should be $300,000.

Insurance for Multiple Permits

If the holder is using one policy to insure more than one permit, add a rider that lists each site and that states that each site is covered up to the dollar limits in the policy.

Insurance for Permits Issued to States

If the prospective holder is a state or one of its political subdivisions, a risk assessment and insurance policy may be required if the state or its political subdivision has statutory or constitutional authorities limiting its liability or obligation to indemnify. See the user notes for Clause lil.l in FS-2700-4h.

Insurance for Permits Issued to Federal Agencies

If the prospective holder is a Federal agency, insurance is not required. Substitute language should be used that addresses limitations imposed by Federal law on assumption of liability by a Federal agency under the permit. See the user notes for Clause lll.l in FS-2700-4h.

Administering Insurance Coverage

Adequate insurance coverage is a prerequisite to permit issuance; Within 30 days of the selection decision, the selected applicant must provide a copy of the insurance policy for the use and occupancy to be authorized under the permit to the FS for review.

If the policy is included in the master policy list, it has been reviewed by the FS, and a quick comparison can be made with the master policy to check for any exclusions or endorsements that might affect required coverage. If the policy is not included in the master policy list, review the policy in detail, to ensure that it affords the required coverage.

Proceeds recovered by the United States under liability insurance policies must be deposited into the Treasury as miscellaneous receipts. For casualty insurance policies, the FS has the discretion either to require the concessionaire to use all proceeds recovered to repair, rebuild,

restore, or replace damaged Government property covered by the policy, or to obtain payment of the proceeds from the concessionaire or the insurance company. (See FS-2700-4h, Clause 111.1.2.) Casualty insurance proceeds paid to the FS must be deposited into the Treasury as miscellaneous receipts, rather than spent at the site to rectify the damage.

Bonding

In the context of the agency's concession program, bonding is a type of guarantee that protects the United States against financial loss resulting from defaulted obligations associated with special-use permits. A bond ensures obligations or payments associated with these permits.

Do not use bonds to enforce general terms of the permit. Rather, use bonds to enforce readily identifiable requirements that are specified in FS-2700-4h, Clause J. Also, do not use bonds as a substitute for enforcement action under the permit, such as suspension or revocation. Bonding should not be necessary for permit fee requirements, as permit fees should be paid in advance of the authorized use and occupancy. Bonding is particularly appropriate to protect the United States from a complete default under the permit. (See FSM 2344.2, item 4; FSM 2713.34; and FSH 6509.11k, Chapter 80, for direction on the use of bonding.)

The agency has the discretion to require bonding. If it is required, it should be addressed in the prospectus. The amount of the bond should be sufficient to coyer the anticipated loss. For example, the bond may be based on the cost of operating the sites for the remainder of a season, the cost for a new holder to start operating, the amount of cash on hand required by the FAD, or the amount of services that the holder is committed to provide, based on reservations. If multiple permits are covered by a blanket bond (see FSH 6509.11 k, sec. 81.2), the amount of the bond should be sufficient to cover the anticipated loss under all permits covered by the bond.

Review the economic-feasibility analysis to determine whether bonding should be required, and, if so, an appropriate amount. It is the agency's option to require bonding; however, it should be addressed in the prospectus. After a satisfactory operating season, the authorized officer may reevaluate the need for, or reduce the amount of, the bond.

The bond should provide that at the agency’s option, the surety must pay the United States for any loss covered by the bond, or, in the event of revocation or suspension of the permit or complete default under the permit, must pay a thrid party (NOT THE FS) to operate the concession. ANY BOND PROCEEDS RECOVERED BY THE FS MUST BE DEPOSITED INTO THE TREASURY AS MISCELLANEOUS RECEIPTS. THE FS MAY NOT USE BOND PROCEEDS TO OPERATE THE SITE.

The bond should also provide that selection of a third party to operate the site is subject to FS approval. Upon approval, the FS would issue a temporary permit to the third party to operate the concession for a period up to the balance of the permit term. After a new holder is in place, the operational costs of the concession will be covered by concession revenues. In addition, the new holder will be responsible for all obligations under the permit. Once the permit term expires, a new prospectus must be issued for the concession (see FS-2700-4h, Clause J).

Type of Bond

A performance bond may be required to secure obligations imposed under the permit, in accordance with FS-27004h, Clause J. Either the FS will develop a performance bond form for special uses or adapt General Services Administration (GSA) Form SF-25, Performance Bond (see Appendix 6A, page 6-7). (Although GSA Form SF-25 is approved for use for special-use permits, before it can be used in conjunction with this desk guide, the FS must obtain approval from GSA to modify the form to make it consistent with that use, and to allow the FS to require the surety to pay a third party to operate the concession in the event of a complete default.) The term of the bond should cover the period needed to secure obligations under the permit, which typically would be the length of the permit term.

Forms of Bonding

Bonds may take the form of corporate surety, U.S. Treasury bills, notes, bonds or other negotiable securities, cash deposits, irrevocable letters of credit, assignment of savings accounts, or assignment of certificates of deposit. See FSH 6509.11k, Chapter 82, for direction on requiring and administering bonds.

Collection Agreements

Under certain criteria, the FS may enter into agreements to accept funds and other types of contributions from non-Federal sources, to finance FS activities. When specific requirements of statutory authorities are met, the FS may enter into agreements whereby the FS deposits funds into a trust account as advances or accepts funds as reimbursements, rather than depositing funds into the Treasury as miscellaneous receipts, as required by 16 U.S.C. 498. This type of agreement is known as a collection agreement. A collection agreement is a type of cooperative agreement.

There are several authorities for collection agreements, including the Cooperative Funds Act of 1914, 16 U.S.C. 498, and Section 5 of the G-T Act, 16 U.S.C. 572. Section 5(b) of the G-T Act is the appropriate authority for collection agreements between permit holders and the FS. Section 5(b) of the G-T Act and FSM 1584.12 establish the legal parameters that apply to collection agreements between the FS and permit holders.

Section 5(b) of the G-T Act, 16 U.S.C. 572(b), authorizes collection agreements for work performed in connection with the occupancy or use of National Forest System lands. Under the agency's special-use program, a collection agreement under section 5(b) typically would be executed in connection with a permit. Consult with the local grants-and-agreements staff and OGC if a collection agreement outside the context of a permit relationship is contemplated.

Under collection agreements authorized under section 5(b), the permit holder deposits in one or more payments a sufficient amount to cover the total estimated cost of work, or reimburses the FS for moneys spent from appropriated funds. The work must be done for the benefit of the permit holder (because Section 5(b) authorizes the collection agreement in the context of the use and occupancy authorized by the permit), and the work must benefit the public interest. In addition, the work must be for administration, protection, improvement, reforestation, and other kinds of work that the FS is authorized to do on National Forest System lands. The work must be performed in connection with the use and occupancy of National Forest System lands authorized under the permit, i.e., the work must be done on the land and improvements authorized under the permit.

Although the principal reason for these collection agreements is the holder's desire to have work done on land under the permit, there must be some public benefit, even though indirect, from accomplishment of the work. The FS cannot do work for the holder merely as a matter of accommodation, or because the FS is better equipped, or can do the work at lower cost.

Under FSM 1584.12a, item 2, agreements should not be initiated solely for the benefit of the holder or the FS, i.e., to supplement the use of FS crews or equipment not otherwise justified on a full-time basis for normal FS activities. Thus, collection agreements that in effect fund an FS employee's position or an FS program are inappropriate. In other words, collection agreements are improper if, but for the collection agreements, the FS employee's position or the FS program would not be funded or would not be fully funded.

It is not lawful for the FS to enter into collection agreements for nearly every aspect of the campground concession operation. Section 5(b) of the G-T Act contemplates that the collection agreement is ancillary to the permit, rather than vice versa. If collection agreements are used for most or all of the work that is the holder's as well as the Government's responsibility, they defeat congressional intent in authorizing the FS to issue permits for concessions under Section 7 of the G-T Act.

Thus collection agreements should not be used to cover the costs of ordinary operational aspects of the concession. Examples of such ordinary aspects include holder M&R, fee collection, and required or optional interpretive services that are offered on a routine or frequent basis. Generally,

collection agreements are inappropriate for services that the concessionaire must provide under the prospectus, the permit, and the AOP.

With the exception of collection agreements for G-T fee offset, which may be required as discussed in Chapter 5, collection agreements executed under Section 5 of G-T must be voluntary, because the statute contemplates a cooperative relationship between the parties. Since collection agreements other than for G-T fee offset must be voluntary, the willingness of applicants to enter into collection agreements should not be factored into the evaluation process. Otherwise, the incentive to enter into collection agreements will be so great as to make them, in effect, mandatory.

Ask two questions to start the analysis for determining whether collection agreements are appropriate: (1) Are the FS personnel or equipment being used under the collection agreements entirely funded by those agreements? and (2) Do the services provided by the FS under the collection agreements constitute a majority of the work required by the permit? If the answer is "Yes" to either question, do not enter into the collection agreements. If the answer to both questions is "No," conduct further analysis based on the foregoing discussion in its entirety.

G-T fee offset projects are a common example of work that may be covered by a collection agreement executed under Section 5 of the G-T Act. Examples of appropriate and inappropriate collection agreements for other activities follow.

- ☐ An example of an appropriate collection agreement for interpretive services would be an agreement whereby the FS receives funds to provide a special interpretive presentation particularly within the agency's expertise as a minor part of the concessionaire's overall interpretive program (e.g., once or twice during the operating season where the program is offered five days a week).

- ☐ An example of an inappropriate collection agreement for interpretive services would be an agreement whereby the FS receives funds to provide ongoing or routine interpretive services at the concession, and in effect provides services that the concessionaire must furnish under the permit and AOP (e.g., conducting programs four days a week when the overall program is offered five days a week).

- ☐ An example of an appropriate collection agreement for maintenance services would be an agreement whereby the FS receives funds to provide specialized equipment, such as highway mowing, tree falling, or specialized cleaning equipment once or twice during the operating season.

- ☐ An example of an inappropriate collection agreement for maintenance or other services would be an agreement whereby the FS receives funds to provide ongoing maintenance or other services, such as toilet cleaning, fence building, or fee collection, and in effect provides services that the concessionaire must furnish under the permit and AOP.

See FSM 1584.12a, paragraph 8, for additional requirements applicable to collection agreements with permit holders. Appendix 6B (pages 6–8-9) contains a sample collection agreement. For further guidance, consult with the local grants and agreements staff, auditor, and OGC.