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Part IV

**Department of
Agriculture**

Forest Service

**36 CFR Part 251
Special Uses; Final Rule**

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596-AB35

Special Uses

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: The Department is adopting amendments to regulations governing the use and occupancy of National Forest System lands to streamline and make more efficient the process for obtaining special use authorizations, to provide for the use of one-time payments for easements as presently used in the market place, to limit certain liability requirements to amounts determined by a risk assessment, to clarify definitions of certain terms, and to clarify requirements related to renewal of existing special use authorizations. The intent is to improve service and reduce costs to proponents and applicants for and holders of National Forest System special use authorizations, to expedite decisionmaking, and to permit more "user-friendly" administration of such authorizations by removing certain requirements deemed unnecessary and outdated.

EFFECTIVE DATE: This rule is effective December 30, 1998.

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SUPPLEMENTARY INFORMATION:

Background

Approximately 72,000 special use authorizations are in effect on National Forest System lands. These uses cover a variety of activities, ranging from individual private uses to large-scale commercial facilities, and public services. Examples of authorized land uses include road rights-of-way serving private residences, apiaries, domestic water supply conveyance systems, telephone and electric service rights-of-way, oil and gas pipeline rights-of-way, hydroelectric power generating facilities, ski areas, resorts, marinas, municipal sewage treatment plants, and public parks and playgrounds. The agency receives about 6,000 applications for special use authorizations each year. These applications are subjected to a rigorous, time-consuming, and costly review and

decisionmaking process in determining whether to approve or reject them.

There are 14 statutes authorizing special uses on National Forest System lands. These authorities, which are listed at 36 CFR 251.53, include statutes of broad application, such as the Mineral Leasing Act of 1920, the Federal Land Policy and Management Act of 1976, and the Bankhead-Jones Farm Tenant Act of 1937, as well as statutes focusing on a specific use of Federal lands, such as the National Forest Ski Area Permit Act. The basic authority of the Secretary of Agriculture to regulate the occupancy and use of National Forest System lands is the Act of June 4, 1897 (16 U.S.C. 551).

Additionally, the Independent Offices Appropriations Act of 1952, as amended, (31 U.S.C. 9701) and the Office of Management and Budget (OMB) Circular A-25 require holders of authorizations to pay for the use of the Federal land. The Federal Land Policy and Management Act of 1976 requires holders of rights-of-way authorizations to pay annually, in advance, the fair market value of the use of the Federal land and its resources. The 1976 Act also provides that fees may be waived, in whole or in part, under specified conditions when equitable and in the public interest.

Requirements of the National Environmental Policy Act, the Wilderness Act of 1964, the Endangered Species Act, the Archaeological Resources Protection Act of 1979, additional requirements of the Federal Land Policy and Management Act of 1976, and Executive Order Nos. 11990 (Floodplains) and 11998 (Wetlands) also bear directly on the issuance of special use authorizations. These directives and statutory authorities require extensive analysis and documentation of the impacts of use and occupancy on a wide array of environmental, cultural, and historical resources. The practical effect of these requirements has been to greatly lengthen the time required and the costs involved in processing applications for special use authorizations or reissuing authorizations for existing uses. The time and cost impacts weigh on both the Forest Service and applicants and holders of authorizations. The significance of these impacts has been a principal factor in the development of these amendments to the special use regulations.

On August 14, 1992, the Forest Service published a proposed rule (57 FR 36618) and sought public comment to amend regulations governing the use and occupancy of National Forest System lands at 36 CFR Part 251,

subpart B. Such use and occupancy is authorized by "special use authorizations," which include permits, term permits, easements, licenses, and leases. The proposed revisions had several purposes: to (1) streamline the application process for special use authorizations, (2) enhance efficiency of review of special use proposals, (3) authorize one-time payments of rental fees for certain types of special use authorizations, (4) limit certain liability requirements, (5) clarify certain definitions, and (6) clarify direction on renewal of special use authorizations.

A total of 25 responses were received on the proposed rule. Identity of the respondents is as follows:

| Respondent category | Number | Percent |
|----------------------------------|-----------|------------|
| Individuals | 3 | 12 |
| Electric Utilities | 6 | 24 |
| Oil & Gas Companies | 4 | 16 |
| Telephone Company | 1 | 4 |
| Permit Holder Associations | 8 | 32 |
| Government Agencies | 3 | 12 |
| Total | 25 | 100 |

Readers are advised that a major revision to this subpart was made subsequent to the August 14, 1992, proposed rule. On August 30, 1995, the agency adopted a final rule revising those portions of subpart B governing noncommercial group uses and noncommercial distribution of printed material within the National Forest System (60 FR 45293). The 1995 revisions, referred to in this rulemaking as the "noncommercial group use regulations," ensure that the authorization procedures for these activities comply with First Amendment requirements of freedom of speech, assembly, and religion. They did not directly impact the concurrent effort to streamline and make more efficient the process for obtaining special use authorizations. However, the 1995 revisions added new provisions and revised existing text which required redesignation of several sections and paragraphs throughout the subpart. In the narrative which follows, the terms "current rules" or "current regulations" refer to the regulations at 36 CFR part 251, subpart B, as published in the current volume of Title 36 of the Code of Federal Regulations, revised as of July 1, 1997.

General Comments

Respondents to the 1992 streamlining proposed rule generally supported the Forest Service's effort to streamline the permit application process and to make the administration of special use

authorizations more user friendly, although most asked that the final rule clarify that the revisions apply to new permits only. These respondents felt that the proposed regulations would reduce unnecessary paperwork burdens on applicants and, thereby, reduce costs for both the applicant and the agency. Indicating that the proposed revisions would improve the agency's performance, a number of respondents cited examples of the poor quality of service, the lack of experienced field personnel, and the length of time taken by the agency's field offices in responding to and processing special use permit applications. Further, these respondents urged the agency to quickly adopt final regulations that implement statutory authorities that have been available to the agency for several years, particularly amendments made to the Federal Land Policy and Management Act of 1976 by the Act of October 27, 1986.

Several respondents suggested that the agency institute a land and resource planning procedure or incorporate into its Forest planning activity a process that would pre-authorize certain types of land uses and thus avoid or minimize time consuming and costly analysis of individual applications for authorizations. These respondents suggested the process could be built around standards and guidelines in a national forest's land and resource management plan (forest plan). One respondent suggested the U.S. Army Corps of Engineers Nationwide Permit Program could serve as a model for this process. The types of special uses that would be subject to this pre-authorization process are described by the respondents as routine activities serving the public, such as electric and telephone rights-of-way.

Three respondents expressed concern that the agency's efforts to improve its administration of special use authorizations and make those regulations more user friendly will not be successful unless and until funding for this activity is dramatically improved. These respondents pointed out that the lack of adequate funding at the field office level is the biggest single factor responsible for poor service and delays in processing applications experienced by permit applicants.

The Department of the Interior (DOI) urged that Forest Service regulations for permitting and administering uses on National Forest System lands be more compatible with those of the land-managing agencies in the Department of the Interior, particularly the Bureau of Land Management (BLM). Because both the Forest Service and the BLM derive

much of their authority for administering land uses from the Federal Land Policy and Management Act of 1976, the DOI believes any regulations of the two agencies should be very similar. Further, the DOI urged a coordinated effort to review and revise regulations promulgated under the 1976 Act.

The DOI also expressed concern that the proposed delay in consideration of the environmental effects of the proposed use could result in environmentally unsound projects passing screens only to be rejected in later stages of development after substantial time and investment have been made by the agency and the proponent. In the same context, the DOI suggested that notification of adjacent land-managing agencies should be made earlier in the application review process so that the concerns of the affected agencies could be made known sooner.

The U.S. Small Business Administration advised the Forest Service that the proposed rule was not in compliance with the Regulatory Flexibility Act (5 U.S.C. 601-612). That Act requires Federal Government agencies promulgating rules to describe the impact of the rulemaking on small entities through preparation of a regulatory flexibility analysis. Despite the agency's acknowledgment that the proposed rule would have a beneficial impact on a substantial number of small entities, the U.S. Small Business Administration stated that the aforementioned analysis must nevertheless be prepared.

Response to the General Comments. The Forest Service and the Department are pleased that most respondents generally viewed the proposed rule as a positive step toward improving the administration of special use authorizations. The agency is aware that its performance in responding to applications and administering existing authorizations often is inadequate and its service to permit applicants and holders—its "customers"—needs to be significantly improved. The Department is also mindful of the President's direction to improve service to the public. Executive Order No. 12866, dated September 30, 1993, directed agencies to reform and make more efficient their regulatory processes. The Forest Service initiated this effort with the goal of streamlining and making more user friendly its special use regulations and will, through the adoption of a final rule, ensure that this goal is met in part. Since beginning this particular rulemaking, the Forest Service has undertaken a major project to re-engineer special uses

administration. A team of agency employees is currently at work to implement the re-engineering recommendations, which are focused on agency procedures. Implementation of these recommendations may lead to further changes in rules and will certainly result in additional revisions in agency directives governing special uses administration. Any revisions to rules or directives will be fully coordinated with the revisions made by these final rules.

The agency agrees with the suggestion that broad guidance for considering applications for special use authorizations be made a part of its land and resource planning processes. This guidance would allow decisions to be made on routine permit activities without further analysis. Such a procedure would require that the requisite environmental documentation be made in the Forest plan and that the documentation be specific enough to cover the proposed use.

However, the agency believes that such a procedure can be implemented without additional regulatory guidance. The forest planning process described in the agency's administrative manual (Forest Service Manual, Chapter 1920) prescribes the format and content of each Forest plan. The initial plans were completed in the early to mid 1980's and currently remain in effect. Almost without exception, these plans lack any detail regarding authorizations for use and occupancy of National Forest System lands. The life of these plans is generally 10-15 years and most of the plans for the 123 National Forest planning units of the agency are now or soon will be undergoing revision. The Forest Service recognizes the need to address land use and occupancy generally in the forest plans. The forest plan revision process offers the opportunity for units to consider the need for more specific guidance on land uses. The Department further notes that public participation is a fundamental ingredient in the preparation and revision of Forest plans. Thus, this will allow holders of or applicants for authorizations to participate directly in the development of the plan and, thereby, identify specific opportunities for addressing land use authorizations at the Forest level.

The Department fully agrees with respondents' concerns that sufficient funding for administration of special use authorizations must be considered along with revisions to the regulations. The Forest Service is addressing this matter in a variety of ways. However, the Department must emphasize that the budgeting and appropriation process

takes a much larger view of the management of National Forest System lands, balancing the funding of a wide variety of Forest Service programs and activities in the context of constraints imposed on the Department of Agriculture and the Federal Government as a whole. Thus, while the Department agrees that improving funding for this activity is desirable, it cannot unilaterally support respondents' urging of greater funding for the administration of special use authorizations. Instead, the Forest Service will seek recognition in its budget requests of the importance of efficient and cost-effective administration of land use authorizations and service to its customers.

The Forest Service concurs with the DOI suggestion that regulations governing administration of land uses on Federal lands should be more consistent. The Forest Service and the BLM are taking actions to bring their regulations into closer agreement, albeit in the context of individual uses. The two agencies have agreed that more comprehensive action is needed and are undertaking joint examination and coordination of regulations. While this action was prompted in part by the publication of the proposed special use regulations, additional motivation has been provided by the National Performance Review effort and Executive Order No. 12866. To the extent that statutory authorities permit, the two agencies have embarked on a course to adopt common regulatory approaches to land use and occupancy.

The Department acknowledges the DOI concern that the effort to streamline the permit application process may allow environmentally unsound projects to be initially considered, only to be rejected later after substantial investment of time and money by proponents and the agency. The Forest Service has examined the "screening" process set forth in the proposed regulations (§ 251.54(a)) and made appropriate revisions to respond to the DOI concern.

With regard to the DOI's suggestion that Federal agencies managing lands adjacent to the National Forest System land being considered for a land use authorization be notified sooner in the application process so that those agencies' views can be made known, the Department suggests that such notification may counteract the intent to streamline the application process by inserting a step that is unnecessary. Analysis of an application generally requires, as part of environmental documentation, a "scoping" of the proposal to learn of the concerns of

other agencies and the public. This process of advising the public and affected parties of a proposal provides timely notice to adjacent landowners, whether public or private, and allows those landowners to bring forth any concerns.

The Department's response to the U.S. Small Business Administration's advice that a regulatory flexibility analysis be prepared is found at the conclusion of this supplementary information statement.

Specific Comments on Proposed Rule and Response

The following analysis of and response to comments on the proposed rule is organized by the section of the current special use regulations.

Section 251.51 Definitions. The proposed rule combined definitions found in other sections of the current regulations into this section and added four new definitions intended to improve the implementation of the regulations.

Comment. Three respondents were concerned that the proposed definition for "termination" would be confusing, because the new definition is a reversal of past usage and incorporates the expiration of a permit and ending of a permitted use. They noted that termination of a permit occurred by the direct action of the authorized officer and not by the expiration of a stated period of time.

Response. New definitions for revocation and termination are proposed because over the years the two terms have come to be used interchangeably, even though they have distinctly different usages. This lack of precision has caused confusion among holders of permits and agency personnel. The purpose in adding these two definitions to the regulations is to differentiate between cessation of a special use permit by action of an authorized officer (revocation) and cessation of a special use permit under its own terms without any action by an authorized officer (termination). Terms of a permit which would result in termination could include: (1) Expiration of the term authorized, and (2) transfer of the improvement to another party. Nothing further is intended. Adoption of these definitions will in no way bear upon reissuance of a permit. There will be no change in policy for reissuing a permit that terminates as a result of the application of these definitions. Consequently, the definition of "termination" will remain as defined in the proposed rule, but it has been clarified by listing examples of

permit terms and conditions that would cause a permit to terminate.

Comment. Three respondents commented that the revised definition for "revocation" must be revised to limit use of the "reasons in the public interest" standard to special use permits only, not to easements, for consistency with existing laws and regulations.

Response. Provisions for termination, revocation, and suspension of an easement are contained in § 251.60 (g) and (h). Therefore, the Department has not included easements under the revocation and suspension provisions in § 251.60(a)(2)(i). Moreover, the Department disagrees with the respondents concerning leases. Leases may be revoked for reasons that are in the public interest, and leases are compensable according to their terms as defined in § 251.51. Therefore, leases are not exempted from revocation and suspension criteria in § 251.60(a)(2)(i). To avoid redundancy in the regulations, the definition does not repeat criteria for revoking an authorization that are listed in § 251.60(a)(2)(i), but the provision has been amended to require that revocation in the public interest must be for reasons that are "specific and compelling."

Comment. One respondent suggested that the definition of "sound business management principle" be expanded to include "an accepted industry practice or method * * *," as this would clarify that one individual's or company's practice or method is not necessarily more correct than others.

Response. The Department agrees with this suggestion and has made this change in the final rule.

Other Changes. In preparing this final rule, the Department discovered that the proposed definition of the word "lease" was not consistent with the use of that word in the private rental market, and as proposed could have led to confusion when applied in the field. Specifically, a lease conveys a conditional and limited interest in land that may be revocable and compensable according to its terms. Accordingly, the final rule reflects this clarification in the definition of the word "lease."

In analyzing the comments on and the adequacy of the definitions included in § 251.51, the Department considered whether or not to include a definition for the word "license." This term is often used in connection with the word "permit" and may be confused with the words "easement" and "lease." A separate definition could imply the two terms have separate meaning and, thus, that separate rights in the land may be conveyed, when, in fact, both permits and licenses convey only a privilege to

use and occupy the land, rather than an interest in the land. Therefore, a definition of the term "license" is not included in the final rule.

In preparing this final rule, the Department also concluded that the goal of clarifying when environmental analysis is conducted on proposals for special use authorizations would be enhanced by defining the term "NEPA procedures" as used in several places in the rule. Thus, the term has been added to the definitions included in § 251.51 and refers to the agency's written compliance with the National Environmental Policy Act.

Section 251.54 Special use application procedure and authorization. This section of the current regulations describes the procedures by which the agency accepts and acts upon applications for special use authorizations. This section includes direction on holding advance discussions with a proponent before an application is submitted, where to submit applications, the content of applications, and agency response to applications. The current regulations make it difficult to deny an application for a special use authorization that does not meet certain minimum requirements imposed by law or regulation as they lack specific direction guiding the consideration of and decision on applications for authorizations. The current regulations also result in unnecessary paperwork and expense being imposed on both the proponent and the agency.

The proposed rule would expand this section, adding step-by-step procedures that enumerate required activities and outcomes through the proposal, application, and authorization phases. Specifically, the proposed rule would establish a two-level screening process before a formal application is accepted by the agency.

This section of the proposed rule received the most attention from respondents, and consideration of these responses has resulted in extensive revision of this section in the final rule.

General Comments. Several respondents expressed concern that the new procedures described in this section could be interpreted to apply to reissuance of authorizations for existing uses as well as to issuance of new authorizations. While endorsing the initial screening process, several respondents also cautioned that any efficiencies that might be gained through this process could be lost, unless the agency imposed a time limit on itself, such as 30 days, in which to complete the proposed screening process and respond to the proponent.

Some respondents observed that the organization of this section was difficult to follow in the proposed rule, noting that the sequence of events described by the rule did not seem to correspond with the actions taken by the agency's field officers when receiving and processing requests for special use authorizations.

Response. This section applies only to applications for new or substantially changed uses. Renewal of special use authorizations is covered in § 251.64. To remove the confusion, the title of this section has been revised in the final rule to read "Proposal and application requirements and procedures."

The Department agrees that the initial screening process should be completed as expeditiously as possible. However, because of the number, variety, and complexity of special use proposals, it does not believe a specified time limit should be imposed on the screening process. The Forest Service policy on customer service in combination with proponent expression of interest should provide necessary encouragement to field offices to act promptly on proposals. Thus, the final rule does not

specify a time limit on the proposal screening process.

The Department agrees with those respondents who found the organization of this section hard to follow. In considering the respondents' comments, and in revising the section to respond to those comments and to its own concerns, the Department determined that an overall reorganization of the section was needed. The intent of the reorganization is to make the process that defines the agency's consideration of proposals and applications more logical and sequential, and fully consistent with regulations implementing the procedural provisions of the National Environmental Policy Act at 40 CFR Parts 1500-1508 and guidance issued by the Council of Environmental Quality.

Readers are advised that the reorganization of this section requires that a clearer distinction be made between actions by proponents and actions by the agency during the process by which a request for an authorization is considered. Hence, a "proponent" makes a "proposal" for a special use authorization. That proposal is subjected to the screening processes described in paragraph (e). Upon meeting the criteria in the initial and second-level screenings, the proposal becomes an "application" and the proponent becomes an "applicant."

Because of the extensiveness of the revisions to the proposed rule, readers are advised that § 251.54 has been presented in the final rule in its entirety, thus including provisions not revised in the proposed rule. Presentation of the entire section, therefore, includes amendments made by the adoption in 1995 of the noncommercial group use regulations. The following table displays the provisions of § 251.54 in the final rule with the same provisions as located in the proposed rule:

| Final rule | Proposed rule |
|---|--|
| (a) Early notice | (a)(1) (Untitled). |
| (b) Filing proposals | (b) Filing applications. |
| (c) Rights of proponents | (d) Rights of applicants. |
| (d) Proposal content | (e) Application content. |
| (1) Proponent identification | (1) Applicant identification. |
| (2) Required information. | |
| (i) Noncommercial group uses. | |
| (ii) All other special uses. | |
| (3) Technical and financial capability | (2) Technical and financial capability. |
| (4) Project description | (3) Project description. |
| (5) Additional information | (4) Additional information. |
| (e) Pre-application actions | (f) Receipt and denial of applications for uses. |
| (1) Initial screening | (a) Initial screening. |
| (2) Results of initial screening. | |
| (3) Guidance and information to proponents | (a)(3) (Untitled). |
| (4) Confidentiality | (a)(4) (Untitled). |
| (5) Second-level screening of proposed uses | (i) Response to applications for all other special uses. |

| Final rule | Proposed rule |
|---|--|
| (6) NEPA compliance for second-level screening process. (f) Special requirements for certain proposals (1) Oil and gas pipeline rights-of-way (2) Electric power transmission lines 66 KV or over (3) Major development (g) Application processing and response. (1) Acceptance of applications (2) Processing applications (3) Response to applications for non-commercial group uses. (4) Response to all other applications (5) Authorization of a special use | (h) Special application procedures. (1) Oil and gas pipeline rights-of-way. (2) Electric power transmission lines 66 KV or over. (3) Major resort development. (f)(1). (g) Processing applications, and (c) Coordination of applications. (j) Action taken on accepted applications. (k) Authorization and reauthorization of a special use. |

Comments on specific provisions of § 251.54 as proposed and the Departmental response follow.

Section 251.54, Paragraph (a)—Initial screening. In a general comment on this paragraph of the proposed rule, a number of respondents stated a concern that the initial screening process would add another step to the already lengthy process of evaluating an application, which would place an additional burden on the applicant. Respondents suggested that paragraph (a)(1) should make clear that the initial screening begins only with a *written* notice or application.

Response. The Department does not agree that the screening process would impose additional burdens on a proponent. In fact, the screening process is expected to reduce the burden by preventing unsuitable or inconsistent projects from proceeding to full-scale applications. The screening process would require only a very simple abstract of the proposed use and would not require a lengthy analysis by the authorized officer. The purpose of the screening is to eliminate those proposed uses which are obviously unsuitable on National Forest System (NFS) lands. The initial screening process appears as paragraph (e)(1) of § 251.54 in the final rule.

The Department also does not agree that any proposal for use of NFS lands that would trigger the screening process must be in writing. Currently, many requests to use National Forest System lands begin with a verbal request by a proponent to the District Ranger's staff. The final rule has been clarified to state that a written notice is not required until a proposal has cleared the initial and second-level screening processes and is ready to be considered as an application for a special use authorization. However, for more complex special use proposals, proponents may be advised to prepare a brief written summary to ensure that the Forest Service has a full understanding of the scope of the proposal.

Readers are also advised that the final rule makes a technical modification to language adopted by the noncommercial group use amendments to this subpart on August 30, 1995, to ensure consistency with the overall intent of this revision to subpart B. The proposed rule would have established nine minimum requirements (or criteria) to be applied at the initial screening stage. These were listed in paragraph (a)(1) of the proposed rule. Comments received on these requirements and the Department's response follow.

Minimum requirement (i). A suggestion was made that this criterion, requiring all special uses to be consistent with laws, regulations, orders, and policies, should state that the agency has an obligation to protect the environmental integrity of the area proposed for a special use. Another respondent commented that under the Federal Power Act, the Federal Energy Regulatory Commission (FERC) determines whether proposed hydroelectric uses on NFS lands are consistent and that FERC's authority should not be prejudiced by the agency authorizing official.

Response. The Forest Service obligation to protect the environment is adequately covered, since laws pertaining to environmental protection are included in the laws, regulations, and policies referred to in this criterion. All special uses must comply with environmental law. Thus, this suggested revision has not been adopted in the final rule.

FERC does not have sole responsibility for determining the consistency of hydroelectric uses on NFS lands. As part of its responsibility under Section 4(e) of the Federal Power Act, the Forest Service must make a consistency determination on proposed hydroelectric uses. The FERC determines whether the proposed hydroelectric project should be licensed, based in part on the consistency determination by the Forest Service. That consistency determination

is based on the direction found in the applicable forest plan, as set forth in minimum requirement (ii). Therefore, the text of this requirement (a)(1)(i) is unchanged in the final rule, but now appears at paragraph (e)(1)(i).

Minimum requirement (ii). No comments were received recommending revision or change to this criterion, which would require the proposed use to be consistent with the applicable forest plan for the area. The intent of this requirement is to capture the provision in section 6(i) of the National Forest Management Act of 1976 (90 Stat. 2955). The agency did streamline the language of this requirement from that in the proposed rule but made no substantive change in the text of the requirement, which now appears at paragraph (e)(1)(ii) in the final rule.

Minimum requirement (iii). A respondent suggested that this criterion, which would require that the proposed use not pose a serious or substantial risk to public health and safety, include a list of examples which are considered acceptable from a health and safety standpoint.

Response. The Department agrees that examples would clarify the intent of this criterion, but believes that it would be more appropriate to include such examples in the Forest Service's internal procedural handbooks. This possibility will be explored following adoption of this final rule. Further, the agency believes that the phrase "serious and substantial risk" will limit the discretion of the authorized officer to findings of genuine risk to public health and safety. Therefore, no changes were made to this requirement in the final rule, which appears at paragraph (e)(1)(iii).

Minimum requirement (iv). Several respondents stated that utility companies seeking rights-of-way across NFS lands should be exempted from this criterion, which would cause rejection of a proposed use if it created an exclusive or perpetual right of use or occupancy. The respondents contended

that a perpetual right of use is the basis under which all utility service is provided. Another respondent asked that the language be revised to ensure that applications for permanent easements, such as those authorized by the Forest Roads and Trails Act of 1964, would be accepted. Finally, a respondent suggested that the language of the proposed rule could be interpreted to mean that a proponent, after having an application approved and expending capital to implement the use, would not have an exclusive right to receive the proceeds resulting from the use.

Response. The Department recognizes the concerns of these respondents but rejects the suggestions that utility companies should be exempted from this criterion because they must have an exclusive and perpetual use of Federal land. To grant such use would, in effect, grant fee title to Federal land to an authorization holder. Longstanding Congressional and Executive Branch policy dictates that authorizations to use NFS lands cannot grant a permit holder an exclusive or perpetual right of occupancy in lands owned by the public. The direction contained in this requirement is no different from that contained in the current regulations at § 251.55(b). Similarly, the respondent's assertion that a proponent without exclusive right would not have the exclusive right to receive the proceeds from the use is without merit since such rights are provided by the terms of an easement or lease. Accordingly, the recommendation that the criterion allow automatic acceptance of an application for a permanent road easement is not adopted. Such applications should be subjected to the same screening as all other applications. The language of this requirement remains unchanged in the final rule and appears at paragraph (e)(1)(iv).

Minimum requirement (v). Three comments were received on this criterion, which would prohibit approval of proposed uses that would unreasonably conflict or interfere with administrative use by the agency, with other existing uses, or with use of adjacent non-NFS lands. These respondents were concerned that this criterion was overly broad and would lead to abuses by local agency officials when reviewing applications and recommended that clarifying guidelines be added. Additionally, the respondents suggested that proposals that may have an effect on adjacent non-NFS lands, whether unreasonable or not, should prompt local Forest Service officials to inform adjacent landowners, including land-managing government agencies, of

the proposal and possible impacts on adjoining lands.

Response. The criterion is limited to unreasonable conflicts or interference; some conflict or interference with existing uses would still be allowed. Therefore, the Department does not agree that additional guidance is needed in the rule and has retained the text of this requirement in the final rule (paragraph (e)(1)(v)) without change. The appropriate place for more detailed, cautionary guidance is in the agency's administrative Manual and Handbooks. Upon adoption of this final rule, the applicable Manual and Handbooks will be reviewed to determine if there is a need for additional guidance to prevent overly broad application of this requirement.

Minimum requirement (vi). This criterion stated that proposals will not be considered if the proponent has outstanding debts owed to the Forest Service under a prior authorization. Seven respondents suggested that an exception to this criterion be allowed if the delinquent debt is the result of an administrative appeal decision, a fee review, or similar legal or administrative process. By contrast, another respondent suggested that the authorized officer check with the BLM to determine if a proponent owes any debts to that agency. Finally, a respondent suggested that the criterion not be interpreted to include obligations of a proponent who is a cooperater with the agency through a road cost-share and use agreement.

Response. Without this requirement, a proponent's bad faith under a prior authorization could not be used to disqualify the applicant from receiving another authorization. To reward an applicant with a delinquent debt with a new authorization is not a prudent management practice and would be unacceptable on privately owned lands. The Department agrees with the suggestion that debts owed the Government as a result of an administrative appeal or similar legal process, including that involving a review of annual rental fees, should not be considered in applying this criterion and has revised the rule to specify that debts owed as a result of decisions in administrative appeals or fee reviews will not be included under this criterion. However, such debts must be current and the proponent in good standing on a payment schedule.

While the Department agrees that debts owed other Federal agencies are important, requiring authorized officers to check with other agencies could lengthen the time involved in the initial screening process. Indebtedness in

general, and delinquent debts owed to the Federal government in particular, should be revealed at the second-level screening process.

Finally, road cost-share and use agreements are not special use authorizations; outstanding obligations existing under these agreements are not considered debts for the purpose of applying this criterion. Therefore, this requirement does not need to be revised to respond to this concern. For this reason, no changes were made to this provision in the final rule, which appears as paragraph (e)(1)(vi).

Minimum requirement (vii). This criterion would prohibit consideration of a proposed use that involves gambling or providing sexually oriented services. No comments were received on this requirement which has been longstanding agency administrative policy. It is retained in the final rule without change as paragraph (e)(1)(vii).

Minimum requirement (viii). This criterion would codify longstanding agency policy to prohibit consideration of a proposed use if it involves military or paramilitary training or exercises by private organizations or individuals, unless the training is federally funded. No comments were received on this criterion, and it is retained without change in the final rule as paragraph (e)(1)(viii).

Minimum requirement (ix). This criterion would prohibit consideration of a proposed use if it involves disposal of solid waste or storage or disposal of radioactive or other hazardous material. Two responses were received on this criterion. One respondent suggested that the term "hazardous material" be changed to "hazardous substances" to conform to the definitions in the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act. The other respondent suggested that the reference to "storage" of hazardous materials be deleted because it would prohibit storage at an authorized use area of crude oil and chemicals necessary to maintain oil and gas production.

Response. The Department agrees that the terms used in this rule should conform to definitions set forth in other Federal statutes and has, therefore, revised the wording of this requirement in the final rule. The Department also agrees that materials to be used in conducting activities at the use area, even though considered hazardous, should not be cause to reject a proposed use. Since controls prescribed by other Federal statutes should ensure that proper care is taken, the term "storage" has not been included in this

requirement in the final rule, which appears as paragraph (e)(1)(ix) in the final rule.

Other Changes. No comments were received on paragraphs (a)(2) and (3) of § 251.54 of the proposed rule.

Paragraph (a)(2) stated that if a proposed use did not meet all the minimum requirements, as set forth in paragraphs (a)(1)(i)–(ix), it would not be considered further and the applicant would be notified of this action in writing. Paragraph (a)(2) does not appear in the current regulation. The text of paragraph (a)(2) is included in the final rule as paragraph (e)(2) and it has been revised to state that the authorized officer would not have to notify in writing a proponent who makes an oral request that the proposal will not receive further consideration. Requests for special use authorizations are frequently made orally to local agency officials, and, as such, would not require a written response.

Paragraph (a)(3) of the proposed rule stated that if a proposed use appears to meet the minimum requirements, the authorized officer would provide the applicant with information relevant to obtaining a special use authorization. The content of paragraph (a)(3) of the proposed rule was unchanged from that already in effect, § 251.54(a)(1)–(8). However, when reviewing paragraph (a)(3) of the proposed rule in the context of the overall public review and comment, the Department determined that the phrase “appear to” might suggest the possibility of arbitrary action and, therefore, removed the words in the final rule. This material appears at paragraphs (e)(3)(i)–(viii) in the final rule.

In addition, minor editing changes have been made to paragraphs (e)(2) and (3) in the final rule for clarity and to incorporate changed terminology.

Section 251.54, Paragraph (a)(4). This paragraph of the proposed rule would have directed the agency, if requested by the proponent, and to the extent reasonable and authorized by law, not to disclose project and program information revealed during pre-application consideration and screening. Respondents stated their concern that this provision could prevent public scrutiny of a proposal, particularly one involving large commercial projects, thus giving the proponent an inside track on approval.

Response. The Department disagrees that maintaining confidentiality, to the extent reasonable and authorized by law, at the pre-application stage of a proposal having commercial application would preclude public scrutiny. Confidentiality would be maintained

only prior to the agency’s acceptance of a formal written application that has cleared the screening processes, and only to the extent it is reasonable and authorized by law. Once an application is accepted and initial review determines that an environmental assessment or environmental impact statement must be prepared, law and agency policy require public disclosure in the review and approval process. Applications for relatively minor proposals which a review indicates can be categorically excluded from documentation in an environmental assessment or environmental impact statement under current rules, generally do not include the public review and disclosure of information envisioned by this paragraph.

This paragraph appears in the final rule at paragraph (e)(4) under the heading “Confidentiality.” The text has been revised in the final rule to substitute the word “shall” for “will” in the direction regarding the disclosure of project and program information, and the paragraph has also been edited to improve clarity of the provision’s intent.

Section 251.54, Paragraph (b)—Filing applications. Paragraph (b) of current § 251.54 gives direction on where and with whom applications for authorizations should be filed. This paragraph appears at § 251.54(b), entitled “Filing proposals,” in this final rule. The text has been revised to conform to changed terminology; namely, to change “application” to “proposal” and “applicant” to “proponent,” or the plural forms of these words.

Section 251.54, Paragraph (c)—Coordination of applications. The proposed change to this paragraph would have eliminated the requirement that proponents of projects requiring use of National Forest System (NFS) lands who must obtain a license or permit from a State, county, or other Federal agencies for that project must simultaneously file an application with the Forest Service. The proposed rule stated that the Forest Service may require in its authorization that the applicant obtain licenses, permits, certificates, or similar approval documents from other entities or agencies.

Comment. Four respondents suggested that this provision describes a requirement in an authorization and thus should not be included in this section describing the proposal and application process. Instead, the respondents recommended that the provision be placed in § 251.56(a).

Response. The Department agrees that revision and relocation of this provision

is appropriate and has placed it at § 251.56(a)(2) in the final rule. This action will benefit the applicant by not requiring that other approval documents be obtained until a decision is made on the application to use NFS lands. However, the provision has been revised in the final rule to make clear to holders that such licenses, permits, certificates, or other approval documents must be obtained prior to commencement of any activities on NFS lands.

No revision was proposed to paragraph (d), “Rights of applicants,” of section 251.54 of the regulations. While the text remains unchanged, this paragraph has been redesignated as paragraph (c), “Rights of proponents,” in the final rule.

Section 251.54, Paragraph (e)—Application content. This paragraph of the proposed rule defined the minimum content of an application for a special use authorization. In the proposed rule, the agency proposed revising paragraph (e)(3), “Project description,” to make it consistent with the proposed addition which addresses the issuance of planning permits for major commercial developments. Paragraph (e)(4) in the current rules also required an applicant to describe the impact of the proposed use on the environment. However, to streamline the proposal/application process, the proposed rule would have moved this requirement to paragraph (j), which described actions to be taken by the agency after an application has been accepted.

Comment. Some respondents were concerned with the removal from paragraph (e)(3) of the requirement that applicants address the proposed user’s impact on the environment, and with a companion provision in paragraph (e)(5) that the application include a plan for protection and rehabilitation of the environment during the life of the proposed project. These respondents believe early consideration of environmental effects is essential to ensure that environmentally unacceptable projects do not proceed to the application stage and recommended that all of the provisions in paragraphs (e)(3) and (4) be retained.

Response. Paragraph (e) was extensively revised by the noncommercial group use amendments of August 30, 1995 (60 FR 45294). As revised by those amendments, this paragraph distinguishes between noncommercial group uses (paragraph (e)(2)(i)) and all other special uses (paragraph (e)(2)(ii)), in describing the information required for an application for a special use authorization. This final rule redesignates this paragraph as (d), retitles it as “Proposal content,” and

makes additional changes. Changes in terminology are made throughout paragraph (d) to be consistent with changes made earlier in this section. Paragraph (e)(3), "Technical and financial capability," is redesignated as (d)(3), but is unchanged in the final rule. Paragraph (e)(4), "Project description," has been redesignated as (d)(4) in the final rule and revised to make the exception in the first sentence applicable to all major developments, rather than just to "major resort development." This revision is consistent with the revision to paragraph (f)(3) of the final rule which describes the requirements for requesting authorizations for major developments.

The Department recognizes respondents' concern with paragraph (e)(5), "Environmental protection plan." It emphasizes that it does not seek to avoid consideration of environmental effects when evaluating proposals. However, the removal of environmental analysis requirements in this paragraph is consistent with the overall objective of streamlining the regulation. It will save the proponent and the agency the time and expense of conducting an environmental analysis on proposals that would be rejected on other grounds. For example, the agency has found that applications often are not approved because the proponent lacks sufficient technical or financial capability to operate the proposal successfully, or because the Forest plan for the area precludes the proposed use. Readers are reminded that the procedure proposed in the rule to screen proposals is intended to screen out those proposals which do not meet minimum requirements/criteria before they become proposals as defined by the National Environmental Policy Act (NEPA) and its implementing regulations, which would require environmental analysis and documentation. Once an application has been accepted by the agency, analysis of the proposed use's environmental effects must be considered (§ 251.54(g)(2) of the final rule).

Section 251.54, Paragraph (f)—Receipt and denial of applications for special uses. This paragraph of the proposed regulation, which has been paragraph (i) in the previous regulations describing agency response to applications, would mark the point in processing requests for special use authorizations at which the proposal is considered received by the agency.

Comment. Respondents suggested that a time limit be set for completion of the application analysis set forth in paragraph (f)(2): 30 days was suggested.

One respondent stated that proposals for hydroelectric projects, which are also governed by the Federal Power Act, would not be subject to the criteria listed in paragraph (f)(2), since the ultimate approval of these projects lies with the FERC. A respondent suggested that subjecting an application for reissuance of an authorization for an existing use to this second-level screening seemed unfair and inconsistent with due process requirements.

Response. The Department does not agree that a rigid time limit should be applied to analysis of applications. The wide variation in scope and complexity of applications requires flexibility in response time. Thus, while the Department recognizes the appropriateness of prompt action, it will not impose time limits on its decisionmaking responsibility. Also, the Forest Service has affirmative responsibility with respect to applications for hydroelectric projects. Section 4(e) of the Federal Power Act requires the agency to provide the FERC a determination of whether the project is consistent with the purpose for which the National Forest is established. This statutory requirement, coupled with the agency's internal policy on hydroelectric projects, serves as sufficient guidance in recognizing the unique actions necessary for these projects.

The screening/analysis process described in paragraph (f)(2) (now (e)(5) in the final rule) is tiered to the initial screening process and thus applies only to applications for new authorizations, not renewals for existing uses, which are covered by § 251.64. Therefore, the criteria in proposed paragraph (f)(2) have been retained in the final rule as paragraph (e)(5)(i)-(v) since this second-level screening is intended to apply to proposals that have met the criteria of the initial screening and which would be subjected to additional scrutiny and consideration. This shift presents the agency's process for considering requests for special use authorizations in a more logical sequence than that of the proposed rule.

No comments were received on proposed paragraphs (f)(1) and (3) of this section of the proposed rule. Proposed paragraph (f)(1) of the proposed rule was a new provision stating that an application that passes the initial screening set forth in paragraph (a) would be received but not accepted by the agency for consideration. The paragraph appears in the final rule as (g)(1), "Acceptance of applications," but has been revised to state that a proposal meeting the criteria

of both the initial and second-level screening processes (paragraphs (e)(1) and (e)(5)) would be accepted by the agency as a formal application for the use. If the request does not meet the criteria for the screening processes, it is not accepted as a formal application. Proposed paragraph (f)(3), also a new provision, stated that the decision to deny a special use application based on the factors listed in paragraph (f)(2) would not constitute a "proposal" as defined by Council on Environmental Quality regulations and thus would not require the agency to conduct an environmental analysis. This paragraph applies to proposals which have been screened under the second-level screening process. It is retained as paragraph (e)(6) in the final rule, but edited to clarify its intent.

Other comments relevant to Section 251.54(f).

Four respondents objected to the removal of an unnumbered paragraph which has been at the end of § 251.54(i) requiring the authorized officer, when denying an application under two conditions, to offer the applicant an alternative site or time for the proposed use. These respondents believed that removal of this provision would alter the agency's obligation to consider alternatives to the proposed use under current Council on Environmental Quality regulations and the agency's own policies for environmental analysis and documentation. The respondents urged that the provision be retained to provide applicants additional flexibility in obtaining authorizations to use NFS lands. However, one respondent supported the elimination of this provision, stating that it avoided unnecessary duplication in the application process and thus would be helpful to applicants.

Response. The removal of the provision requiring that an alternative site be offered when denying an application does not circumvent NEPA requirements to consider reasonable alternatives to a proposed action when documenting environmental impacts. The Forest Service believes that it has no affirmative duty to provide alternative sites for a proposed use when a use is denied because it is inconsistent or incompatible with the purposes for which the lands are managed, or because the applicant is not qualified. Therefore, this provision has not been included in the final rule.

This determination on the offering of an alternative site for special use authorizations in general differs from that in the recently adopted revisions to this subpart concerning noncommercial group uses and noncommercial

distribution of printed material. Constitutional requirements concerning ample alternatives for communication of information dictated that an alternative site provision be included in the noncommercial group use regulations.

Section 251.54, Paragraph (g)—*Processing Applications.* Paragraph (g) of the proposed rule, which has until now appeared as paragraph (f) of § 251.54, describes the procedure to be followed when an application is accepted for processing. The proposed rule revised this paragraph to be consistent with revisions made elsewhere in the regulations. Central to these revisions was the removal of those provisions in paragraph (f)(1) that required the authorized officer to complete environmental documentation requirements, consult with other agencies and interested parties, hold public meetings, and take other actions necessary to evaluate an application. These provisions were moved to paragraph (i) of the proposed rule to achieve the consistency sought by the overall revision to subpart B.

A new paragraph (3) was proposed to provide guidance on processing applications for planning permits, principally those for major resort developments. This addition was tied to a revision in paragraph (h) of this section describing major commercial developments. This proposed new provision would limit application information to that needed to make a decision on issuance of a planning permit; that is, a permit authorizing only minor disturbance of the proposed site in order to gather information and data to prepare an application for the development project which would be submitted later. If the planning resulted in an application to develop the project, the detailed information and requisite environmental documentation would be completed.

There were no comments received on proposed paragraph (g). Nevertheless, as noted in the discussion of and comments on proposed paragraph (f), this paragraph has been revised extensively in the final rule to conform to the overall reorganization of this section. In particular, it should be noted that this paragraph was reformatted to accommodate the August 30, 1995, noncommercial group use regulations which are redesignated as paragraph (g)(3) in the final rule.

In the final rule, paragraph (g)(2) requires the authorized officer to evaluate formal applications for special use authorizations, including evaluation of effects on the environment, and, where required by NEPA procedures, to provide notice to the public with an opportunity to comment on the

application. This provision appeared in paragraph (j) of the proposed rule. Paragraph (g)(2) represents the point of the special use proposal/application process at which the proposal becomes an application as defined by 40 CFR 1508.23, and thus requires environmental analysis and documentation. In the final rule, paragraph (g)(2) also incorporates provisions previously found elsewhere in the rule regarding notice to and consideration of findings of other Federal, State, and local government agencies concerning the application.

Section 251.54, Paragraph (h)—*Special application procedures.* This paragraph of the proposed rule described special requirements and procedures for handling applications for oil and gas pipelines and large electric transmission line rights-of-way. In the proposal, a third type of special use requiring special procedures when applying for an authorization would have been added—that is, proponents for a major resort development on NFS lands could apply for a 5-year planning permit.

This provision would substantially change the way proposals for major commercial recreation development would be considered. Previously, an application for this use would trigger full-scale economic and environmental analysis—before the proponent has fully defined the project and prepared a master development plan. Once a project is fully defined in a development plan, a project different from that described in the application often results, thus requiring reconsideration of the original analysis and decision and sometimes requiring a supplemental environmental impact statement. This supplemental analysis can impose considerable additional cost on the proponent and the agency. Under the proposed rule, a proponent who passed the initial screening criteria would apply for a planning permit. This application would be subjected to the established procedures for review and decision by the agency. Approval of the planning permit application would allow the proponent to complete the master development plan, which would then become the basis for an application for an authorization to construct and operate the major resort development. The second application would be subject to separate analysis and decision.

Comment. Respondents generally endorsed the proposed 2-part permitting process for major commercial recreation development. However, they urged that the process be available for all large-scale commercial developments. The respondents suggested that oil and gas

pipelines or hydroelectric projects, for example, would qualify for this procedure. The respondents believed that this procedure would further reduce the regulatory burden on both the applicant and the agency.

Response. The Department agrees that the proposed planning permit for major resort developments should be available for all types of major developments on NFS lands and has adopted this change in the final rule. Further, the Department believes that a fixed term of five years for the planning permit may not be adequate for some types of major development, which are subject to separate licensing/approval actions by other Federal and State agencies. Accordingly, the final rule states that planning permits may be issued for up to 10 years.

Paragraph (h) of the proposed rule has been redesignated as (f) in the final rule, with the new provision concerning major developments appearing as paragraph (f)(3). This redesignation places this paragraph ahead of the regulations on processing applications; thus it occupies a more logical location in the sequence of processing requests for authorizations. The title of paragraph (f) has been revised to read “Special requirements for certain proposals,” to more accurately reflect the paragraph’s purpose.

Section 251.54, Paragraph (j)—*Action taken on accepted applications.* This provision of the proposed rule would require the authorized officer to evaluate the effects of the accepted application, including effects on the environment, and to make a decision on whether to approve or disapprove the application. The proposed paragraph described the three types of action that could be taken by the authorized officer on an accepted application: (1) approval; (2) denial; or (3) approval with modification. By specifying the range of decisions available, this provision would enable the agency to define more clearly in the environmental documentation the purpose of and need for the project to which the agency is responding.

Comment. Respondents stated that the agency needed to describe in greater detail the review and analysis process that culminates in a decision on the application. For example, respondents suggested that this paragraph address the backgrounds, or areas of expertise, of those who will review the application and the regulations, policies, and agency procedures that will apply to the review. This suggestion was offered in the belief that a more complete decision record is needed. Respondents also

urged the agency to include a time limit in this paragraph for making a decision on an application. If a decision was not made within the time specified, the application would be considered approved under standard permit terms and conditions.

One respondent suggested that due to the magnitude of the revisions proposed in its comments on this and other sections of the proposed rule, the agency should reissue proposed regulations and provide for an additional comment period.

Two respondents objected to the sentence in this paragraph that would allow several similar special use applications to be approved in one decision and its documentation. These respondents felt that an application's approval could be delayed by incomplete applications for similar projects of others and suggested that this provision be amended to require that a combined decision be made only with the concurrence of the applicants. Another respondent believed that all applications need to be considered individually to give adjacent land managers adequate opportunity to consider a proposed use.

Response. Expanding paragraph (j) to describe in detail the process for reaching a decision on an application is not necessary or appropriate to a regulation. While no change will be made in this regard in the final regulations, upon adoption of final regulations, the Forest Service will review its Manual and Handbook direction to determine if revision is necessary to improve consistent interpretation among field units.

It also would be inappropriate to place a time limit on the authorized officer to render a decision on an accepted application. Such a provision could prevent the authorized officer from reaching a sound decision, particularly where unforeseen events, such as an extended period of forest fire emergency, prevent the authorized officer from performing the administrative duties involved in evaluating a special use application. Thus, this suggestion is not adopted in the final regulation.

Similarly, it is not appropriate to reissue proposed regulations reflecting the Department's response to respondents' suggestions. Comments of all respondents were carefully considered and their appropriateness and applicability determined. Acknowledgment of the Department's response to those comments, as explained in this supplementary information section, is considered to be

sufficient explanation of the rulemaking decision.

The Department recognizes respondents' concerns about combining applications into one decision. However, it is the agency's intent that uses that could be grouped under one decision would be homogeneous and have relatively minor impact. Applications for complex proposals could not be grouped due to the variations in impacts and the resulting variation in the depth of analysis required for each proposal. An example of how this provision could be used occurs in the Pacific Northwest, where a large number of applications are received each year to place bee hives temporarily on NFS lands where timber harvest activities have recently occurred. While the hives may be scattered over an area of several hundred acres, the impact of each hive is essentially the same as that of all others. Thus, a single decision could authorize placement of all hives. Therefore, the Department has decided to retain the language of this provision as § 251.54(g)(4) in the final rule, but has added clarifying guidance limiting the application of this provision to those uses having minor impacts.

The Department disagrees with the respondent who believes each application must be considered individually to ensure that it does not adversely affect management of adjoining land. Even if several applications were acted upon in one decision, the impacts of each proposed use, including those on adjacent lands, would have to be considered. Further, where an environmental assessment or environmental impact statement is prepared, the public, including the adjacent landowner, would have the opportunity to be involved in the analysis of the proposed use.

Paragraph (j) has been relocated in the final rule as part of the overall reorganization of this section to achieve a more logical sequential process. A portion of the first sentence of proposed paragraph (j) concerning evaluation of the proposed use has been moved to paragraph (g)(2), while the remainder of the paragraph has been moved to paragraph (g)(4) in the final rule. These provisions have been edited in the final regulation to improve clarity.

As part of the overall reorganization of § 251.54, the rules applicable to noncommercial group uses are now codified as paragraph (g)(3). A provision previously in paragraph (f)(5) stating that applications for noncommercial group uses are automatically granted unless denied within 48 hours of receipt has been moved to paragraph (g)(3) in

the final rule since the provision concerns the response to rather than the processing of the application. Also, the text of paragraph (g)(3) has been revised to correct citations to other parts of this subpart which have been revised in the final rule and to correct incorrect uses of the word "shall"; however, the Department emphasizes that no substantive changes have been made.

Section 251.54, Paragraph (k)—Authorization and reauthorization of a special use. This proposed paragraph would govern issuance of a special use authorization after a decision is made to authorize the use. The use thus authorized may be reauthorized as long as it remains consistent with the original decision. However, if new information becomes available, or new circumstances have developed, new analysis must support a decision to reauthorize the use.

Comment. Eight respondents commented on paragraph (k). These respondents suggested that the direction regarding reauthorizing uses is not appropriate since § 251.54 applies only to new authorizations. Respondents also stated that the language on reauthorizations does not provide sufficient protection from an arbitrary decision not to reissue an authorization. One respondent suggested that reauthorizations should be allowed at any time, not just upon expiration of the authorization.

Response. The Department agrees that this language concerning reauthorization of the special use authorization is out of place. Thus, the second sentence of proposed paragraph (k) has been moved to § 251.64(a) in the final rule, which deals with renewals of special use authorizations. The heading of § 251.54 has been revised to make clear that this section deals solely with the special use proposal and application process. Further, the agency believes that placement of the language concerning reauthorization in § 251.64 responds to respondent concerns that decisions disallowing reauthorization may be arbitrary. The language in § 251.64(a), as modified by the final rule, prescribes additional requirements that must be observed when reauthorization is considered. These requirements will help prevent arbitrary decisions.

The adoption of the noncommercial group use regulations on August 30, 1995, to this subpart did not affect proposed paragraph (k). However, the first sentence of proposed paragraph (k) has been redesignated as (g)(5) in the final rule in keeping with the placement of all actions related to processing and responding to applications in paragraph

(g)—Application processing and response.

Because of the complexity of the screening and application processes, the Department has prepared Exhibit 1 to display the entire special use authorization approval process defined in § 251.54. Exhibit 1 is set out at the end of this rule but will not appear in the Code of Federal Regulations.

Section 251.56 Terms and conditions. This section of the current regulations sets forth the terms and conditions to be included in each special use authorization. Paragraph (d) prescribes the liability requirements to be imposed on a holder of an authorization. The proposed rule would have revised only paragraph (d)(2) of this section. The revision was intended to clarify that the maximum limit of liability for certain high hazard authorized uses would be determined by an assessment of the risk associated with the use rather than an amount set by the authorized officer. This is usually \$1,000,000, the maximum liability amount previously established by the regulations at § 251.56(d)(2).

Comment. Most respondents commenting on this revision agreed with the proposal to require risk assessments in order to establish liability limits for a specific use. Several respondents suggested factors to be included in the risk assessment, such as the holder's past performance and the historical frequency of incidents where negligence associated with the holder's use and occupancy has contributed to the liability of the Forest Service. Some respondents proposed that holders of authorizations with a lower risk of accidents and negative impacts on the land should not pay the same fee as holders of authorizations with a higher risk use.

Three respondents objected to the current provision, for which revision was not proposed, that requires holders of authorizations for high-risk uses to be liable for all injury, loss, or damage without regard to the holder's negligence. These respondents stated that since the holder does not have exclusive use of the lands and cannot control the activities of others on those lands, the holder should not be liable for the actions of third parties.

Finally, one respondent recommended that the regulations be revised to allow the agency to obtain restitution in excess of the amount established by a risk assessment, or \$1,000,000 as authorized by law, should special circumstances arise or actual costs incurred by the agency exceed the established amount. This respondent further suggested that the regulations

provide that damages paid to the agency under the liability provision be made available to adjacent landowners who suffer losses as a result of a holder's activities on Federal lands.

Response. Factors to be included in a risk assessment to determine the maximum limit of liability should be identified, in order to avoid standardizing the liability and thus creating inequities among holders of authorizations involving high-risk uses. However, this type of information is more appropriately included in the Forest Service's internal directive system; namely, the Special Uses Handbook (FSH 2709.11). The agency will add direction on how to conduct liability risk assessment to the Special Uses Handbook. Factors to be included in this risk assessment will recognize uses having less risk of damage to National Forest System resources and improvements.

The Department does not agree with those respondents who object to placing liability for all injury, loss, or damage on holders without regard to the holders' negligence. Placing the burden of risk on the holder of the authorization rather than the landowner is an established practice in transactions involving private lands and is justified as a reasonable requirement to insure against potential liability from any cause. Therefore, no change has been made to this provision in the final rule.

State laws governing rules of ordinary negligence allow the agency to litigate to seek damages in excess of an amount established by law or regulation for strict liability. These State laws offer sufficient protection to the Federal Government, and these same laws allow adjacent landowners the opportunity to seek damages from the holder, instead of claiming a share of damages received by the Forest Service. Thus, no change was made in the final regulations to respond to this comment.

Paragraph (a) of § 251.56 has been reformatted and slightly revised in the final rule to clarify the content of a special use authorization. A new paragraph (a)(2) has been added to this section, which states that authorizations may be conditioned to require approvals from other government agencies. This paragraph was previously at § 251.54(c).

Section 251.57 Rental fees. This section of the regulations currently requires that holders of authorizations pay an annual rental fee in advance based on the fair market value of the rights and privileges authorized. In addition, this section prescribes the conditions under which all or a part of those annual fees may be waived and

the circumstances under which additional fees may be assessed.

The proposed rule incorporated into paragraph (a) of the regulation an amendment made to the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1701 *et seq.*) by the Act of October 27, 1986 (Pub. L. 99-545). That amendment allows the Secretary of Agriculture to require payment of fees either annually or for more than one year at a time. The 1986 amendment also gives private individuals (holders of authorizations who are not commercial or governmental entities and are acting in an individual capacity) whose annual rental fees are greater than \$100 the option of paying annually or for more than one year at a time.

The supplementary information section for the proposed rule explained that in accordance with Title V of FLPMA, the agency is authorized to issue easements and leases, instead of annual permits, when authorizing certain types of special uses, particularly those involving large-scale commercial operations but that this authority had not been implemented in agency practice. (See the definitions for "easement" and "lease" in § 251.51.) The agency can provide an extended authorization period by using easements or leases to authorize commercial land uses, such as communication sites, utility rights-of-way, and roads. In the case of easements, the commonly accepted practice in the private marketplace is to receive a onetime payment when the easement is negotiated that recognizes the fair market value of the rights and privileges granted, as determined by appraisal or other sound business management practices. The proposed rule indicated that if the Forest Service uses this approach when authorizing use of NFS lands by an easement, considerable cost-savings could accrue to the agency and to the holder of the authorization through avoidance of annual administrative costs and the costs of permit renewal activities. It is also possible (although uncommon in the private market) that the acquisition of an easement could be accomplished by periodic payments, in which case the purchase value would be amortized over an agreed-upon timeframe, and an appropriate interest rate on the unpaid balance would be applied.

Comment. Eleven respondents commented on this section. Five respondents suggested that the option of annual versus multi-year payments not be limited to private individuals, suggesting that partnerships and corporations be given this option as

well. Five respondents supported the agency's proposal to allow use of easements and leases, but suggested that the conversion of permits be made at the request of the holder rather than upon expiration of the permit. Some respondents expressed concern that allowing a one-time payment would not allow the agency to keep pace with inflation, thus preventing receipt of fair market value. Finally, some respondents asked how the proposed revisions to this section would be implemented by the agency, suggesting that modification of the agency's directive system would be necessary.

Response. The provision in the proposed rule allowing private individuals the option of paying fees annually or for more than one year at a time if their annual fees are more than \$100 precisely tracks with the language in the 1986 amendment to FLPMA. Thus, since the law limits the revision to private individuals, the suggestion to allow partnerships, corporations, and governmental entities the same privilege in the final rule cannot be adopted. However, the language of proposed paragraph (a)(2) of this section has been revised in the final rule to simplify and clarify the provision.

Allowing immediate use of easements and leases would be desirable; however, the workload imposed on the agency's field staff should this occur could be overwhelming. Thus, the agency will revise its current administrative direction to indicate that conversion to easements and leases will be made as permits expire, or as mutually agreed upon between the holder and the authorized officer, in order to spread out the workload of conversion. Also, it should be noted that many of the authorizations that would be affected by this provision can be terminated annually by mutual agreement of the agency and the holder, thus accomplishing what has been suggested by the respondents.

The Department disagrees with those respondents who suggest that the effects of inflation should be a part of the fee calculation process when providing for a one-time payment of fees. The fair market value of an easement is indicated by comparable transactions in the private market place. The agency assumes that inflation is considered by the grantor in determining the value of the easement in the same manner that the additional rights granted are recognized in determining value. For example, an easement could convey additional rights to the holder, such as tenure, transferability, and compensation in the event of termination. In addition, the holder

could treat the easement as a capital asset, thereby gaining favorable financial treatment. The value of these additional rights would be realized in increased fees, providing increased returns to the Treasury. Thus, a one-time payment can represent fair market value for the entire term of the authorization, and no loss to the Government will occur. Upon adoption of this final rule, the agency's directives will be amended to reflect this regulatory revision.

The proposed regulation would have removed paragraph (g) of § 251.57. Subsequently redesignated as paragraph (h) by the 1995 noncommercial group use rule, this paragraph provides special authority to the Supervisor of the Mark Twain National Forest to waive fees under certain specified conditions. This provision was added to the regulations to test a procedure to reduce costs to the agency and contained an expiration date of December 31, 1990. Thus, the provision is no longer in effect and should be removed from the section. No comments were received on the removal of this paragraph, and no additional information has come to light bearing on this provision. Therefore, this provision is removed by adoption of this final rule.

Section 251.59 Transfer of special use privileges. This section sets forth the requirements for transferring a special use authorization from the current holder to a new holder. No change was proposed to this section in the 1992 proposed rule. However, as a result of its review of public comments and the overall analysis of subpart B, the Department has determined that this section contains incorrect and misleading requirements. Specifically, the language of this section can be interpreted to contradict itself by stating in the first sentence that a permit may be transferred and, then, by stating in the last sentence that, if the holder through transfer of the authorized improvements ceases to be the owner, the permit is subject to termination.

Section 504(c) of FLPMA (90 Stat. 2778) provides discretionary authority to the agency (delegated through the Secretary of Agriculture) to specify the terms and conditions applicable to authorizations it grants. The Department's longstanding position has been and remains that, with the exception of easements, an authorization itself has no value. To allow transfer of the authorization would simply imply that it is a valuable asset to the owner of the improvements. Accordingly, the Forest Service requires as a provision of the authorizing document that new owners of

improvements covered by a special use authorization must first obtain a new authorization. Therefore, except for certain types of easements and leases, the agency does not actually transfer an authorization when the authorized improvements are sold or otherwise transferred between parties. Rather, upon a change of ownership, the agency deems the original authorization terminated and issues a new authorization to the new owner of the improvements upon a determination that the new owner is eligible to hold a special use authorization.

Therefore, the agency has revised the title and the text of this section to remove the current ambiguity and to reflect more accurately its purpose and intent. In the final rule, the title reads "Transfer of authorized improvements." The text of the section has been reorganized and edited for precision and clarity. It now states that a special use authorization terminates when the holder of the authorization ceases to be the owner of the authorized improvements. A new owner of the improvements may be issued an authorization upon applying for and receiving approval from the authorized officer.

The Department considers this change to be a technical correction that reflects longstanding policy and practice and that it has no substantial effect on administration of current special use authorizations.

Section 251.60 Termination, revocation, and suspension. This section of the regulation prescribes the conditions under which a special use authorization may be suspended, terminated, or revoked. Revisions to paragraphs (b), (e), (f), and (h) of this section were proposed to be consistent with proposed definitions of these terms in § 251.51. Revision to paragraphs (g) and (i) of this section was necessary to correct identification of regulations pertaining to administrative appeals of decisions relating to special use authorizations.

Comment. Five respondents commented on the proposed revisions to this section. These respondents noted that the use of the word "termination" in paragraph (a) implies an action by the authorized officer, which is inconsistent with the proposed definition in § 251.51. One respondent recommended that the proposed revision require the authorized officer to follow agency policy and procedures when decisions to terminate, revoke, or suspend a permit are under consideration. Another respondent recommended that decisions to suspend or revoke a permit not be delegated to agency officials below the

Regional Forester. Two respondents suggested that the on-site review set forth in paragraph (f), proposed to be conducted within 10 days following the request of the holder when a permit is suspended, is too long a period for public utilities such as hydroelectric facilities or electric or gas transmission lines. These respondents suggested that the review be conducted within 24 hours of a suspension.

One respondent suggested that the proposed regulation be revised to require that all authorizations issued to holders providing public utilities must be renewed as long as the holder is in compliance with all laws and regulations affecting the authorization. One respondent suggested that the proposed definition for "termination" would require review of all related laws, regulations, and policies and revision of many individual permits to make them conform to the proposed definition. As a result, the agency would face a major increase in regulatory burden and costs.

Response. Readers are advised that the adoption of the noncommercial group use amendments on August 30, 1995, resulted in extensive revision to paragraphs (a) and (b) of § 251.60. The amendments, in specifying the grounds for termination, revocation, and suspension of special use authorizations, distinguished between noncommercial group uses (paragraph (a)(1)) and all other special uses (paragraph (a)(2)). In responding to comments to this section of the proposed rule, the agency was required to take special consideration of the August 30, 1995, amendments. The revisions also caused paragraph (b), as amended in 1995, to be reorganized to be consistent with paragraph (a). The revision of paragraphs (a) and (b) of this section resulted in the elimination in the final rule of paragraph (g), concerning appeals of termination, revocation, and suspension decisions by an authorized officer. This provision has been incorporated into both paragraphs (a) and (b).

The Department agrees that the language of paragraph (a) of the proposed regulations (previously paragraph (a)(2)) was inconsistent with the new definition for "termination" in § 251.51 and has revised this paragraph to remove the inconsistency. The agency disagrees that additional language should be added in the final rule to ensure that authorized officers follow policy and procedures when considering decisions to terminate, revoke, or suspend permits. The delegation of authority to agency officials carries with it the responsibility to follow agency policies and

procedures; therefore, no additional regulatory guidance is necessary. The suggestion that decisions to suspend or revoke permits not be delegated below the Regional Forester has not been adopted. Decisions by authorized officers below the Regional Forester are reviewable by line officers one level above the deciding officers under current administrative appeal regulations. The Department believes that this procedure offers sufficient protection for holders.

In response to the concern about the proposed 10-day period to review conditions leading to suspension of a permit, readers should be aware that paragraph (f) would be invoked only in an emergency to protect the public health and safety or the environment. In a normal situation where suspension of a permit is contemplated, written notice would be given and a reasonable time to cure the condition leading to the suspension would be provided. However, the Department agrees that 10 days is too long to respond in an emergency situation and has revised the provision in the final rule to provide for a 48-hour response period.

The Department disagrees with the respondent who suggested that all authorizations for utility rights-of-way must be renewed, if the holder is in compliance with applicable laws and regulations. This proposal would inappropriately restrict the actions of the authorized officer responsible for protecting and managing the NFS lands.

The Department also disagrees with the respondent who believed that the definition of the word "termination" would increase regulatory burden and agency costs. Upon adoption of this final rule, the agency will make necessary revision to its internal directives to ensure consistency and conformity with the regulations. Conformance of these directives with the use of the terms adopted by this rule will be a part of this effort. Thus, no change has been made to this provision in the final rule.

The agency determined during its analysis of the proposed rule and the public comments that the regulation does not clearly identify the agency official who may initiate termination, revocation, or suspension of authorizations. Thus, the final rule provides that for the purposes of section 251.60 the authorized officer is the officer who issues the authorization or that officer's successor.

In addition to the revisions and new language included in this section, the final rule also reflects some minor editing to clarify and simplify the text.

Section 251.61 Modifications. This section of the regulation describes those actions which a holder is required to undertake when it becomes necessary to modify an existing authorization and the information which the holder must supply to the authorized officer when modification becomes necessary. The proposed rule would have clarified paragraph (c) of this section, to provide that modifications to an authorization requiring the approval of the authorized officer include all activities that would impact the environment, other users, or the public, not just those involving "maintenance or other activities."

Three respondents were concerned that the wording of the proposed revision would apply to all activities that would impact the environment, other users, or the public, not just those activities for which modification is proposed. They suggested that the language be clarified to allow implementation of activities already approved in the permit that are not subject to modification to proceed without further approval.

Response. The Department agrees that the language of proposed paragraph (c) was overly broad. In response to respondents' concerns, the Department has revised paragraph (c) to require the holder to obtain prior approval for all *modifications* to approved uses that will impact the environment, other users, or the public.

Section 251.64 Renewals. This section of the regulation enumerates the criteria for renewing an authorization when it provides for renewal and when it does not. There were no changes proposed to this section, nor did the adoption of the noncommercial group use regulations on August 30, 1995, to this subpart, affect this section. However, the agency has revised this section to incorporate a provision moved from § 251.54(k) into paragraph (a) of this section which respondents had indicated was out of place in that section.

Section 251.65 Information collection requirements. This section of the regulation describes the requirements imposed on the agency when collecting information from applicants. The regulation sets forth in paragraph (b) the agency's estimate of the time required for a proponent/applicant to provide the information requested in an application for a special use authorization, which is estimated to range from 30 minutes for simple projects (or uses) to several months for complex ones with an average of four hours for each project (or use). There were no changes proposed to this section.

The Department notes it is no longer required to set forth the information

contained in paragraph (b) of § 251.65 concerning estimates of the information collection requirement burden. Thus, this paragraph has been removed in the final rule as a technical revision to the section. The text of former paragraph "(a)" is retained but as an undesignated paragraph.

Summary

This final rule responds to direction from the President to reduce the regulatory burden imposed on those entities holding or seeking to obtain authorizations to use and occupy National Forest System (NFS) lands. The current special use regulations at 36 CFR Part 251, Subpart B addresses the rights of all citizens regarding uses of National Forest System lands are protected. The regulations provide the means to protect the health and safety of the public when using the services of commercial entities authorized to use the Federal lands; ensure that the services or facilities authorized are operated in compliance with Title VI of the Civil Rights Act of 1964; and ensure that environmental safeguards are employed and that authorized uses do not have adverse environmental effects on National Forest System lands.

This final rule will retain these basic safeguards. The rule will enhance efficiency in the review of applications, the approval/denial process, and the administration of authorizations, thereby providing significant cost savings to applicants, holders, and the Federal Government. The intent of the final rule is to make the issuance and administration of special use authorizations a less cumbersome and costly process, thereby reducing the burden on that segment of the public making use of these Federal lands, improving productivity of agency employees, and streamlining operations of the agency. Screening a proposed use will permit review of the proposal before the proponent invests time and expense in providing detailed information to accompany the application or the Forest Service invests time and expense in performing a detailed evaluation of the proposed use, including an analysis of the impacts on the environment. By eliminating time-consuming and costly processing of proposals that cannot meet minimum requirements, a faster agency response on those applications that pass the initial screening would result.

The final rule also incorporates into regulation statutory authority that has been available to the Forest Service that expands its authority to administer special use authorizations. The final rule underscores that the agency may

issue long-term easements instead of annual or short-term permits and that those easements may allow for a one-time fee payment rather than annual fee payments. Holders of authorizations for high-risk uses such as electric transmission lines will be subject to strict liability for damage or loss that will be determined by a risk assessment rather than a fixed dollar amount specified in regulations. Finally, the agency has made the regulations more "user-friendly" by clarifying certain provisions and removing unnecessary language, and carefully reorganizing the text to flow in a logical sequence.

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this is not a significant rule. This rule will not have an annual effect of \$100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this final rule is not subject to OMB review under Executive Order 12866. To the contrary, adoption of this final rule will have positive effects on the economy by creating efficiencies for the Forest Service and special use proponents and holders. The expected benefits of this rule outweigh the expected costs to society, the rule is fashioned to maximize net benefits to society, and the rule provides clarity to the regulated community.

Moreover, this final rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been certified that this action will not have a significant economic impact on a substantial number of small entities as defined by that Act. Therefore, contrary to the views of the Small Business Administration, a regulatory flexibility analysis is not required. The efficiencies and cost savings to be achieved by the rule will benefit both small entities who apply for or hold special use authorizations as well as large-scale entities.

No Taking Implications

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, and it has been determined that

the rule does not pose the risk of a taking of constitutionally protected private property rights. This rule applies to the discretionary use of Federally owned land.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), which the President signed into law on March 22, 1995, the Department has assessed the effects of this rule on State, local, and tribal governments and the private sector. This rule does not compel the expenditure of \$100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Civil Justice Reform Act

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. With adoption of this final rule, (1) all State and local laws and regulations that are in conflict with this final rule or which would impede its full implementation would be preempted; (2) no retroactive effect would be given to this final rule; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

Environmental Impact

Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43180; September 18, 1992) excludes from documentation in an environmental assessment or impact statement "rules, regulations, or policies to establish Service-wide administrative procedures, program processes or instructions." Based on consideration of the comments received and the nature and scope of this rulemaking, the Department has determined that this rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Controlling Paperwork Burdens on the Public

This rule will not result in additional paperwork not already required by law or not already approved for use. Therefore, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and implementing regulations at 5 CFR 1320 do not apply.

List of Subjects in 36 CFR Part 251

Electric power, Mineral resources, National forests, Rights-of-way, and Water resources.

Therefore, for the reasons set forth in the preamble, subpart B of part 251 of title 36 of the Code of Federal Regulations is amended as follows:

PART 251—LAND USES

Subpart B—Special Uses

1. The authority citation for subpart B continues to read as follows:

Authority: 16 U.S.C. 472, 497b, 551, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761–1771.

2. In § 251.51, revise the definitions for “Easement” and “Lease,” and add definitions for “NEPA procedures,” “Revocation,” “Sound business management principles,” “Suspension,” and “Termination” in the appropriate alphabetical order to read as follows:

§ 251.51 Definitions.

* * * * *

Easement—a type of special use authorization (usually granted for linear rights-of-way) that is utilized in those situations where a conveyance of a limited and transferable interest in National Forest System land is necessary or desirable to serve or facilitate authorized long-term uses, and that may be compensable according to its terms.

* * * * *

Lease—a type of special use authorization (usually granted for uses other than linear rights-of-way) that is used when substantial capital investment is required and when conveyance of a conditional and transferable interest in National Forest System lands is necessary or desirable to serve or facilitate authorized long-term uses, and that may be revocable and compensable according to its terms.

* * * * *

NEPA procedures—the rules, policies, and procedures governing agency compliance with the National Environmental Policy Act set forth in 50 CFR parts 1500–1508, 7 CFR part 1b, Forest Service Manual Chapter 1950, and Forest Service Handbook 1909.15.

* * * * *

Revocation—the cessation of a special use authorization by action of an authorized officer before the end of the specified period of occupancy or use for reasons set forth in § 251.60(a)(1)(i), (a)(2)(i), (g), and (h) of this subpart.

* * * * *

Sound business management principles—a phrase that refers to accepted industry practices or methods of establishing fees and charges that are used or applied by the Forest Service to help establish the appropriate charge for

a special use. Examples of such practices and methods include, but are not limited to, appraisals, fee schedules, competitive bidding, negotiation of fees, and application of other economic factors, such as cost efficiency, supply and demand, and administrative costs.

* * * * *

Suspension—a temporary revocation of a special use authorization.

* * * * *

Termination—the cessation of a special use authorization by operation of law or by operation of a fixed or agreed-upon condition, event, or time as specified in an authorization without the necessity for any decision or action by the authorized officer; for example, expiration of the authorized term or transfer of the authorized improvement to another party.

3. Revise § 251.54 to read as follows:

§ 251.54 Proposal and application requirements and procedures.

(a) *Early notice.* When an individual or entity proposes to occupy and use National Forest System lands, the proponent is required to contact the Forest Service office(s) responsible for the management of the affected land as early as possible in advance of the proposed use.

(b) *Filing proposals.* Proposals for special uses must be filed in writing with or presented orally to the District Ranger or Forest Supervisor having jurisdiction over the affected land (§ 200.2 of this chapter), except as follows:

(1) Proposals for projects on lands under the jurisdiction of two or more administrative units of the Forest Service may be filed at the most convenient Forest Service office having jurisdiction over part of the project, and the proponent will be notified where to direct subsequent communications;

(2) Proposals for cost-share and other road easements to be issued under § 251.53(j) must be filed in accordance with regulations in § 212.10(c) and (d) of this chapter; and

(3) Proposals for oil and gas pipeline rights-of-way crossing Federal lands under the jurisdiction of two or more Federal agencies must be filed with the State Office, Bureau of Land Management, pursuant to regulations at 43 CFR part 2882.

(c) *Rights of proponents.* A proposal to obtain a special use authorization does not grant any right or privilege to use National Forest System lands. Rights or privileges to occupy and use National Forest System lands under this subpart are conveyed only through issuance of a special use authorization.

(d) *Proposal content*—(1) *Proponent identification.* Any proponent for a special use authorization must provide the proponent’s name and mailing address, and, if the proponent is not an individual, the name and address of the proponent’s agent who is authorized to receive notice of actions pertaining to the proposal.

(2) *Required information*—(i) *Noncommercial group uses.* Paragraphs (d)(3) through (d)(5) of this section do not apply to proposals for noncommercial group uses. A proponent for noncommercial group uses shall provide the following:

(A) A description of the proposed activity;

(B) The location and a description of the National Forest System lands and facilities the proponent would like to use;

(C) The estimated number of participants and spectators;

(D) The starting and ending time and date of the proposed activity; and

(E) The name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the proponent.

(ii) *All other special uses.* At a minimum, proposals for special uses other than noncommercial group uses must include the information contained in paragraphs (d)(3) through (d)(5) of this section. In addition, if requested by an authorized officer, a proponent in one of the following categories must furnish the information specified for that category:

(A) If the proponent is a State or local government agency: a copy of the authorization under which the proposal is made;

(B) If the proponent is a public corporation: the statute or other authority under which it was organized;

(C) If the proponent is a Federal Government agency: the title of the agency official delegated the authority to file the proposal;

(D) If the proponent is a private corporation:

(1) Evidence of incorporation and its current good standing;

(2) If reasonably obtainable by the proponent, the name and address of each shareholder owning three percent or more of the shares, together with the number and percentage of any class of voting shares of the entity which such shareholder is authorized to vote;

(3) The name and address of each affiliate of the entity;

(4) In the case of an affiliate which is controlled by the entity, the number of shares and the percentage of any class of voting stock of the affiliate that the

entity owns either directly or indirectly; or

(5) In the case of an affiliate which controls that entity, the number of shares and the percentage of any class of voting stock of that entity owned, either directly or indirectly by the affiliate; or

(E) If the proponent is a partnership, association, or other unincorporated entity: a certified copy of the partnership agreement or other similar document, if any, creating the entity, or a certificate of good standing under the laws of the State.

(3) *Technical and financial capability.* The proponent is required to provide sufficient evidence to satisfy the authorized officer that the proponent has, or prior to commencement of construction will have, the technical and financial capability to construct, operate, maintain, and terminate the project for which an authorization is requested, and the proponent is otherwise acceptable.

(4) *Project description.* Except for requests for planning permits for a major development, a proponent must provide a project description, including maps and appropriate resource information, in sufficient detail to enable the authorized officer to determine the feasibility of a proposed project or activity, any benefits to be provided to the public, the safety of the proposal, the lands to be occupied or used, the terms and conditions to be included, and the proposal's compliance with applicable laws, regulations, and orders.

(5) *Additional information.* The authorized officer may require any other information and data necessary to determine feasibility of a project or activity proposed; compliance with applicable laws, regulations, and orders; compliance with requirements for associated clearances, certificates, permits, or licenses; and suitable terms and conditions to be included in the authorization. The authorized officer shall make requests for any additional information in writing.

(e) *Pre-application actions.* (1) *Initial screening.* Upon receipt of a request for any proposed use other than for noncommercial group use, the authorized officer shall screen the proposal to ensure that the use meets the following minimum requirements applicable to all special uses:

(i) The proposed use is consistent with the laws, regulations, orders, and policies establishing or governing National Forest System lands, with other applicable Federal law, and with applicable State and local health and sanitation laws.

(ii) The proposed use is consistent or can be made consistent with standards and guidelines in the applicable forest land and resource management plan prepared under the National Forest Management Act and 36 CFR part 219.

(iii) The proposed use will not pose a serious or substantial risk to public health or safety.

(iv) The proposed use will not create an exclusive or perpetual right of use or occupancy.

(v) The proposed use will not unreasonably conflict or interfere with administrative use by the Forest Service, other scheduled or authorized existing uses of the National Forest System, or use of adjacent non-National Forest System lands.

(vi) The proponent does not have any delinquent debt owed to the Forest Service under terms and conditions of a prior or existing authorization, unless such debt results from a decision on an administrative appeal or from a fee review and the proponent is current with the payment schedule.

(vii) The proposed use does not involve gambling or providing of sexually oriented commercial services, even if permitted under State law.

(viii) The proposed use does not involve military or paramilitary training or exercises by private organizations or individuals, unless such training or exercises are federally funded.

(ix) The proposed use does not involve disposal of solid waste or disposal of radioactive or other hazardous substances.

(2) *Results of initial screening.* Any proposed use other than a noncommercial group use that does not meet all of the minimum requirements of paragraphs (e)(1)(i)-(ix) of this section shall not receive further evaluation and processing. In such event, the authorized officer shall advise the proponent that the use does not meet the minimum requirements. If the proposal was submitted orally, the authorized officer may respond orally. If the proposal was made in writing, the authorized officer shall notify the proponent in writing that the proposed use does not meet the minimum requirements and shall simultaneously return the request.

(3) *Guidance and information to proponents.* For proposals for noncommercial group use as well as for those proposals that meet the minimum requirements of paragraphs (e)(1)(i)-(ix), the authorized officer, to the extent practicable, shall provide the proponent guidance and information on the following:

(i) Possible land use conflicts as identified by review of forest land and

resource management plans, landownership records, and other readily available sources;

(ii) Proposal and application procedures and probable time requirements;

(iii) Proponent qualifications;

(iv) Applicable fees, charges, bonding, and/or security requirements;

(v) Necessary associated clearances, permits, and licenses;

(vi) Environmental and management considerations;

(vii) Special conditions; and
(viii) identification of on-the-ground investigations which will require temporary use permits.

(4) *Confidentiality.* If requested by the proponent, the authorized officer, or other Forest Service official, to the extent reasonable and authorized by law, shall hold confidential any project and program information revealed during pre-application contacts.

(5) *Second-level screening of proposed uses.* A proposal which passes the initial screening set forth in paragraph (e)(1) and for which the proponent has submitted information as required in paragraph (d)(2)(ii) of this section, proceeds to second-level screening and consideration. In order to complete this screening and consideration, the authorized officer may request such additional information as necessary to obtain a full description of the proposed use and its effects. An authorized officer shall reject any proposal, including a proposal for commercial group uses, if, upon further consideration, the officer determines that:

(i) The proposed use would be inconsistent or incompatible with the purposes for which the lands are managed, or with other uses; or

(ii) The proposed use would not be in the public interest; or

(iii) The proponent is not qualified; or

(iv) The proponent does not or cannot demonstrate technical or economic feasibility of the proposed use or the financial or technical capability to undertake the use and to fully comply with the terms and conditions of the authorization; or

(v) There is no person or entity authorized to sign a special use authorization and/or there is no person or entity willing to accept responsibility for adherence to the terms and conditions of the authorization.

(6) *NEPA compliance for second-level screening process.* A request for a special use authorization that does not meet the criteria established in paragraphs (e)(5)(i) through (e)(5)(v) of this section does not constitute an agency proposal as defined in 40 CFR

1508.23 and, therefore, does not require environmental analysis and documentation.

(f) *Special requirements for certain proposals.* (1) *Oil and gas pipeline rights-of-way.* These proposals must include the citizenship of the proponent(s) and disclose the identity of its participants as follows:

(i) Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of the United States, shall not own an appreciable interest in any oil and gas pipeline right-of-way or associated permit; and

(ii) The authorized officer shall notify the House Committee on Resources and the Senate Committee on Energy and Natural Resources promptly upon receipt of a proposal for a right-of-way for a pipeline twenty-four (24) inches or more in diameter, and no right-of-way for such a pipeline shall be granted until sixty (60) days (not counting days on which the House of Representatives or the Senate has adjourned for more than three (3) days) after a notice of intention to grant the right-of-way, together with the authorized officer's detailed findings as to terms and conditions the officer proposes to impose, has been submitted to such committees, unless each committee by resolution waives the waiting period.

(2) *Electric power transmission lines 66 KV or over.* Any proposal for authority to construct and maintain a facility for the generation of electric power and energy or for the transmission or distribution of electric power and energy of 66 kilovolts or higher under this section must be referred to the Secretary of Energy for consultation.

(3) *Major development.* Proponents of a major development may submit a request for a planning permit of up to 10 years in duration. Requests for a planning permit must include the information contained in paragraphs (d)(1) through (d)(3) of this section. Upon completion of a master development plan developed under a planning permit, proponents may then submit a request for a long-term authorization to construct and operate the development. At a minimum, a request for a long-term permit for a major development must include the information contained in paragraphs (d)(1) and (d)(2)(ii) through (d)(5) of this section. Issuance of a planning permit does not prejudice approval or denial of a subsequent request for a special use permit for the development.

(g) *Application processing and response.* (1) *Acceptance of applications.* Except for proposals for

noncommercial group uses, if a request does not meet the criteria of both screening processes or is subsequently denied, the proponent must be notified with a written explanation of the rejection or denial and any written proposal returned to the proponent. If a request for a proposed use meets the criteria of both the initial and second-level screening processes as described in paragraph (e) of this section, the authorized officer shall notify the proponent that the agency is prepared to accept a written formal application for a special use authorization and shall, as appropriate or necessary, provide the proponent guidance and information of the type described in paragraphs (e)(3)(i) through (e)(3)(viii) of this section.

(2) *Processing applications.* (i) Upon acceptance of an application for a special use authorization other than a planning permit, the authorized officer shall evaluate the proposed use for the requested site, including effects on the environment. The authorized officer may request such additional information as necessary to obtain a full description of the proposed use and its effects.

(ii) Federal, State, and local government agencies and the public shall receive adequate notice and an opportunity to comment upon a special use proposal accepted as a formal application in accordance with Forest Service NEPA procedures.

(iii) The authorized officer shall give due deference to the findings of another agency such as a Public Utility Commission, the Federal Regulatory Energy Commission, or the Interstate Commerce Commission in lieu of another detailed finding. If this information is already on file with the Forest Service, it need not be refiled, if reference is made to the previous filing date, place, and case number.

(iv) Applications for noncommercial group uses must be received at least 72 hours in advance of the proposed activity. Applications for noncommercial group uses shall be processed in order of receipt, and the use of a particular area shall be allocated in order of receipt of fully executed applications, subject to any relevant limitations set forth in this section.

(v) For applications for planning permits, including those issued for a major development as described in paragraph (f)(3) of this section, the authorized officer shall assess only the applicant's financial and technical qualifications and determine compliance with other applicable laws, regulations, and orders. Planning permits may be categorically excluded

from documentation in an environmental assessment or environmental impact statement pursuant to Forest Service Handbook 1909.15 (36 CFR 200.4).

(3) *Response to applications for noncommercial group uses.* (i) All applications for noncommercial group uses shall be deemed granted and an authorization shall be issued for those uses pursuant to the determination as set forth below, unless applications are denied within 48 hours of receipt. Where an application for a noncommercial group use has been granted or is deemed to have been granted and an authorization has been issued under this paragraph, an authorized officer may revoke that authorization only as provided under § 251.60(a)(1)(i).

(ii) An authorized officer shall grant an application for a special use authorization for a noncommercial group use upon a determination that:

(A) Authorization of the proposed activity is not prohibited by the rules at 36 CFR part 261, subpart B, or by Federal, State, or local law unrelated to the content of expressive activity;

(B) Authorization of the proposed activity is consistent or can be made consistent with the standards and guidelines in the applicable forest land and resource management plan required under the National Forest Management Act and 36 CFR part 219;

(C) The proposed activity does not materially impact the characteristics or functions of the environmentally sensitive resources or lands identified in Forest Service Handbook 1909.15, chapter 30;

(D) The proposed activity will not delay, halt, or prevent administrative use of an area by the Forest Service or other scheduled or existing uses or activities on National Forest System lands, including but not limited to uses and activities authorized under parts 222, 223, 228, and 251 of this chapter;

(E) The proposed activity does not violate State and local public health laws and regulations as applied to the proposed site. Issues addressed by State and local public health laws and regulations as applied to the proposed site include but are not limited to:

(1) The sufficiency of sanitation facilities;

(2) The sufficiency of waste-disposal facilities;

(3) The availability of sufficient potable drinking water;

(4) The risk of disease from the physical characteristics of the proposed site or natural conditions associated with the proposed site; and

(5) The risk of contamination of the water supply;

(F) The proposed activity will not pose a substantial danger to public safety. Considerations of public safety must not include concerns about possible reaction to the users' identity or beliefs from non-members of the group that is seeking an authorization and shall be limited to the following:

(1) The potential for physical injury to other forest users from the proposed activity;

(2) The potential for physical injury to users from the physical characteristics of the proposed site or natural conditions associated with the proposed site;

(3) The potential for physical injury to users from scheduled or existing uses or activities on National Forest System lands; and

(4) The adequacy of ingress and egress in case of an emergency;

(G) The proposed activity does not involve military or paramilitary training or exercises by private organizations or individuals, unless such training or exercises are federally funded; and

(H) A person or persons 21 years of age or older have been designated to sign and do sign a special use authorization on behalf of the applicant.

(iii) If an authorized officer denies an application because it does not meet the criteria in paragraphs (g)(3)(ii)(A) through (g)(3)(ii)(H) of this section, the authorized officer shall notify the applicant in writing of the reasons for the denial. If an alternative time, place, or manner will allow the applicant to meet the eight evaluation criteria, an authorized officer shall offer that alternative. If an application is denied solely under paragraph (g)(3)(ii)(C) of this section and all alternatives suggested are unacceptable to the applicant, the authorized officer shall offer to have completed the requisite environmental and other analyses for the requested site. A decision to grant or deny the application for which an environmental assessment or an environmental impact statement is prepared is subject to the notice and appeal procedures at 36 CFR part 215 and shall be made within 48 hours after the decision becomes final under that appeal process. A denial of an application under paragraphs (g)(3)(ii)(A) through (g)(3)(ii)(H) of this section constitutes final agency action and is immediately subject to judicial review.

(4) *Response to all other applications.* Based on evaluation of the information provided by the applicant and other relevant information such as environmental findings, the authorized

officer shall decide whether to approve the proposed use, approve the proposed use with modifications, or deny the proposed use. A group of applications for similar uses having minor environmental impacts may be evaluated with one analysis and approved in one decision.

(5) *Authorization of a special use.* Upon a decision to approve a special use or a group of similar special uses, the authorized officer may issue one or more special use authorizations as defined in § 251.51 of this subpart.

4. In § 251.56, revise paragraphs (a) and (d)(2), to read as follows:

§ 251.56 Terms and conditions.

(a) *General.* (1) Each special use authorization must contain:

(i) Terms and conditions which will:

(A) Carry out the purposes of applicable statutes and rules and regulations issued thereunder;

(B) Minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment;

(C) Require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and

(D) Require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance if those standards are more stringent than applicable Federal standards.

(ii) Such terms and conditions as the authorized officer deems necessary to:

(A) Protect Federal property and economic interests;

(B) Manage efficiently the lands subject to the use and adjacent thereto;

(C) Protect other lawful users of the lands adjacent to or occupied by such use;

(D) Protect lives and property;

(E) Protect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes;

(F) Require siting to cause the least damage to the environment, taking into consideration feasibility and other relevant factors; and

(G) Otherwise protect the public interest.

(2) Authorizations for use of National Forest System lands may be conditioned to require State, county, or other Federal agency licenses, permits, certificates, or other approval documents, such as a Federal Communication Commission license, a Federal Energy Regulatory Commission license, a State water right, or a county building permit.

* * * * *

(d) * * *

(2) Holders of special use authorizations for high risk use and occupancy, such as, but not limited to, powerlines and oil and gas pipelines, shall be held liable for all injury, loss, or damage, including fire suppression costs, caused by the holder's use or occupancy, without regard to the holder's negligence, provided that maximum liability shall be specified in the special use authorization as determined by a risk assessment, prepared in accordance with established agency procedures, but shall not exceed \$1,000,000 for any one occurrence. Liability for injury, loss, or damage, including fire suppression costs, in excess of the specified maximum shall be determined by the laws governing ordinary negligence of the jurisdiction in which the damage or injury occurred.

* * * * *

5. In § 251.57, remove paragraph (h), redesignate paragraph (i) as (h), and revise paragraph (a) to read as follows:

§ 251.57 Rental fees.

(a) Except as otherwise provided in this part or when specifically authorized by the Secretary of Agriculture, special use authorizations shall require the payment in advance of an annual rental fee as determined by the authorized officer.

(1) The fee shall be based on the fair market value of the rights and privileges authorized, as determined by appraisal or other sound business management principles.

(2) Where annual fees of one hundred dollars (\$100) or less are assessed, the authorized officer may require either annual payment or a payment covering more than one year at a time. If the annual fee is greater than one hundred dollars (\$100), holders who are private individuals (that is, acting in an individual capacity), as opposed to those who are commercial, other corporate, or business or government entities, may, at their option, elect to make either annual payments or payments covering more than one year.

* * * * *

6. Revise § 251.59 to read as follows:

§ 251.59 Transfer of authorized improvements.

If the holder, through death, voluntary sale, transfer, or through enforcement of a valid legal proceeding or operation of law, ceases to be the owner of the authorized improvements, the authorization terminates upon change of ownership. Except for easements issued under authorities other than § 251.53(e) and leases and easements under § 251.53(l) of this subpart, the new

owner of the authorized improvements must apply for and receive a new special use authorization. The new owner must meet requirements under applicable regulations of this subpart and agree to comply with the terms and conditions of the authorization and any new terms and conditions warranted by existing or prospective circumstances.

7. Amend § 251.60 as follows:

- a. Remove paragraph (g);
- b. Redesignate paragraphs (h), (i), and (j) as (g), (h), and (i), respectively; and
- c. Revise paragraphs (a)(2), (b), (e), (f), and newly redesignated (g), (h), and (i) to read as follows:

§ 251.60 Termination, revocation, and suspension.

(a) * * *

(2) *All other special uses.* (i)

Revocation or suspension. An authorized officer may revoke or suspend a special use authorization for all other special uses, except an easement issued pursuant to § 251.53 (e) and (l):

- (A) For noncompliance with applicable statutes, regulations, or the terms and conditions of the authorization;
- (B) For failure of the holder to exercise the rights or privileges granted;
- (C) With the consent of the holder; or
- (D) At the discretion of the authorized officer for specific and compelling reasons in the public interest.

(ii) *Administrative review.* Except for revocation or suspension of an easement issued pursuant to § 251.53 (e) and (l) of this subpart, a suspension or revocation of a special use authorization under this paragraph is subject to administrative appeal and review in accordance with 36 CFR part 251, subpart C, of this chapter.

(iii) *Termination.* For all special uses except noncommercial group uses, a special use authorization terminates when, by its terms, a fixed or agreed-upon condition, event, or time occurs. Termination of a special use authorization under this paragraph does not involve agency action and is not subject to administrative or judicial review.

(b) For purposes of this section, the authorized officer is that person who issues the authorization or that officer's successor.

* * * * *

(e) Except when immediate suspension pursuant to paragraph (f) of

this section is indicated, the authorized officer shall give the holder written notice of the grounds for suspension or revocation under paragraph (a) of this section and reasonable time to cure any noncompliance, prior to suspension or revocation pursuant to paragraph (a) of this section.

(f) Immediate suspension of a special use authorization, in whole or in part, may be required when the authorized officer deems it necessary to protect the public health or safety or the environment. In any such case, within 48 hours of a request of the holder, the superior of the authorized officer shall arrange for an on-site review of the adverse conditions with the holder. Following this review, the superior officer shall take prompt action to affirm, modify, or cancel the suspension.

(g) The authorized officer may suspend or revoke easements issued pursuant to § 251.53 (e) and (l) of this subpart under the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings instituted by the Secretary under 7 CFR 1.130 through 1.151. No administrative proceeding shall be required if the easement, by its terms, provides that it terminates on the occurrence of a fixed or agreed-upon condition, event, or time.

(h)(1) The Chief may revoke any easement granted under the provisions of the Act of October 13, 1964, 78 Stat. 1089, 16 U.S.C. 534:

- (i) By consent of the owner of the easement;
- (ii) By condemnation; or
- (iii) Upon abandonment after a 5-year period of nonuse by the owner of the easement.

(2) Before any such easement is revoked for nonuse or abandonment, the owner of the easement shall be given notice and, upon the owner's request made within 60 days after receipt of the notice, an opportunity to present relevant information in accordance with the provisions of 36 CFR part 251, subpart C, of this chapter.

(i) Upon revocation or termination of a special use authorization, the holder must remove within a reasonable time the structures and improvements and shall restore the site to a condition satisfactory to the authorized officer, unless the requirement to remove structures or improvements is otherwise waived in writing or in the

authorization. If the holder fails to remove the structures or improvements within a reasonable period, as determined by the authorized officer, they shall become the property of the United States, but holder shall remain liable for the costs of removal and site restoration.

8. In § 251.61, revise paragraph (c) to read as follows:

§ 251.61 Modifications.

* * * * *

(c) A holder shall obtain prior approval from the authorized officer for modifications to approved uses that involve any activity impacting the environment, other users, or the public.

9. In § 251.64, add two sentences at the end of paragraph (a) to read as follows:

§ 251.64 Renewals.

(a) * * * Special uses may be reauthorized upon expiration so long as such use remains consistent with the decision that approved the expiring special use or group of uses. If significant new information or circumstances have developed, appropriate environmental analysis must accompany the decision to reauthorize the special use.

* * * * *

10. Revise § 251.65 to read as follows:

§ 251.65 Information collection requirements.

The rules of this subpart governing special use applications (§ 251.54 and § 251.59), terms and conditions (§ 251.54), rental fees (§ 251.57), and modifications (§ 251.61) specify the information that proponents or applicants for special use authorizations or holders of existing authorizations must provide in order for an authorized officer to act on a request or administer the authorization. As such, these rules contain information requirements as defined in 5 CFR part 1320. These information requirements are assigned OMB Control Number 0596-0082.

Dated: October 31, 1998.

Anne Kennedy,
Deputy Under Secretary, Natural Resources and Environment.

Note: The following exhibit will not appear in the Code of Federal Regulations.

**Special Use Authorization Approval Process
Exhibit 1**

