

03/2012

**Justification for Change – 0596-0082**  
**Revision to form FS-2700-5b**

FORM	REVISION	RATIONALE
FS-2700-5b	v. 03/12 XII. Miscellaneous Decisions Revise clause: F. Water Facilities and Water Rights	Interim directive id_2709.11-2012-2 was issued on March 6, 2012. The sky area water rights clause in form FS-2700-5b needs to be consistent with the new directive. The subject matter is in litigation.

The new text for affected sections under the clause is shown in red.

2. Water Rights. This permit does not confer any water rights. The term “water rights” includes all authorizations, such as certificates, reservations, decrees, or permits, for water use issued under State law. **Any expenses for acquiring and maintaining water rights shall be the responsibility of the holder and not the responsibility of the United States.** The United States reserves the right to take all actions necessary to maintain and protect any right to divert and use water on site.

a. Ownership of Water Rights For Water Diverted From and Used on NFS Lands Covered By This Permit. Clause XII.F.2.a restricts the use and ownership of water rights for water diverted from and used on NFS lands covered by this permit (hereinafter “rights to divert and use water on site”). **Unless otherwise specified, all necessary water rights must be jointly applied for and acquired by the holder and the United States. These water rights shall be used, retained, and maintained by the holder as the agent of the United States in accordance with State law and the terms of this permit and for the benefit of the United States and the holder.** Any right to divert and use water on site shall be used primarily in support of operation of the winter or year-round resort and facilities authorized by this permit.

(3) Effectuation of Ownership. **The Forest Service shall not take any action, including conveyance, with respect to the ownership interest of the United States in a right to divert and use water on site that the Forest Service determines would adversely affect the availability of water for operation of the winter sports or year-round resort and facilities authorized by this permit unless necessary to fulfill legal requirements. Additionally, the holder shall not take any action intended to divide or transfer the holder’s ownership interest in any right to divert and use water on site; to sever the holder’s ownership interest in any right to divert and use water on site from support of operation of the winter or year-round resort and facilities authorized by this permit; or to modify the type, place, or season of use associated with any right to divert and use water on site, in any manner except as provided for in this and any previous Forest Service permit, unless otherwise approved in writing in advance by the authorized officer. The holder may submit an application to the authorized officer for approval to divide or transfer the holder’s ownership interest in these water rights; to sever these water rights from support of operation of the ski area; or to modify the type, place, or season of use of these water rights. Furthermore, during the term of this permit and any subsequent permit issued to the holder for the use authorized by this permit, the holder shall be responsible for maintaining and shall have the right**

to submit any applications or other filings that are necessary to protect any right to divert and use water on site. The holder shall undertake any action required to effectuate clause XII.F.2.a under State and federal law, including executing a quit claim deed in the name of the United States and the holder or in the name of the United States.

b. Ownership of Water Rights For Water Diverted From NFS Lands Not Covered By This Permit For Use on NFS Lands Covered by This Permit. Any right to divert water from NFS lands not covered by this permit for use on NFS lands covered by this permit (hereinafter "right to divert water off site for use on site") requires a separate special use authorization. **These water rights shall be used, retained, and maintained by the holder as the agent of the United States in accordance with State law and the terms of the special use authorization for the benefit of the United States and the holder.**

(1) Sole United States Ownership of Rights to Divert Water Off Site for Use on Site After November 8, 2011. Except as provided in clause XII.F.2.c, after **November 8, 2011**, any right to divert water off site for use on site shall be applied for and acquired solely in the name of the United States by the holder. **The Forest Service shall not take any action, including conveyance, with respect to the ownership interest of the United States in a right to divert water off site for use on site that the Forest Service determines would adversely affect the availability of water for operation of the winter sports or year-round resort and facilities authorized by this permit unless necessary to fulfill legal requirements.**

(2) Sole Holder or United States Ownership of Rights to Divert Water Off Site for Use on Site Before November 8, 2011. Ownership of any right to divert water off site for use on site that was initiated, developed, certified, or adjudicated prior to **November 8, 2011**, continues to be governed by the terms and conditions of the permit for the diversion, if one exists, or the ski area permit in effect at the time that water right was first filed with an administrative or judicial entity. If that permit provided for United States ownership, the water right shall be owned solely by the United States. If that permit was silent on ownership of water rights and the water right was acquired in the name of the holder, ownership of the water right shall continue in the name of the holder. If the permit was silent on ownership of water rights and the water right was acquired in the name of the United States, ownership of the water right shall continue to be in the name of the United States. **The Forest Service shall not take any action, including conveyance, with respect to the ownership interest of the United States in a right to divert water off site for use on site that the Forest Service determines would adversely affect the availability of water for operation of the winter sports or year-round resort and facilities authorized by this permit unless necessary to fulfill legal requirements. The holder shall not take any action intended to divide or transfer the holder's ownership interest in any right to divert water off site for use on site; to sever any right owned by the holder to divert water off site for use on site from support of operation of the winter or year-round resort and facilities authorized by this permit; or to modify the type, place, or season of use of any right owned by the holder to divert water off site for use on site, in any manner except as provided for in this permit and any previous Forest Service permit, unless otherwise approved in writing in advance by the authorized officer. The**

holder may submit an application to the authorized officer for approval to divide or transfer the holder's ownership interest in these water rights; to sever these water rights from support of operation of the ski area; or to modify the type, place, or season of use of these water rights.

c. Sole Holder Ownership of Water Rights Purchased or Leased By the Holder for Water Diverted From Non-NFS Lands For Use on NFS Lands Covered by This Permit.

(1) Notwithstanding clauses XII.F.2.a and XII.F.2.b, water rights purchased or leased by the holder in support of operation of the winter or year-round resort and facilities authorized by this permit may be owned solely in the name of the holder, even if these water rights are changed or exchanged to a point of diversion on NFS lands covered by this permit for use on NFS lands covered by this permit (hereinafter "for diversion and use on site").

(2) Notwithstanding clauses XII.F.2.a and XII.F.2.b, water rights for water diverted from non-NFS lands for use on NFS lands covered by this permit (hereinafter "for use on site") may be owned solely in the name of the holder.

d. Termination or Revocation. Upon termination or revocation of this permit, the holder shall transfer the holder's interest in any water rights subject to clauses XII.F.2.a and XII.F.2.b and any water rights that are purchased or leased by the holder and that are changed or exchanged for diversion and use on site after November 8, 2011. If that use is not reauthorized, the holder shall transfer the holder's interest in water rights that are jointly owned under clause XII.F.2.a(1) to the United States. The holder shall promptly petition in accordance with State law to remove from NFS lands the point of diversion and water use associated with water rights owned solely by the holder under clauses XII.F.2.a through XII.F.2.c or shall transfer these water rights to the United States. The parties intend that once the holder's interest in these water rights is transferred to the United States, they shall be owned solely in the name of the United States.

e. Documentation of Transfer. The holder and the holder's heirs and assigns shall execute and properly file any document necessary to transfer to a succeeding permit holder or the United States ownership of the holder's interest in any water rights subject to clauses XII.F.2.a and XII.F.2.b; any water rights that are purchased or leased by the holder and that are changed or exchanged for diversion and use on site after November 8, 2011, or to correct a failure to ensure that any right to divert water under clause XII.F.2.a be held jointly by the United States and the holder as joint tenants with a right of survivorship or as tenants in common, in accordance with the terms of this permit. By executing this permit, the holder hereby grants limited power of attorney to the authorized officer to execute any document on behalf of the holder as may be necessary to transfer to a succeeding permit holder or the United States the holder's interest in any water rights subject to clauses XII.F.2.a and XII.F.2.b and any water rights that are purchased or leased by the holder and that are changed or exchanged for diversion and use on site after November 8, 2011, or to correct a failure to ensure that any right to divert water under clause XII.F.2.a be held jointly by the United States and the holder as joint tenants with a right of survivorship or as tenants in common, in accordance with the terms of this permit.