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Special Uses: Managing Recreation Residences and Assessing Fees Under the Cabin User Fee Fairness Act; Procedures for Appraising Recreation Residence Lots and for Managing Recreation Residence Uses Pursuant to the Cabin User Fee Fairness Act; Final Rules

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596–AB83

Special Uses; Managing Recreation Residences and Assessing Fees Under the Cabin User Fee Fairness Act

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: The Cabin User Fee Fairness Act of 2000 directs the Forest Service to promulgate regulations and adopt policies for carrying out provisions of the act. Accordingly, the Department is adopting this final rule that revises special uses regulations and related agency directives, published elsewhere in this part of today's **Federal Register**. The final rule and agency directives set out requirements and provide direction to agency personnel for managing recreation residence uses and assessing fees for those uses of National Forest System lands pursuant to the act.

DATES: *Effective Date:* This rule is effective May 3, 2006.

ADDRESSES: The documents used in developing this final rule are available for inspection and copying at the office of the Director, Lands Staff, Forest Service, USDA, 4th Floor South, Sidney R. Yates Federal Building, 1400 Independence Ave., SW., Washington, DC, during regular business hours (8:30 a.m. to 4 p.m.), Monday through Friday, except holidays. Those wishing to inspect these documents are encouraged to call ahead (202) 205–1248 to facilitate access to the building.

Other documents not in the rulemaking record that were requested in the comments on the proposed rule are beyond the scope of this rulemaking conducted pursuant to 5 U.S.C. 553(c). Those interested in obtaining these documents may request them under the Freedom of Information Act by writing to the USDA Forest Service, Freedom of Information Act/Privacy Act Branch, Office of Regulatory and Management Services, 1400 Independence Ave., SW., Mail Stop 1143, Washington, DC 20250–1143.

FOR FURTHER INFORMATION CONTACT: Julett Denton, Lands Staff, (202) 205–1256.

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1. Background

Recreation Residence Special Uses Program

Forest Service regulations at 36 CFR part 251, subpart B, govern authorizations for occupancy and use of National Forest System lands. Section 251.50 characterizes special uses as ''all uses of National Forest System lands, improvements, and resources, except those authorized by the regulations governing the disposal of timber (part 223), disposal of minerals (part 228), and the grazing of livestock (part 222).'' The regulation requires an authorization for all special uses, with certain exceptions.

Approximately 74,000 special use authorizations are in effect on National Forest System (NFS) 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 accessing private residences and non-Federal lands, domestic water supplies and water conveyance systems, utility rights-of-way, communications uses, ski areas, resorts, marinas, outfitting and guiding services, and public parks and campgrounds. Approximately 15,000 of the 72,000 special use authorizations on NFS lands are term special use permits for recreation residence uses, which authorize the holder to construct, operate, and maintain a recreation residence and related improvements on NFS lands.

On August 16, 1988, in a notice published in the **Federal Register** (53 FR 30924), the Forest Service adopted a policy that set forth procedures for administering term special use permits that authorize privately owned recreation residences on National Forest System (NFS) lands. The 1988 policy included direction concerning the tenure and renewal of recreation residence term special use permits, and described procedures to be followed when a recreation residence site was needed for a higher public purpose. The 1988 policy also established a new procedure for assessing fair market value fees for this type of use and occupancy. In the 1988 policy the Forest Service designated as ''base fees'' those annual fees for recreation residence special uses permits that were established during the years 1978 through 1982. Those base fees were determined as a result of appraisals of the fee simple fair market value of lots that were completed during that time period. The time period from 1978 through 1982 served as ''year 1'' in a 20-year appraisal cycle in the 1988 policy.

That policy was appealed to the Secretary of Agriculture on September 15, 1988. In general, the appellants alleged that certain aspects of the policy were flawed, in that they exceeded limitations in the statute authorizing recreation residence uses of the National Forests. In a decision dated February 15, 1989, the Assistant Secretary of Agriculture for Natural Resources and Environment remanded the 1988 policy to the Forest Service for reconsideration, and stayed the implementation of those specific provisions in the policy that were the subject of the appeal. None of the appeal or remand issues involved provisions in the 1988 policy concerning the appraisals of recreation residence lots, nor the determination and assessment of land use fees generally. Rather, the remand directed the agency to reconsider: (1) Nonrenewal provisions in recreation residence special use permits that would be applied when the agency determined a need to convert the use of a recreation residence site to a higher, or alternative, public purpose; (2) provisions requiring an automatic permit renewal 10 years prior to expiration (unless procedures for nonrenewal had been established); (3) provisions requiring the offering of an in-lieu lot to those permit holders who received nonrenewal notices pursuant to the agency's finding to convert the use of a recreation residence site to some alternative public purpose; and (4) provisions weighted against consideration of commercial uses for sites when nonrenewal of the recreation residence use was contemplated.

A final revised policy for recreation residences was adopted and published

in the **Federal Register** on June 2, 1994 (59 FR 28713). It revised the 1988 policy with new provisions identified in the appeal and remand concerning tenure, and clarified policy for determining the annual fee for recreation residences. However, those provisions that were revised and clarified in 1994 pertained only to annual fees for those permits affected by notices of nonrenewal for an alternative public purpose.

The 1988 policy established base fees for recreation residence lot appraisals conducted during the years 1978 through 1982. Those base fee amounts were then indexed annually, using the annualized change in the economic indexing factor known as the Implicit Price Deflator-Gross National Product (IPD–GNP), as provided in the 1988 policy. The 1988 policy also established a 20-year appraisal cycle for keeping recreation residence fees current with changes in fair market value.

In accordance with the provisions of the 1988 and 1994 policies, the Forest Service began to appraise recreation residence tracts in 1996, which was year 18 of the 20-year appraisal cycle for those lots appraised in 1978. The appraisals that were completed in 1997 revealed varying degrees of increases in the market value of recreation residence lots since they were last appraised in the late 1970's and early 1980's. In some locations and markets the increase in value was dramatic. Because annual land use fees are calculated on the basis of 5 percent of the fee simple value of each lot, increases in the appraised fee simple values of some lots exceeded the cumulative effect of 18 to 20 years of annual IPD-GNP indexing of fees, which resulted in corresponding increases in land use fees. Some of the more dramatic fee increases as a result of new appraisals were of significant concern to recreation residence permit holders, and to State and national associations that represent them. In response, recreation residence permit holders and associations of holders began to contact their Congressional representatives, requesting relief from the increased fees.

Congress initially responded to these concerns on November 14, 1997, in the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1998, Public Law 105–83, Section 343 by providing for a 3-year phase-in of recreation residence fee increases, when a new appraisal of a recreation residence lot resulted in fees that exceeded 100 percent of the previous land use fees.

In fiscal year 1999, Congress directed the Forest Service not to increase recreation residence fees for fiscal year 1999 on the Sawtooth National Forest in Idaho by more than 25 percent of the fee paid during the prior fiscal year.

In fiscal year 2000, Congress provided additional relief to recreation residence permit holders in section 342 of Public Law 106–113 (Consolidated Appropriations for Fiscal Year Ending September 30, 2000) which directed that recreation residence permit fees assessed during fiscal year 2000 could not exceed the fiscal year 1999 fee amount by more than $2000.

Congress further addressed concerns about fee assessments for recreation residence uses with the October 11, 2000, passage of the Cabin User Fee Fairness Act of 2000 (CUFFA). The primary purpose of CUFFA is to establish a more consistent process for appraising the fee simple value of recreation residence lots on NFS lands.

Need for Amending the Existing Rule

The Cabin User Fee Fairness Act of 2000 (CUFFA) directs the Forest Service to promulgate regulations and adopt policies for carrying out provisions of the act. The Forest Service published a proposed rule for notice and comment on May 13, 2003 in the **Federal Register** (68 FR 25748) to revise current regulations at 36 CFR part 251, subpart B, and proposed agency directives (68 FR 25751) to incorporate the provisions of CUFFA into the Forest Service Directive System.

2. Purely Technical, Nonsubstantive Revisions

All references to enactment of CUFFA as having occurred on October 12, 2000 have been revised to reflect that CUFFA was actually enacted on October 11, 2000. In addition, Forest Service Manual 2347.12, governing caretaker cabin user fees, has been revised for clarity and for purposes of using the terminology in the corresponding provisions in CUFFA.

3. Public Comments on the Proposed Rule

Overview

The proposed rule (68 FR 25748) and proposed agency directive notice (68 FR 25751), publised May 13, 2003, provided for a 90-day comment period which ended August 11, 2003.

The proposed rule and agency directives were posted electronically on the World Wide Web/Internet on the **Federal Register** site at *http://www.gpoaccess.gov* and on the FirstGov e-rulemaking site at *http://www.regulations.gov.* The agency also posted the proposed rule, appraisal guidelines, and recreation residence directives on its World Wide Web site for special uses at *http://www.fs.fed.us/recreation/permits.* The public was afforded the opportunity to respond either by regular mail, fax, or electronic format. In addition, the Forest Service individually notified each of its approximately 15,000 holders of recreation residence term special use permits about the publication and availability of these notices and how to obtain copies of them by either electronic or in paper copy format. No formally organized, agency-wide, public meetings or hearings were held. However, Forest Service personnel at all levels of the organization used meetings with individual permit holders and recreation residence tract associations to inform interested parties of the opportunity to review and comment on the proposed rule and agency directives.

The Forest Service received 950 responses. There were no requests for an extension of time for comments. Each respondent was grouped by the respondent's declaration of affiliation with one of the following organizations, or within one of the following categories:

Affiliation or category	Number of responses
Term Special Use Permit Holder of a Recreation Residence	595
Representing Organizations that in Whole or in Part, Represent the Interests of Recreation Residence Special Use Permit Holders	32
Individuals (that didn't clearly identify themselves as being a permit holder, nor affiliated with an organization	319
Representatives of Appraisal Organizations	3
Forest Service employees	1
Total	950

The 950 respondents represented 37 States and the District of Columbia. The majority of comments were from individuals who identified themselves as recreation residence term special use permit holders or organizations representing their interests. The second largest group of respondents were from individuals who chose not to identify their affiliation or status.

Approximately 162 (17%) of the responses received were submitted in the form of a standardized letter. Another 392 responses (41%) of the responses were submitted as a ''fill-in-the-blanks'' form letter. Approximately 167 of those who completed such a form also elected to supplement their response with individually written ''additional comments'' on the document.

The public was encouraged to respond to specific sections of the proposed rule and agency directives and most who responded did so. However, some respondents offered only general comments either supporting or not supporting the proposed rule and directives, or offered specific comments about current regulations or existing Forest Service policy that were beyond the scope of the proposed rule and directives. Non-responsive comments also included those comments expressing a dislike for the Forest Service's administration and management of recreation residence special uses in general, comments focused on permit-specific issues, concerns, or disputes (e.g., the manner in which a respondent's lot or tract had previously been appraised), or comments which were not received by the Forest Service in a timely manner.

Response to Comments

This section contains the Department's response to comments received on the proposed revisions to the rule at 36 CFR part 251, subpart B, published in the **Federal Register** on May 13, 2003 (68 FR 25748). The response to comments received on the agency's proposed appraisal guidelines and revisions to the agency's proposed directives, and published in the **Federal Register** on May 13, 2003 (68 FR 25751), are published elsewhere in this part of today's **Federal Register**.

Responses to General Comments on the Proposed Rule

Comment. A number of respondents commented about the manner in which the Forest Service established an electronic comment database to provide the public with the opportunity to submit responses and comments electronically via the internet. Some respondents were complimentary of the electronic format and database and commented about the ease and convenience that it provided them in responding to the proposed rulemaking. Others commented negatively, saying that they had difficulty navigating within the Web site and that they, along with many others, become so frustrated that they didn't provide comment at all. Some respondents asserted that the electronic comment option provided in the draft rulemaking notice was purposely designed by the Forest Service to discourage interested parties from commenting.

Response. The Department realizes that for a large segment of the public the option to provide comments electronically during a Federal government rulemaking and policymaking procedure is a new experience. Therefore, the range of positive and negative comments received about the electronic/internet response option to this particular rulemaking effort was not unexpected. The Department disagrees, however, with the assertion that the electronic comment database was in any way designed to frustrate those who used it, to discourage interested parties from commenting, or to minimize responses to this proposed rulemaking and policymaking effort. Instead, it was intended to provide another format for interested members of the public to provide responses to the proposed rule and policy revisions, using a technology which is fast and inexpensive. Likewise, the Forest Service has no evidence to support one commenter's assertion that due to user frustration with the electronic database only a portion of those who wanted to respond actually did so, or the assertion by a commenter that some people became so frustrated with the electronic format, that they did not respond at all using any one of the other available means such as written responses using regular mail, express mail, or fax.

Comment. Many respondents expressed a general concern about some of the language in the agency's proposed rulemaking and policymaking, suggesting that any new or amended Departmental rules, agency policies, or appraisal guidelines, should reflect, verbatim, the language in CUFFA. This same general comment was often repeated and made a part of other comments about more specific sections of the proposed rule, appraisal guidelines, and policies.

Response. Most of the procedures prescribed in CUFFA are clear and the Department agrees that such direction should simply be repeated verbatim in regulation, appraisal guidelines, and agency directives. However, some of the direction in CUFFA is unclear, ambiguous, or subject to interpretation. In these instances, the Department disagrees with the comment that the language in the rule, appraisal guidelines, and agency policies should be nothing more than a reiteration of that language. One of the primary purposes of promulgating these regulations, agency directives, and appraisal guidelines is to provide for clarity and consistency in the administration of recreation residence special use permits, consistent with the intent and purpose of CUFFA. Therefore, where language that appears in CUFFA is subject to varying interpretations, the Department's rules and the agency's directives and guidelines will further refine and define that language as needed to assure a clear understanding to permit holders and consistent administration by agency personnel in exercising CUFFA's direction and authority.

Response to Comments in Preamble of Proposed Rule

Comment. Some respondents, including one national organization representing a significant percentage of recreation residence special use permit holders, commented that the background information included in the May 13, 2003, **Federal Register** notice (68 FR 25748–25749) did not accurately reflect the purposes for which the Congress passed CUFFA. One commenter asserted that the proposed regulations, policies, and appraisal guidelines were not a good faith attempt to implement the provisions of CUFFA. One organization commented that the background discussion should have documented (1) the Federal laws that the Forest Service used, presumably prior to the passage of CUFFA, as the basis for requiring special use fees based on the fair market value of the use; and (2) disclosed that it was the intent of the Congress in its passage of CUFFA to provide the Forest Service with specific direction on how to conduct appraisals to estimate the fair market value of a lot for use in establishing base cabin user fees.

Response. The Department disagrees with the comment that the agency was not acting in good faith in publishing the proposed regulations, policies, and appraisal guidelines. In drafting its proposed regulations, policy revisions, and appraisal guidelines, the agency put forth its best effort to reflect the clear and concise provisions of CUFFA, and its interpretation of those provisions of CUFFA that appear ambiguous or subject to multiple interpretations. The purpose of publishing the regulations, appraisal guidelines, and policy revisions in draft form, and soliciting public comment, was to provide a transparent and good faith opportunity for interested members of the public to review and express opinions about the agency's interpretation and proposed implementation of CUFFA.

The Department has reviewed the background information in the proposed rule and found that it provided a thorough chronology of events beginning in the mid-1980's through the mid-1990's describing a series of policymaking procedures that were conducted by the Forest Service concerning the management of recreation residence special uses on National Forest System (NFS) lands.

The background information described how, in 1988, the agency adopted a policy describing how annual ''base fees'' for most recreation residence special use permits would be established, based on the appraised market value of lots as they were determined from appraisals of lots conducted between 1978 and 1982. In 1988, the Forest Service also revised its recreation residence policy to direct that appraisals of recreation residence lots be conducted at least once every 20 years. That represented a change from the agency's previous practice, dating at least as far back as the early 1960's, that conducted appraisals of recreation residence lots every 5 years.

The background information in the proposed rule also identified how, as a product of appraisals of recreation residence lots that the Forest Service started to conduct in 1996, some annual land use fees for recreation residence special use permits were going to increase dramatically. Included, was a chronology describing how Congress reacted to the outcome of some of those Forest Service appraisals, by limiting the agency's ability to increase recreation residence special use permit fees with language in annual appropriations authorities for Fiscal Years 1998 through 2000. The culmination of Congress's involvement with recreational residence fees was the enactment of CUFFA, as Title VI to the appropriations authority for the Department of the Interior and Related Agencies for Fiscal Year 2001.

The Department agrees that the background information in the proposed rule did not address the statutory authority under which the Forest Service had, prior to passage of CUFFA, asserted the need to assess and collect annual fees for recreation special use permits based on the principle of fair market value. Nor did it address the specific manner in which appraisals were being conducted prior to the passage of CUFFA, or the purposes for which CUFFA was enacted.

In response to these comments, the Department notes that Title V of the Independent Offices Appropriations Act of 1952 (IOAA) (31 U.S.C. 9701), provides the statutory authority that, prior to the passage of CUFFA, served as the basis by which annual land use fees were assessed and collected for recreation residence special uses. The IOAA is one of several statutes authorizing the use and occupancy of NFS lands that serve as the premise upon which Departmental regulations at 36 CFR 251.57 were promulgated and which direct the assessment of special use permit fees based on the fair market value of the authorized use. In 1993, the Office of Management and Budget (OMB) issued OMB Circular A–25 that provided specificity and consistency in the implementation of Title V of the IOAA. OMB Circular A–25 directed all Executive agencies and departments and establishments of the Federal Government to assess and collect from identifiable recipients of a special benefit, a user charge based on the market price of the benefit being provided. The enactment of CUFFA now serves as the authority to determine, assess, and collect a land use fee for recreation residence special uses.

Comment. Some respondents, including one national organization whose membership includes a significant percentage of recreation residence special use permit holders, commented that the background information of the proposed rule should have informed readers that (1) a percentage of the lot's appraised value determines the annual land use fee that represents fair market value; (2) instructing appraisers on the procedures to follow to achieve an accurate reflection of the local market has proven difficult; and (3) it was the intent of Congress in the passage of CUFFA to provide specific direction on how to conduct appraisals of recreation residence lots.

Response. The Department agrees with these three comments. Congress documented in section 602(2) of CUFFA ''that current appraisal procedures have, in certain circumstances, been inconsistently applied in determining fair market values for residential lots demonstrates that problems exist in accurately reflecting market values.'' It is clear that Congress wanted to create greater consistency in the manner in which the appraisals for determining the market value of recreation residence lots are conducted, and that it did so by establishing in section 606(a) of CUFFA specific requirements for conducting appraisals of recreation residence lots, and instructing the Secretary of Agriculture to establish specific appraisal guidelines that include specific provisions identified in section 606(b). Furthermore, section 607(a) of CUFFA established in Federal statute a long-standing Forest Service policy dating back to the 1960's, that is, the annual land use fee for a recreation residence special use permit shall be 5 percent of the market value of the recreation residence lot.

Responses to Comments on the Major Provisions of the Cabin User Fee Fairness Act of 2000 (CUFFA)

Comment. Many comments were received questioning the use of The Appraisal Foundation (TAF), saying that TAF testified against the provisions of CUFFA before Congress and that many members of TAF believe that testifying before Congress and reviewing the proposed appraisal guidelines exceeds the scope of TAF's charter. Comments also suggested that TAF lacks the expertise to make legal judgments about the appraisal guidelines.

Response. The Forest Service contracted with TAF to assist in the development and review of the proposed appraisal guidelines and to fulfill the statutory requirement of section 606(a)(3) of CUFFA directing the Secretary to enter into a contract with an appropriate professional appraisal organization to manage the development of specific appraisal guidelines.

Only one sponsor organization member of TAF registered an objection to the Forest Service's use of TAF as the appropriate professional appraisal organization to assist the Forest Service in the development of the appraisal guidelines. This objection was made outside of the public comment process provided for in the proposed rule. The fact that TAF was requested by Congress to provide testimony on CUFFA and complied with that request does not diminish TAF's qualifications or responsibilities as the single authority in the United States for development and interpretation of appraisal standards. TAF was requested by Congress to testify on a wide variety of issues affecting the real estate appraisal industry. Its testimony does not disqualify TAF as the authority for appraisal standards and appraiser qualifications. No sponsor member organization of TAF has provided the Forest Service any evidence that either testifying before Congress or reviewing the proposed Forest Service appraisal guidelines exceeds the scope of TAF's charter. TAF did not offer a legal judgment about the draft Forest Service appraisal guidelines. TAF was requested and provided its professional opinion as the single authority for development and interpretation of appraisal standards.

Response to Specific Sections of the Proposed Rule

Section 251.51—Definitions. This section of the proposed rule added a definition for a ''recreation residence lot.''

Comment. Almost all who responded to the proposed rule commented on the definition of a recreation residence lot. The majority of those comments were nearly identical and many were made in the form of a ''check-the-box'' form letter. The most common concerns raised in these comments were that (1) the definition of a recreation residence lot at 36 CFR 251.51 should be verbatim the definition of a ''lot'' in section 604(9) of CUFFA; (2) the proposed definition was contrary to the language in CUFFA; (3) the proposed definition is an impermissible attempt to enlarge the subject of an appraisal; (4) the proposed definition seeks to redefine a lot as a ''site''; and (5) the definition is objectionable, erroneous, and in violation of and in conflict with CUFFA.

Response. Section 604(9) of CUFFA defines a ''lot'' as ''a parcel of land in the National Forest System—(A) on which a cabin owner is authorized to build, use, occupy and maintain a cabin and related improvements; and (B) that is considered to be in its natural, native state at the time at which use of the lot described in paragraph (A) is first permitted by the Secretary.'' If this definition in CUFFA were clear and unambiguous, the Department would agree that the definition in section 604(9) of CUFFA should be simply repeated in section 251.51. However, that is not the case. By including the words ''and related improvements'' in the definition, Congress was expressing its intent that a recreation residence lot include more than just that area of National Forest System (NFS) land being occupied by the recreation residence itself; that is, more than just the land occupied by the footprint of a cabin. The language in CUFFA clearly states that a recreation residence ''lot'' also includes those areas of NFS land being used and occupied by ''related improvements,'' or improvements owned and used by the owner of the recreation residence and used in conjunction with that owner's recreation residence experience.

However, CUFFA is silent with respect to defining or describing what constitutes such ''related improvements.'' The Department believes that CUFFA's definition of a recreation residence ''lot'' has the high potential of being a source of inconsistency and inequity. The Department consequently believes that additional language in regulation and agency policy is necessary to provide clarity to CUFFA's definition of a lot, and to in turn assure consistency in implementing the provisions of CUFFA.

The ambiguity that this part of the definition of a recreation residence ''lot'' creates is evidenced by the comments received from many who responded to this part of the proposed rule. Many responses included comments that the terms ''related improvements'' could be interpreted by the Forest Service to include extenuating facilities, such as 3 miles of National Forest road used to access a recreation residence or publicly provided facilities (such as, National Forest picnic facilities, trails, boat docks, and so forth) used by recreation residence permit holders. Individual concerns and interpretations included in the comments received as to what constitutes ''related improvements'' makes it clear that a definition of a recreation residence lot clearly needs to be expanded upon. This is further evidenced by some comments to the proposed rule which suggested that without further clarity, where does an appraiser, or the agency, stop when it comes to identifying the boundaries of a ''lot''? Therefore, the Department disagrees with the numerous comments which suggested that regulations and agency policies should be limited to simply mirroring the language contained in the statute.

The Department disagrees with those who commented that the wording in the proposed definition of a ''recreation residence lot'' at 36 CFR 251.51 is inconsistent with, in violation of, or in conflict with the provisions of CUFFA. The proposed rule attempted to more clearly articulate those facilities and uses that constitute ''related improvements.'' It did so by stating at 36 CFR 251.51 that ''a recreation residence lot is not necessarily confined to the platted boundaries shown on a tract map or permit area map. A recreation residence lot includes the physical area of all National Forest System land being used or occupied by a recreation residence permit holder, including, but not limited to land being occupied by ancillary uses, such as septic systems, water systems, boat houses and docks, major vegetative modifications, and so forth.'' This list of some of the uses or occupancies of NFS land are those that are commonly conducted in conjunction with, and as a part of, a permit holder's recreation residence use. It was intended to refer to only those recreation residence related improvements and facilities that are owned, operated, and maintained by the holder of the recreation residence special use permit.

The Department agrees with many of the comments which suggest that the proposed rule's expansion of the definition of a lot didn't clearly articulate this intent. Therefore, the definition in the final rule is revised to make it clear that only ancillary uses ''owned and maintained by the holder'' would be included in what constitutes a ''recreation residence lot.'' Furthermore, these comments have prompted the inclusion in the final directives in section 33.05 (Definitions) of Forest Service Handbook (FSH) 2709.11, examples of what constitutes ''related improvements'' in the context of defining the extent of a recreation residence lot. In addition, when considering the boundaries of a recreation residence ''lot,'' the authorized officer will identify as ''related improvements'' the cumulative area of NFS land being occupied by permit holder owned facilities, such as outbuildings, wood piles, water systems, wastewater treatment facilities, retaining walls, boat docks, picnic tables, driveways, private trails, boardwalks, campfire rings, and so forth. The authorized officer will also consider as ''related improvements'' those areas of NFS land where the holder has manipulated and/or is maintaining a manipulation of native vegetation and/or the natural contour of the land. Common examples are the establishment and maintenance of lawns, or the installation of landscaping features (terracing, bordering developed trails, and so forth). Conversely, agency policy will also specify that a recreation residence lot will not be defined by those areas of NFS land that are solely used to manage native vegetation, with approval of the authorized officer, for the purpose of protecting property or to mitigate safety hazards, such as the need to occasionally remove or fall a hazard tree or treat or manage vegetation to reduce fuel loading and create defensible space to combat a wildfire.

The Department believes that this approach to identifying the extent of a recreation residence lot is consistent with the definition of a lot as used in CUFFA. Furthermore, it is entirely consistent with the manner in which the Forest Service identifies the ''authorized area'' for nearly all other types of special uses of NFS lands, such as private access roads, fences, irrigation ditches, and so forth. It is reasonable to identify the ''authorized area'' or ''permit area,'' or in the case of a recreation residence special use, the ''lot,'' as being all NFS land being used and occupied as part of the authorized special use activity. It should include all NFS land that is occupied by facilities owned or controlled by the permit holder. The lot should also include all areas of NFS land upon which activities are being conducted by the holder, which could not be conducted by the general public's

use of the land without specific approval from a Forest Officer, and uses and occupancies which can only legally occur when authorized with a Forest Service-issued special use authorization. For example, the construction and maintenance of trails, boardwalks, and boat docks, and the placement of picnic tables and permanent campfire rings are common to, and a part of, many recreation residence uses. All are facilities that could not be placed on NFS land without a special use permit, and wherever these types of improvements or facilities are situated, the NFS land being used, occupied, and manipulated should be included in the ''lot'' as a recreation residence lot as defined in CUFFA.

Finally, a large number of comments were received asserting that the proposed rule attempted to redefine a lot as a ''site'' and that doing so was in direct contravention to the language in CUFFA. The Department reviewed the proposed rule, and failed to find any use of the word ''site'' in the proposed definition of a lot at 36 CFR 251.51. After a thorough review of both the proposed rule and the corresponding proposed revisions to agency policy, the only place where the word ''site'' was used in conjunction with reference to a recreation residence ''lot'' was in the proposed revision to section 33 of FSH 2709.11. In section 33, the Forest Service proposed a series of additional definitions, including the definition of ''natural, native state'' as being ''The condition of a lot or site, free of any improvements, at the time at which the lot or site was first authorized for recreation residence use by the Forest Service.'' The Department believes that use of the word ''site'' in this definition is what prompted more than 900 comments asserting an attempt to define a ''lot'' with use of the term ''site.'' The proposed definition of ''natural, native state'' quoted above was extracted almost verbatim from section 604 (10) of CUFFA, which includes use of the term ''site'' in the exact manner in which it was proposed in section 33 of FSH 2709.11. However, the Department agrees that the use of the term ''site'' is confusing. Therefore, the term ''site'' will not be included in the definition of a recreation residence ''lot.'' Neither will the term ''site'' be used interchangeably with the word ''lot'' in appraisal guidelines, contracts, or reports. However, to be reflective of the language in CUFFA, the Forest Service will continue to use the term ''site'' in its definition of ''native natural state'' in FSH 2709.11.

Comment. Several comments related to the proposed definition of a recreation residence lot and suggested that many of the related improvements associated with a recreation residence use, such as water systems, boat houses, docks, septic systems, and so forth, should not be considered part of the recreation residence term special use permit, but should instead be authorized under separate types of special use authorizations, such as separate easements or permits, and that a separate land use fee be assessed for those types of facilities. By doing so, many respondents suggested that the recreation residence lot could then be kept to the minimum size possible. Other comments suggested that any related improvements that are not owned by a single cabin owner, but are instead used by a group or tract of cabin owners, should not be included as part of the related improvements of any one recreation residence lot, but that such improvements should be authorized by a separate special use authorization issued in the name of the group of cabin owners that actually owns and uses them.

Response. The Department disagrees with the concept that facilities and uses such as water systems, powerlines, telephone lines, boardwalks, boat houses, docks, lawns, picnic areas, and other facilities and uses that are associated with a cabin owner's recreation residence use of NFS land should be authorized with separate types of permits and easements and assessed with individual land use fees. Doing so would significantly increase administrative inefficiencies and costs.

The Department does agree, however, with those respondents who suggested that when a facility or use that is ancillary to recreation residence uses are owned, operated, and maintained by more than a single cabin owner, then such a use or facility should be authorized under the terms and conditions of a separate special use authorization. This is already common practice in most areas where, for example, facilities such as community owned boat docks, swimming areas, water systems, or sewage systems are authorized with a permit issued in the name of the tract association or some other entity representing the owners of those facilities. The final directives in FSH 2709.11 clarifies that uses owned and operated by a tract association, or other entity representing the owners of those facilities, shall be authorized by a separate authorization. Where that exists, the area of NFS land being used and occupied by such improvements or facilities authorized under a separate special use authorization will not be considered as part of any one recreation residence lot for recreation residence permit administration or appraisal purposes and a separate land use fee for such permits will be assessed and collected, pursuant to agency policy for special uses.

Comment. At least one respondent suggested that to remove all ambiguity concerning what constitutes a recreation residence lot, the Forest Service should provide every holder of a recreation residence term special use permit with a surveyed plat of each lot and a precise legal description of the bounds of that lot, to reflect comparable lots located in subdivisions in the private sector. Doing so would eliminate inconsistency and ambiguity by appraisers and administrators in estimating the market value of lots and administering permits.

Response. The Department agrees that there may be instances in which all of the NFS land currently being occupied by a recreation residence and related improvements has not yet been clearly defined nor agreed to between the Forest Service and the cabin owner. This is in part because CUFFA established a new definition of a recreation residence ''lot,'' which can extend beyond any previously paper platted boundaries of a lot. It is also in part because the Forest Service has not always adequately identified all of the related improvements in existing permits and, in some cases, because cabin owners have added improvements without prior authorization by the authorized officer. In the next 3 years, nearly all of the 15,000 recreation residence term special use permits will be due to expire. As they do, the Forest Service will be diligently inspecting the facilities and improvements located on each lot and will identify those uses to be included as authorized uses in the preparation and issuance of a new permit upon the expiration of the existing permit. In doing so, the cumulative area of NFS land being used and occupied by the recreation residence and all related improvements that will be authorized in those new permits will define the size, shape, and configuration of the recreation residence ''lot'' authorized by each permit.

In the interim, the inventory of improvements that is required in section 606(1)(a) of CUFFA will be conducted for every typical lot used for appraisal purposes. That inventory will identify all the improvements that are owned by the holder of each typical lot and, if those lots are typical of each of the lots within the representative group of lots, the cumulative area of NFS land being occupied by those holder-owned

improvements, as documented in the inventory, will define the size, shape, and configuration of the ''lot'' for appraisal and administration purposes. If some of the recreation residences uses within a group of lots represented by the typical lot are occupying a significantly smaller or larger area of NFS land, the authorized officer may consider, in consultation with the holders, a new group of lots and associated representative typical lot. Alternatively, any lot within a grouping of lots that is of significantly different size to the typical lot representing that group might serve as the basis for the authorized officer to make minor adjustments to a cabin user fee to accommodate such differences.

The Department disagrees with comments that every recreation residence lot needs to be marked, monumented, surveyed, and platted, along with an associated legal description. The definition of the size, shape, and configuration of each recreation residence lot will be accomplished and documented through the procedures and mechanisms previously described, without incurring the unnecessary and often significant expense of conducting legal surveys and preparing survey plats. However, permit holders who wish to establish a legal description with on-the-ground monuments that clearly mark the extent, size, shape, and configuration of their lot, as defined by CUFFA and these regulations, may make requests to the authorized officer for approval to do so.

Section 251.57—Rental Fees. This section of the proposed rule added language to incorporate the provision in section 607 of CUFFA that the base cabin user fee shall be 5 percent of the market value of a recreation residence lot ''established by an appraisal or other sound business management principles'' (§ 251.58(a)(3)), and section 606 of CUFFA that each permit or term permit for a recreation residence use shall be conditioned to state that the Forest Service shall recalculate the base cabin user fee at least every 10 years (§ 251.57(i)).

Comment. Many comments were received suggesting that use of the words ''or other sound business management principles'' as a means of determining the market value of a recreation residence lot, and the subsequent base cabin user fee, was inconsistent with the provisions of CUFFA and should be eliminated. The comments suggested that CUFFA directs that the only means by which the market value of a recreation residence lot may be determined is with an appraisal, conducted pursuant to the provisions of CUFFA.

Response. The Department agrees with these comments. Use of the words ''or other sound business management principles'' was carried forward from current language in other sections of this part of 36 CFR 251.57 as an acceptable means for determining a fair market value land use fee for other special uses of NFS lands. However, with respect to recreation residence special uses, section 607 of CUFFA is clear in directing that the market value of a recreation residence lot, for fee determination purposes, be established by appraisal, pursuant to the principles in section 606 of CUFFA. Therefore, ''or other sound business management principles'' will be deleted from section 251.57 of the final rule.

Comment. Comments were received concerning various sections in the proposed rule and directives which referenced the annual fee for a recreation residence special use, or the base cabin user fee, as a ''rental fee.'' The base cabin user fee, and how it would be determined pursuant to CUFFA, was identified and included under section 251.57 of the proposed rule, which is entitled ''Rental fees.'' Respondents commented that a base cabin user fee is not the same as a rental fee, and that equating it to a rental fee will confuse appraisers in their implementation of the appraisal provisions of CUFFA and the Forest Service's appraisal guidelines.

Response. The Department agrees with the concerns in these comments. A cabin user fee is an annual fee collected for a special use permit and is legally equivalent to a rental payment, which is more typically collected pursuant to the terms and conditions of a lease or a rental agreement. However, the Department will keep the reference to a base cabin user fee under ''Rental fees'' because that is the most appropriate section in the existing regulatory framework to address this issue. However, the Forest Service will eliminate the use of the terms ''rent,'' ''rental,'' or ''rental fees'' wherever they appear in agency directives, appraisal guidelines, and instructions to appraisers involving special use permit fees for recreation residence uses. Instead, the agency will use either the term ''cabin user fee,'' or ''base cabin user fee'' (pursuant to the provisions of CUFFA), or the term ''land use fee,'' when referencing the annual fee assessed and collected from the holder of a term special use permit for a recreation residence use.

Comment. Several comments questioned why section 251.57(a)(3) of the proposed rule did not include the qualifier ''fair'' when referencing that the base cabin user fee is ''5 percent of the market value of the recreation residence lot.'' The respondents questioned why the terminology of ''fair market value'' was not used here, because that is the terminology used in section 602 of CUFFA. Without that qualifier, respondents questioned whether market value is always ''fair.''

Response: Section 602 cited findings of Congress in its creation of CUFFA, which state that ''the fact that current appraisal procedures have, in certain circumstances, been inconsistently applied in determining fair market values for residential lots demonstrates that problems exist in accurately reflecting market values.'' However, section 607 of CUFFA specifically directs that a cabin user fee shall be established ''as the amount that is equal to 5 percent of the market value of the lot.'' Section 606 of CUFFA directs that the Secretary ''establish an appraisal process to determine the market value of the fee simple estate of a typical lot or lot.'' The prescriptive provisions of sections 605, 606, and 607 use the terminology ''market value'' without use of the qualifier ''fair''. Therefore, ''market value'' is reflected in the final rule at section 251.57(a)(3).

4. Regulatory Certifications

Environmental Impact

The final rule makes terminology in part 251 consistent with CUFFA. The changes are intended to improve administrative efficiencies and have no environmental effects. Section 31.1b of FSH 1909.15 (57 FR 43180, September 18, 1992) excludes from documentation in an environmental assessment or environmental impact statement rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions. The agency's assessment is that this final rule falls within this category of actions and that no extraordinary circumstances exist as currently defined that require preparation of an environmental assessment or environmental impact statement.

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 final rule does not have an annual effect of $100 million or more on the economy, nor does it adversely affect productivity, competition, jobs, the environment, public health and safety, or State or

local governments. This final rule does not interfere with an action taken or planned by another agency, nor does it raise new legal or policy issues. Finally, this final rule does not alter the budgetary impact of entitlement, grant, user fee, or loan programs or the rights and obligations of beneficiaries of such programs. Accordingly, this final rule is not subject to Office of Management and Budget review under Executive Order 12866.

This final rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). Based on a threshold Regulatory Flexibility Act analysis, prepared by the Forest Service for this final rule, it has been determined that this final rule does not have a significant economic impact on a substantial number of small entities as defined by the act because the final rule does not impose recordkeeping requirements on them; it does not affect their competitive position in relation to large entities; and it does not affect their cash flow, liquidity, or ability to remain in the market.

No Takings Implications

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630. It has been determined that the final rule does not pose the risk of a taking of private property.

Civil Justice Reform

This final rule has been reviewed under Executive Order 12988 on civil justice reform. After adoption of this final rule, (1) all State and local laws and regulations that conflict with this rule or that impede its full implementation will be preempted; (2) no retroactive effect will be given to this final rule; and (3) the Department will not require administrative proceedings before parties may file suit in court challenging its provisions.

Federalism and Consultation and Coordination With Indian Tribal Governments

The agency has considered this final rule under the requirements of Executive Order 13132 on federalism, and has made an assessment that the final rule conforms with the federalism principles set out in this Executive Order; does not impose any compliance costs on the States; and does not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the agency has determined that no further assessment of federalism implications is necessary.

Moreover, this final rule does not have tribal implications as defined by Executive Order 13175, Consultation and Coordination With Indian Tribal Governments, and therefore, advance consultation with tribes is not required.

Energy Effects

This final rule has been reviewed under Executive Order 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that this final rule does not constitute a significant energy action as defined in the Executive Order.

Unfunded Mandates

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 agency has assessed the effects of this final rule on State, local, and tribal governments and the private sector. This final rule does not compel the expenditure of $100 million or more by any State, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Controlling Paperwork Burdens on the Public

The information collection associated with the permitting and administration of recreation residences are covered under the approved Office of Management and Budget (OMB) control number 0596–0082. However, as provided by Section 614 of the Cabin User Fee Fairness Act of 2000 ((CUFFA) 16 U.S.C. 6210–13) the final directive, published elsewhere in this part of today's **Federal Register**, does contain a new one-time information collection requirement in FSH 2709.11, §§ 33.8 through 33.83. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do apply. Approval of this information collection requirement has been submitted for approval to the OMB. The agency expects the new information collection required by CUFFA to be approved by OMB prior to implementation of the provisions in §§ 33.8 through 33.83.

5. Text of the Final Rule

List of Subjects in 36 CFR Part 251

Administrative practice and procedure, Electric power, National forests, Public lands rights-of-way, Reporting and recordkeeping requirements, Water resources.

■ For the reasons set out in the preamble, the Forest Service amends subpart B of part 251 of title 36 of the Code of Federal Regulations to read as follows:

PART 251—LAND USES

Subpart B—Special Uses

■ 1. The authority citation for 36 CFR 251 is revised to read as follows:

Authority: 16 U.S.C. 472, 479b, 551, 1134, 3210, 6201–13; 30 U.S.C. 1740, 1761–1771.

■ 2. In § 251.51 add a definition for ''recreation residence lot'' in the appropriate alphabetical order to read as follows:

§ 251.51 Definitions.

* * * * *

Recreation Residence Lot—a parcel of National Forest System land on which a holder is authorized to build, use, occupy, and maintain a recreation residence and related improvements. A recreation residence lot is considered to be in its natural, native state at the time when the Forest Service first permitted its use for a recreation residence. A recreation residence lot is not necessarily confined to the platted boundaries shown on a tract map or permit area map. A recreation residence lot includes the physical area of all National Forest System land being used or occupied by a recreation residence permit holder, including, but not limited to, land being occupied by ancillary facilities and uses owned, operated, or maintained by the holder, such as septic systems, water systems, boat houses and docks, major vegetative modifications, and so forth.

* * * * *

■ 3. In § 251.57 add new paragraphs (a)(3) and (i) to read as follows:

§ 251.57 Rental fees.

(a) * * *

(3) A base cabin user fee for a recreation residence use shall be 5 percent of the market value of the recreation residence lot, established by an appraisal conducted in accordance with the Act of October 11, 2000 (16 U.S.C. 6201–13).

* * * * *

(i) Each permit or term permit for a recreation residence use shall include a clause stating that the Forest Service shall recalculate the base cabin user fee at least every 10 years and shall use an appraisal to recalculate that fee as provided in paragraph (a)(3) of this section.

Dated: December 26, 2005.

David P. Tenny,

Deputy Under Secretary, Natural Resources and Environment.

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DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596–AB83

Procedures for Appraising Recreation Residence Lots and for Managing Recreation Residence Uses Pursuant to the Cabin User Fee Fairness Act

AGENCY: Forest Service, USDA.

ACTION: Issuance of final directives.

SUMMARY: The Cabin User Fee Fairness Act of 2000 directs the Forest Service to promulgate regulations and adopt policies for carrying out provisions of the act. Accordingly, the Forest Service is adopting final directives issued in the Forest Service Manual (FSM) Title 2300, Recreation, Wilderness, and Related Resource Management; FSM Title 2700, Special Uses Management; Forest Service Handbook (FSH) 2709.11, Special Uses Handbook; and FSH 5409.12, Appraisal Handbook. These final directives, and revised special uses regulations published elsewhere in this part of today's **Federal Register**, set out requirements and provide direction to agency personnel for managing recreation residence uses and assessing fees for those uses of National Forest System lands pursuant to the act.

DATES: These directives are effective May 3, 2006.

ADDRESSES: The documents used in developing these directives are available for inspection and copying at the office of the Director, Lands Staff, Forest Service, USDA, 4th Floor South, Sidney R. Yates Federal Building, 1400 Independence Ave., SW., Washington, DC, during regular business hours (8:30 a.m. to 4 p.m.), Monday through Friday, except holidays. Those wishing to inspect these documents are encouraged to call ahead (202) 205–1248 to facilitate access to the building.

Other documents not in the decision-making record that were requested during the comment period on the proposed directives are beyond the scope of this direction making process conducted pursuant to 5 U.S.C. 553(c). Those interested in obtaining these documents may request them under the Freedom of Information Act by writing to the USDA Forest Service, Freedom of Information Act/Privacy Act Branch, Office of Regulatory and Management Services, 1400 Independence Ave., SW., Mail Stop 1143, Washington, DC 20250–1143.

FOR FURTHER INFORMATION CONTACT: Julett Denton, Lands Staff, (202) 205–1256.

SUPPLEMENTARY INFORMATION:

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1. Background

A discussion of the history and development of direction and regulations for the administration of recreation residences is found in the final rule to Title 36, Code of Federal Regulations, part 251, subpart B, published elsewhere in this part of today's **Federal Register**.

Most of the changes required by the Cabin User Fee Fairness Act of 2000 (CUFFA) affect direction for administering recreation residences contained in the Forest Service Manual (FSM) and Forest Service Handbook (FSH) directives. Accordingly, the changes to recreation residence management identified in CUFFA will be implemented through revisions to the FSM and FSH pursuant to CUFFA. Table I at the end of this notice has been prepared as an aid to understanding the directive changes being adopted. Table I displays the recreation residence directive provision, its reference to the appropriate section of CUFFA, and a section-by-section comparison of the proposed and final direction.

2. Purely Technical, Nonsubstantive Revisions

All references to enactment of CUFFA as having occurred on October 12, 2000 have been revised to reflect that CUFFA was actually enacted on October 11, 2000. In addition, Forest Service Manual 2347.12, governing caretaker cabin user fees, has been revised for clarity and for purposes of using the terminology in the corresponding provisions in CUFFA.

3. Public Comments and Responses To Proposed Revisions To Recreation Residence Directives

A discussion on the general nature of comments and a response to comments on the proposed rule are found in a final rule published elsewhere in this part of today's **Federal Register**.

Forest Service Manual

Chapter 2340—Privately Provided Recreation Opportunities

2340.05—Definitions. This section included a definition of a ''caretaker cabin'' and reference that a cabin needed to be occupying a lot within a recreation residence tract.

Comment. Many respondents commented that limiting the use of cabins to only those situated on a lot within a recreation residence tract is inconsistent with CUFFA.

Response. The Forest Service agrees with these comments. The final direction includes a revised definition for a caretaker cabin. The revised definition is more reflective of the definition of a caretaker cabin that appears in CUFFA and does not necessarily require that the location of a caretaker cabin be situated within a recreation residence tract. In making this revision, however, the Forest Service is not implying that it will consider authorizing the construction of new cabins outside of existing recreation residence tracts for the purpose of creating a caretaker cabin use. However, the revised definition will provide the authorized forest officer with the option to authorize an existing privately-owned cabin on National Forest System (NFS) land to be used for caretaker cabin purposes in those rare circumstances where a privately-owned cabin may already exist outside of a designated recreation residence tract. Examples might be existing privately-owned cabins currently authorized by the Forest Service for use as an isolated cabin, a residence, or as part of a larger use and occupancy of NFS land, such as in conjunction with a grazing allotment or for mining purposes.