

adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

#### Environment

We have analyzed this rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2-1, paragraph (34)(g), of the Instruction, from further environmental documentation. A final "Environmental Analysis Check List" and a final "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES**.

#### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR Part 165 as follows:

#### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for Part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 50 U.S.C. 191, 195; 33 CFR 1.05-1(g), 6.04-1, 6.04-6, and 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 165.514 amend paragraph (b) by adding the paragraph heading "Regulations." immediately before the word "Notwithstanding", amend paragraph (c) by adding the paragraph heading "General Information." immediately before "(1) The COTP Wilmington", amend paragraph (c)(1) by adding the paragraph heading "Announcements." immediately before the words "The COTP Wilmington", revise paragraphs (c)(2) and (d), and add paragraph (c)(3) to read as follows:

**§ 165.514 Safety Zone: Atlantic Intracoastal Waterway and connecting waters, vicinity of Marine Corps Base Camp Lejeune, North Carolina.**

\* \* \* \* \*

(b) *Regulations.* \* \* \*

(c) *General information.*

(1) *Announcements.* \* \* \*

(2) *Camp Lejeune Artillery Operations.* Artillery weapons firing

over the AICW from Marine Corps Base Camp Lejeune will be suspended and vessels permitted to transit the specified 2-nautical-mile firing area for a 1-hour period beginning at the start of each odd-numbered hour local time (e.g., 9 a.m.; 1 p.m.). A vessel may not enter the specified firing area unless it will be able to complete its transit of the firing area before firing exercises are scheduled to re-start.

(3) *Atlantic Ocean Naval Gunnery live fire operations.* Naval gunnery live fire operations over the AICW from off shore on the Atlantic Ocean may be conducted for periods not to exceed 4 hours, then suspended and vessels permitted to transmit the specified two-mile firing area for a minimum of one hour before firing may resume. A vessel may not enter the specified firing area unless it will be able to complete its transit of the firing area before firing exercises are scheduled to re-start.

(d) *Contact information.* U.S. Navy safety vessels may be contacted on VHF marine band radio channels 13 (156.65 MHz) and 16 (156.8 MHz). The Captain of the Port may be contacted at the Marine Safety Office Wilmington, NC by telephone at 1 (877) 229-0770 or (910) 770-2200.

Dated: June 22, 2004.

**Jane M. Hartley,**

*Captain, U.S. Coast Guard, Captain of the Port, Wilmington, NC.*

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#### DEPARTMENT OF AGRICULTURE

#### Forest Service

#### 36 CFR Parts 251, 261, and 295

**RIN 0596-AB74**

#### Land Uses; Special Uses Requiring Authorization

**AGENCY:** Forest Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Department is revising regulations that govern the issuance and administration of special use authorizations on National Forest System lands to clarify categories of activities for which a special use authorization is required. In particular, this final rule clarifies requirements regarding the issuance of special use authorizations for activities involving National Forest System roads and trails. The revised regulations promote consistency in the special uses program, improve the agency's ability to resolve management issues by requiring permits

in certain situations, and reduce the agency's administrative costs by eliminating the need to issue a Forest order to require a special use permit in certain situations and by providing the authorized officer with the discretion to waive the requirement for a special use authorization when issuance of a permit serves no management purpose. The final rule also adds definitions to part 251, revises definitions in part 261, and revises the heading of part 295 to ensure consistent terminology in all three parts.

**DATES:** *Effective Date:* This rule is effective August 12, 2004.

**ADDRESSES:** The rulemaking record for this final rule contains all the documents pertinent to this rulemaking. These documents are available for inspection and copying at the office of the Director, Recreation and Heritage Resources Staff, Forest Service, USDA, 4th Floor Central, 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) 205-1399 to facilitate access to the building.

Any 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.

Several agency directives are being revised for consistency with this final rule, and the directive changes are described in the preamble to this final rule. These directives, which include amendments to Forest Service Manual (FSM) 2350, 2710, and 2730, and other agency directives referenced in the preamble, are available electronically on the World Wide Web at <http://www.fs.fed.us/im/directives>. These amendments are numbered as 2300-2004-1, 2700-2004-1, and 2700-2004-2.

**FOR FURTHER INFORMATION CONTACT:** Carolyn Holbrook, Recreation and Heritage Resources Staff, (202) 205-1399, or Melissa Hearst, Lands Staff, (202) 205-1196.

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## 1. Background

### *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 of this subpart characterizes as “special uses” 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 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 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. About 6,000 special use proposals are submitted to the agency annually by various entities wanting to

use and occupy National Forest System lands.

### *Need for Revised Rule*

The current regulation at § 251.50(d) provides that a special use authorization is not required for use of National Forest System roads and trails, unless mandated by an order issued pursuant to § 261.50 or a regulation issued pursuant to § 261.70. Two courts have construed this provision as not requiring an authorization for special uses that occur on National Forest System roads and trails and have invalidated orders issued pursuant to § 261.50 that required a permit for special uses occurring on National Forest System roads. These rulings have created a gap in regulatory coverage that is resulting in management inconsistencies for certain types of special use activities.

Additionally, the agency prefers not to regulate uses when it is unnecessary to establish terms and conditions to protect National Forest System lands and resources or to avoid conflict with agency programs or operations.

## 2. Public Comments on the Proposed Rule and Department Responses

### *Overview*

On January 22, 2003, the Forest Service published the proposed rule in the **Federal Register** (68 FR 2948) and sought public comment in adopting regulations for the revision of parts 251, 261, and 295 to clarify when a special use authorization is required. Additionally, these proposed regulatory revisions would allow the agency to exempt uses from the permit requirement when it is unnecessary to establish terms and conditions to protect National Forest System lands and resources or to avoid conflict with agency programs or operations. The proposed rule gave the authorized officer the discretion to waive the special use authorization requirement in such circumstances and specified criteria upon which the authorized officer could determine that a special use authorization is not required.

During the 60-day comment period on the proposed rule that ended on March 24, 2003, the agency received five requests for an extension of the comment period. Respondents indicated that, due to the complexity of the proposed regulations, additional time was needed. The Forest Service did not extend the comment period because the agency does not agree that the proposed regulation was complex and because litigation involving certain aspects of

the proposed rule is being stayed pending conclusion of this rulemaking.

The proposed rule was posted electronically on the World Wide Web on the **Federal Register** site at [www.gpoaccess.gov](http://www.gpoaccess.gov) and on the FirstGov e-rulemaking site at [www.regulations.gov](http://www.regulations.gov). The agency also posted the proposed rule on its World Wide Web site for special uses at [www.fs.fed.us/recreation/permits](http://www.fs.fed.us/recreation/permits). The Forest Service received 4,055 letters or electronic messages in response to the proposed rule. Each respondent was grouped in one of the following categories:

Business (association, chamber of commerce)—1  
 Commercial Recreation Permit Holder—20  
 Individual (unaffiliated or unidentifiable)—3,993  
 Multiple Use/Wise Use Organization—1  
 Other (unidentified organizational type)—3  
 Place-Based Group—1  
 Preservation/Conservation Organization—20  
 Recreational Organization—13  
 State Government—1

The 4,055 respondents represented 50 States, the District of Columbia, Puerto Rico, and 25 foreign countries.

The majority of comments were from organizations and individuals who were concerned about the environmental impact of the agency’s not requiring a permit for routine operation or maintenance of rights-of-way. Most of these comments took the form of a standard letter or a letter substantially similar to many other comment letters.

There were many comments from recreational organizations and individuals concerned about recreational use of National Forests. Two primary subcategories of this group were motorized recreational users and recreational clubs. One State agency also submitted comments.

Holders of commercial recreation permits (specifically, outfitting and guiding permits), an industry organization, and individuals representing permit holders were another well-represented group among respondents.

Some respondents offered general comments either supporting or not supporting the proposed rule. Many respondents offered specific comments about sections of the proposed rule that they would like to see revised. Many respondents offered specific comments about current regulations, other rulemaking efforts, or existing Forest Service policy that are beyond the scope of this rulemaking. Nonresponsive comments also included those comments expressing a dislike for the Forest Service or the Federal Government in general and those

comments not received in a timely manner.

Table I, which appears at the end of this final rule, has been prepared as an aid to the reader in understanding changes between the previous rule, the proposed rule, and the final rule. This table is not part of the final rule.

#### *Response to General Comments*

*Comment.* One respondent observed that research shows an overall trend of increasing recreation activities that supports finalizing this rule, and believed that the proposed rule would enhance the Forest Service's authority to manage National Forest land and resources to reduce impacts on the National Forest System.

*Response.* The Department agrees that recreation use is increasing in the National Forests. In some areas increased use has resulted in more user conflicts, increased resource impacts, and safety concerns. The rule provides the authority needed to manage special uses occurring on National Forest System roads and trails to minimize user conflicts, resource impacts, and safety concerns.

*Comment.* Several respondents observed that the current rules are working well and that there is no need to change them.

*Response.* The Department disagrees that there is no need to change the current regulations. There are several reasons for the revisions. First, an increasing number of people engaged in commercial recreation events and outfitting and guiding are relying on the regulatory gap in the current rule to conduct activities without a special use authorization. Sometimes these activities include the use of National Forest System lands outside the rights-of-way for National Forest System roads and trails. Monitoring these uses to determine whether the use is confined to a road or trail right-of-way is costly and often impractical. Requiring a special use authorization for the most common types of special uses that use and occupy National Forest System roads and trails will eliminate the need to conduct field monitoring to make such determinations.

Second, conducting one of these types of special uses on a National Forest System road or trail without an authorization exposes the United States to potential liability. Special use authorizations contain indemnification and insurance requirements and other provisions that protect the United States from claims of liability.

Third, the regulatory gap creates an uneven playing field among businesses, some of which obtain a special use

authorization and pay a land use fee, while others do not. Additionally, the public should realize a market value return for commercial uses of Federal lands, which can be achieved only by requiring a special use authorization.

*Comment.* Several respondents were concerned that the rule would decrease competition and thus would cause economic harm to their community. They believed that commercial outfitters supply needed jobs and that this rule would put some of them out of business, causing the loss of jobs.

*Response.* The Department disagrees with this assertion. It is not the intent of the rule to put entities out of business, but rather to provide for greater equity among entities that conduct special uses on National Forest System roads and trails and those that do not.

The direct effect of this final rule is to require a special use authorization for outfitting and guiding, and other specifically enumerated special uses even when those activities are conducted exclusively on National Forest System roads or trails. Therefore, as a result of the final rule, some special uses that currently do not require a special use authorization will require one.

Individuals or entities that conduct outfitting and guiding without a special use authorization (because they assert that they are conducting those activities within the confines of a National Forest System road or trail) are attracting clients and conducting a viable business because of the amenities that National Forest System landscapes and resources offer, yet they are not paying a land use fee and are not required to carry liability insurance or indemnify the United States. Those who conduct outfitting and guiding under a special use authorization must comply with its terms and conditions, which generally include paying a land use fee, carrying liability insurance, and indemnifying the United States. This disparity gives unauthorized operators an unfair economic advantage over authorized businesses.

*Comment.* One respondent stated that documents on which the agency relies to make evaluations and form conclusions should be provided.

*Response.* The rulemaking record for this final rule contains all the documents pertinent to this rulemaking. These documents are available for inspection and copying at the location listed in the **ADDRESSES** section. Any other documents requested in comments on this rulemaking are beyond the scope of rulemaking conducted pursuant to 5 U.S.C. 553(c). Respondents interested in

obtaining either category of documents may request them under the Freedom of Information Act by writing to the location listed in the **ADDRESSES** section for Freedom of Information Act requests.

#### *Proposed Rule Preamble*

*Comment.* One respondent stated that there is no regulatory gap, that the playing field is not uneven, and that any inconsistent treatment among outfitters has resulted from the agency's failure to apply the current regulation. Others observed that the proposed rule would promote consistency and fair treatment of commercial service providers and other groups using National Forest System lands, thus ensuring that the Forest Service administers the commercial use of roads and trails in a fair and equitable manner.

*Response.* The Department disagrees that there is no regulatory gap and agrees that this rule will promote consistency and fairness among commercial service providers. A number of current outfitting and guiding permit holders commented that this regulatory change will be beneficial to commercial permit holders. The regulatory gap creates an uneven playing field among businesses, some of which operate under a special use authorization and pay a land use fee, while others do not. Not paying a fee gives an unfair economic advantage to those who are not currently required to obtain a special use authorization. The value of these uses of National Forest System roads and trails is directly attributable to amenities associated with the National Forest System lands and resources these roads and trails traverse. The public should realize a market value return for these special uses of National Forests, which can be achieved only by requiring a special use authorization and assessing a land use fee.

*Comment.* One respondent stated that increased use warranting this rule change is not evident. Conversely, another respondent observed that there is now a near constant flow of traffic that has become a problem to residents. This respondent noted that commercial tour jeeps are presenting safety problems, as well as noise disturbance, and that user conflicts and resource damage are resulting from the increase in unregulated use.

*Response.* The Department does not agree that use levels do not support the need to regulate. The agency needs to regulate these uses of National Forest System roads and trails to accomplish management objectives and to reduce impacts to National Forest System lands

and resources. The demand for uses of National Forest System lands and resources has increased in recent years. Along with the increase in demand, there are growing conflicts among users and competing interests in the use of a limited land base and its resources. In some cases, the demand is so great that it is necessary to limit use. When an area becomes popular, uncontrolled use can result in land and resource impacts, user conflicts, or increased vehicular and pedestrian traffic, with associated safety concerns on National Forest System roads and trails. In several instances, the courts have ordered the Forest Service to regulate these uses when these conditions exist. Finally, site-or area-specific evaluation of use levels is not the subject of this rulemaking. Such evaluations are conducted through the forest planning or project decisionmaking process.

*Comment.* One respondent stated that intensive monitoring warranting this rule change is not evident, and another asserted that the proposed rule would increase the Forest Service's monitoring costs.

*Response.* The Department disagrees with these assertions. While organizers of recreation events or outfitters and guides may assert that their activities are confined only to a road or trail, often these activities include the use and occupancy of National Forest System lands adjacent to or well beyond the rights-of-way for those roads or trails. Determining whether a special use is confined to a road or trail right-of-way (that is, determining whether a special use authorization is necessary) requires intensive, case-specific monitoring. The final rule will eliminate the need for this monitoring by requiring a special use authorization for all six types of special uses, regardless of whether they occur on or off National Forest System roads and trails.

Monitoring a special use to determine whether it goes beyond the confines of a National Forest System road or trail, and therefore requires a special use authorization, should be distinguished from monitoring compliance with a special use authorization. There may be a modest increase in the costs of monitoring compliance with special use authorizations associated with the small increase in the number of authorizations that will be required pursuant to § 251.50(d) of the final rule. This modest increase in costs will be more than offset by the savings that will be realized by eliminating the need to monitor these six types of special uses when they occur primarily on a National Forest System road or trail, and by the other regulatory benefits

achieved through the rulemaking that were previously identified.

*Comment.* One respondent stated that the issue of invalidated closure orders is local in scope and does not warrant a change in the national rule.

*Response.* The Department disagrees with this assertion. The need to regulate special uses on National Forest System roads and trails has surfaced in several Forest Service Regions. The issuance of a May 21, 1996, letter by the Deputy Chief of the National Forest System clarifying the current regulation shows that this issue has been a concern to the agency for many years at the national level. The 1996 Washington Office letter provides that special use authorizations for special uses occurring solely on National Forest System roads and trails may be required pursuant to a forest order issued under 36 CFR part 261, subpart B. However, courts have invalidated these orders.

*Comment.* One respondent stated that a recent U.S. General Accounting Office report shows off-road vehicles, such as snowmobiles, are permitted in nearly 50 percent of the areas managed by the Forest Service. Therefore, this respondent stated that the rule is needed to put in place clear, consistent terminology to govern treatment of forest roads.

*Response.* Regulation of off-highway vehicle use is beyond the scope of this rulemaking. However, the Department agrees that clear, consistent definitions for forest road or trail, National Forest System road, and National Forest System trail are needed for this rulemaking.

*Comment.* One respondent asserted that dual-sport motorcycle events do not have significant impacts on the environment.

*Response.* The final rule will require a special use authorization for the six types of special uses, including recreation events, occurring on National Forest System roads and trails to serve the purposes identified in the proposed rule, that is, (1) promoting fairness and consistency in authorizing uses; (2) obtaining market value for the use of National Forest System lands; (3) mitigating traffic and safety concerns; (4) managing impacts on National Forest System lands and resources; (5) avoiding and resolving conflicts among users and administrative activities; and (6) requiring insurance and indemnification of the United States. The potential for impacts on National Forest System resources associated with specific recreation events, such as dual-sport motorcycle activities, and the measures needed to mitigate such impacts, are identified through a site-

specific environmental analysis in response to applications for such uses. The final rule does not change that process, which is set out in Forest Service Handbook (FSH) 1909.15.

*Comment.* One respondent stated that there would be an increase in do-it-yourself jeep touring in private or rented vehicles.

*Response.* The final rule will require a special use authorization for the six types of special uses occurring on National Forest System roads and trails. This requirement will serve the purposes identified in the proposed rule and outlined in the preceding response, that is, to promote fairness and consistency in authorizing uses, obtain market value for the use of National Forest System lands, manage impacts on lands and resources, avoid and resolve conflicts among users and administrative activities, and require insurance and indemnification of the United States. The statement that touring in private or rented vehicles will increase as a result of this requirement is speculative and thus cannot be addressed in this response.

*Comment.* One respondent stated that the Forest Service has not made a case that there are unacceptable impacts on roads resulting from the current rule.

*Response.* Mitigating adverse impacts on roads is not a rationale for this rulemaking. Rather, the final rule is intended to provide greater consistency in regulating six types of special uses of National Forest System lands, including instances in which those types of uses occur exclusively within the rights-of-way of National Forest System roads or trails.

*Comment.* One respondent stated that it is not clear how much damage is caused by commercial non-recreational activities and how much by commercial recreation groups, noncommercial groups, and individuals.

*Response.* As previously stated, addressing adverse impacts on roads and trails is not one of the reasons for this rulemaking. The Forest Service evaluates the physical impacts caused by the use of its roads and trails, user conflicts, and public safety through monitoring and site-specific environmental analyses. The agency protects its investment in these facilities through an operation and maintenance program. Additionally, the Forest Service has the authority to require those who use National Forest System roads for commercial purposes to maintain the roads commensurate with their use. Such authority is provided in the National Forest Roads and Trails Act of 1964 and is outside the scope of this rulemaking.

*Comment.* One respondent stated that if roads and trails are unsafe for motorized use or may be damaged by motorized use, they can be closed by order or regulation. Therefore, this regulation is unnecessary.

*Response.* The Department agrees that unsafe roads and trails may be closed by order or regulation, but disagrees that this authority renders the final rule unnecessary. This final rule will not regulate road use or maintenance, but will require the regulation of six types of special uses wherever they occur on National Forest System lands, including those within the rights-of-way of National Forest System roads and trails (but not of roads under the jurisdiction of a State, County, or local public road authority). Regulating special uses on National Forest System roads and trails will enable the agency to administer those uses more consistently; to obtain market value for those uses, where applicable; to manage impacts on National Forest System lands and resources; to eliminate or mitigate conflicts among users and administrative activities; and to require insurance and indemnification of the United States. It is not the purpose of this final rule to address roads and trails that are unsafe for motorized use or that may be damaged by motorized use.

*Comment.* One respondent stated that it is not likely that there is Government liability for the use of roads.

*Response.* One rationale for this rulemaking is to minimize the liability of the United States associated with special uses occurring on National Forest System roads and trails, not the liability of the United States associated with the general public's use of National Forest System roads. The Department believes that the United States has greater protection from liability when a special use occurring on National Forest System roads and trails is being conducted pursuant to a special use authorization that contains indemnification, insurance, and other liability provisions.

*Comment.* One respondent observed that the hazards posed by outfitters and guides stopping on the road to unload passengers or equipment would not be eliminated by the proposed rule change and should be addressed through issuance of orders.

*Response.* The Department disagrees with these comments and believes that a special use authorization and associated operating plan are the most effective way to address appropriate methods for outfitters and guides to operate on National Forest System roads. Moreover, Forest orders would

not address the other purposes of this rulemaking.

*Comment.* Several respondents expressed concern that it is too much to ask private citizens to indemnify the United States and carry insurance because no one can assume the risk of being in a park. These respondents believed that insurance for informal events is unaffordable and requested that the Forest Service clarify what constitutes a group event requiring insurance.

*Response.* Regulations at § 251.56(d)(1) require all holders of special use authorizations to indemnify the United States for any and all injury, loss, or damage the United States may suffer as a result of claims, demands, losses, or judgments caused by the holder's use and occupancy. Accordingly, all special use authorizations contain indemnification provisions. Many special use authorizations also contain insurance provisions that effectuate the indemnification requirement. The Department disagrees that a requirement to secure liability insurance will be burdensome for recreation events in most situations.

There is no insurance requirement for noncommercial group uses. A noncommercial group use is a special use involving 75 or more people, where no entry or participation fee is charged and no goods or services are sold. If an entry or a participation fee is charged or goods or services are sold, generally insurance will be required.

*Comment.* Several respondents were concerned that the Forest Service cannot fit permit processing into its program of work and that the proposed rule would increase, not reduce, permit workload.

*Response.* The Department acknowledges that workload in processing special use applications is an issue and is conducting a separate rulemaking to implement its statutory authority to recover costs associated with processing special use applications.

The Department disagrees that the Forest Service will not be able to undertake the workload associated with this rule. Currently the Forest Service is administering 7,322 outfitting and guiding permits and 1,911 recreation event permits. During fiscal year 2002, the Forest Service issued 2,353 outfitting and guiding permits, 971 recreation event permits, 381 commercial filming permits, 315 still photography permits, and 642 noncommercial group use permits. The agency estimates that it will receive fewer than 50 additional outfitting and

guiding special use applications and 40 additional recreation event applications annually as a result of this rule. It is unlikely that there will be much of an increase in applications for commercial filming or still photography because when these activities occur on National Forest System roads or trails, they generally involve the use of National Forest System lands outside the right-of-way for the roads or trails and therefore are already authorized under a special use authorization. There may be an increase in noncommercial group use applications as a result of this rule if organizers of recreation events, to avoid having to pay a land use fee and the cost of insurance, redesign their activities so that they are not charging entry or participation fees, thus making their activities qualify as noncommercial group uses. There will be no increase as a result of this rule in applications for special use authorizations issued under § 251.110(d) for a landowner's ingress or egress across National Forest System lands that requires travel on a National Forest System road that is not authorized for general public use, as the agency has been issuing these authorizations pursuant to 16 U.S.C. 3210(a).

#### *Specific Sections by Part*

##### Part 251—Land Uses

*Section 251.50(a).* This section of the rule defines the type of activities on National Forest System lands that are classified as "special uses."

*Comment.* One respondent stated that the word "unless" in the last sentence is confusing and may lead people to determine for themselves whether or not an authorization is required.

*Response.* The Department disagrees that the word "unless" in the last sentence needs to be changed. This language in the current rule has not been proposed for change. Section 251.50, paragraphs (c) through (e), enumerate the bases for waiver of the special use authorization requirement. Those proposing to use and occupy National Forest System lands are required under § 251.54(a) to contact the Forest Service in advance of the proposed use and occupancy, at which time applicable requirements can be discussed.

*Section 251.50(b).* This section of the rule prescribes authorization requirements during emergency situations.

*Comment.* One respondent stated that temporary occupancy of National Forest System lands in an emergency should not require a permit and suggested that "temporary" be defined as "lasting no

longer than is necessitated by the nature and character of the emergency leading to the occupancy." This respondent suggested striking the sentence, "Those temporarily occupying National Forest System lands without a special use authorization assume liability and must indemnify the United States for all injury, loss, or damage arising in connection with the temporary occupancy."

*Response.* The Department agrees that temporary occupancy of National Forest System lands without a special use authorization is appropriate in limited circumstances and subject to specific conditions, as enumerated in the final rule. The Department disagrees that temporary occupancy should never require a special use authorization.

Under the final rule, temporary occupancy without a special use authorization is allowed when necessary for the protection of life and property in emergencies, as long as a special use authorization is applied for and obtained at the earliest opportunity, unless waived pursuant to § 251.50(c) through (e). Emergency situations often last longer than originally anticipated. Requiring a special use authorization allows the agency to specify terms and conditions of the occupancy, and to require changes in the temporary occupancy for conformance to the terms and conditions.

The Department disagrees that "temporary" needs to be defined, as the rule will require those temporarily occupying National Forest System lands to obtain a special use authorization at the earliest opportunity. Moreover, in the final rule, paragraph (b) of § 251.50 has been revised to add the phrase "when necessary" as a qualifier to temporary occupancy without an authorization; the phrase "is applied for and" has been inserted before "obtained at the earliest opportunity" to clarify that a proponent must apply for a special use authorization and that the authorized officer has the discretion to decide whether to allow the use to continue. Furthermore, the Department has added to paragraph (b) the sentence "The authorized officer may, pursuant to § 251.56 of this subpart, impose in that authorization such terms and conditions as are deemed necessary or appropriate and may require changes to the temporary occupancy to conform to those terms and conditions," to clarify further that the use may be conditioned and that modifications may be required if needed.

The Department disagrees that the sentence imposing liability on the temporary occupant should be stricken. This sentence was added to the

proposed rule to clarify that the temporary occupant has liability similar to that imposed on holders of a special use authorization under § 251.56(d)(1) of the current rule.

*Section 251.50(c).* This section of the rule describes the types of noncommercial recreational activities for which a special use authorization is not required and the exceptions to those activities.

*Comment.* One respondent suggested that bicycling should be added to the list of noncommercial recreational activities for which a special use authorization is not required. Another respondent suggested that use of motorized off-highway vehicles should be added to the list. Additionally, one respondent requested that the language "or similar recreational activity" in the current regulation be retained.

*Response.* The Department disagrees with adding additional activities to the list of noncommercial recreational activities for which a special use authorization is not required. The list is not intended to be all-inclusive, but rather to identify examples of common recreational activities. Furthermore, the inclusion of mechanized and motorized activities to this list could lead to confusion in areas where mechanized and motorized equipment is prohibited, such as wild sections of wild and scenic rivers and designated wilderness areas. The phrase "or similar recreational activity" does not appear in § 251.50(c) of the current regulations.

*Comment.* One respondent requested removal of § 251.50(c)(1) from the rule.

*Response.* The Department disagrees that paragraph (c)(1) in § 251.50 of the proposed rule should be removed. This paragraph requires a special use authorization for noncommercial group uses. Other than a nonsubstantive change in sentence structure, paragraph (c)(1) of the proposed and final rules is identical to paragraph (c)(3) in the current rule. Since the requirement for a special use authorization for noncommercial group use was not proposed for change, it is beyond the scope of this rulemaking.

*Section 251.50(d).* This section of the rule addresses the need for a special use authorization for special uses occurring on National Forest System roads and trails.

*Comment.* Several respondents said that the agency should require a permit for special uses conducted on National Forest System roads and trails.

*Response.* The Department agrees. Furthermore, the Department is making a technical change to confirm its preexisting authority to issue special use authorizations under Section

1323(a) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3210(a), and 36 CFR 251.110(d). The Department is adding to the list in § 251.50(d)(1) of special uses occurring on National Forest System roads that require a special use authorization a landowner's ingress or egress across National Forest System lands that requires travel on a National Forest System road that is not authorized for general public use.

*Comment.* One respondent said that the growing impact of motorized recreation and regulation of large group activities, whether commercial or noncommercial, is a concern, and therefore it is important and necessary to require special use permits for activities involving National Forest System roads and trails.

*Response.* The Department agrees that it needs to be able to manage commercial and noncommercial special uses occurring on National Forest System roads and trails and has therefore pursued this rulemaking.

*Comment.* One respondent stated that the proposed rule would require permits for businesses that have not previously been subject to permitting.

*Response.* The final rule will require special use authorizations for some businesses that have not previously had to obtain them, such as businesses engaged in outfitting and guiding, commercial filming, and still photography exclusively within the right-of-way of a National Forest System road or trail. However, the Forest Service estimates that the number of these new authorizations will be small: 50 for outfitting and guiding, an increase of 2 percent over the current number of outfitting and guiding authorizations, and 40 for recreation events, an increase of 4 percent. The number of new commercial filming and still photography authorizations is likely to be fewer than 10 for both activities combined.

*Comment.* One respondent stated that the use of National Forest System trails must remain exempt from the requirement for a special use permit.

*Response.* The Department disagrees that special uses occurring on National Forest System trails should remain exempt from the special use authorization requirement. The Forest Service is eliminating the exemption for special uses conducted on National Forest System trails because there is a potential for resource damage on trails that may not be designed or constructed for the level or type of use that occurs. Furthermore, it is unlikely that there are commercial uses of National Forest System trails that should be exempted

from the special use authorization requirement, as there are for many uses of National Forest System roads (such as the delivery of goods within and through the National Forests). Additionally, there have been several instances where courts have ordered the Forest Service to regulate special uses on trails.

*Comment.* One respondent requested that the Forest Service specify that use on a National Forest System trail does not require a special use permit unless it is commercial in nature. Several respondents stated that special use permits should not be required for noncommercial activities.

*Response.* Under the final rule, a noncommercial activity occurring on National Forest System trails that qualifies as a special use will require a special use authorization. One of these special uses is noncommercial group use. In addition, other noncommercial uses of a National Forest System trail could require a special use authorization in certain situations, such as still photography, or pursuant to an order issued under § 261.50 or a regulation issued under § 261.70. Under current law, a special use authorization is required for still photography and noncommercial group uses. Whether a special use authorization should be required for these activities is therefore beyond the scope of this rulemaking.

*Comment.* One respondent observed that special use permits should be required for commercial activities and/or recreation events. Another respondent stated that commercial users should pay a fee or tax.

*Response.* The final rule will require a special use authorization for recreation events and other commercial special uses occurring on National Forest System roads and trails. Most commercial special use authorizations require payment of a land use fee. The regulations governing land use fees are found at § 251.57. No changes to this section of the regulation were proposed as part of this rulemaking.

*Comment.* Several respondents asserted that a permit should not be required for public roads. They believe that if a road has been built, it should be open to all for free travel and suggested that this rule is a disturbing departure from the practice of all other government agencies, which allow free access on all public thoroughfares. Several respondents asserted that events conducted on forest roads and trails should not require fees because a gas tax and fees for off-highway vehicle stickers are already paid. One respondent stated that Forest Service roads have already been paid for. Another respondent

stated that the proposed rule is just the first step to closing roads. Another stated that the requirement for permits for use of roads and trails runs counter to a Forest Service study that calls for reducing permit requirements for minor uses.

*Response.* The final rule will not require a special use authorization for use of public roads. Rather, the final rule will require a special use authorization for six types of special uses wherever they occur on National Forest System lands, including on National Forest System roads (but not on roads under the jurisdiction of a State, County, or local public road authority). This approach is consistent with that of other Federal land management agencies. For example, the Bureau of Land Management requires special recreation permits for commercial and competitive uses (43 CFR 8372.1).

The scope of this rulemaking does not include establishment of criteria for identifying which National Forest System roads should be closed or remain open.

The study being referred to, presumably, is the Forest Service's special uses reengineering study conducted in 1997. The study recommended that the Forest Service consider whether or not a special use authorization should be required for minor uses. Examples of minor uses mentioned in the study are mailboxes and private driveways. This recommendation is incorporated in paragraphs (e)(1) and (2) of § 251.50 in the final rule, which gives authorized officers the discretion to waive the requirement for a special use authorization for uses having nominal effects on National Forest System lands, resources, or programs, or for uses that are adequately regulated by another governmental entity.

However, the Department does not believe that the six special uses occurring on National Forest System roads and trails (outfitting and guiding, recreation events, noncommercial group uses, commercial filming, still photography, and a landowner's ingress or egress across National Forest System lands that requires travel on a National Forest System road that is not authorized for general public use) are minor uses. The 1997 reengineering study did not address situations where regulatory authority needs to be expanded, as is the case for uses occurring on National Forest System roads and trails that are addressed in the final rule.

*Comment.* One respondent stated that there should be no permit requirement

if people merely travel along a road and do not stop.

*Response.* of the objectives of this rulemaking is to provide greater equity in the agency's management of six types of special uses wherever they occur on National Forest System lands, including on National Forest System roads and trails (but not on roads under the jurisdiction of a State, County, or local public road authority), even if those engaging in these types of special uses do not stop along those roads or trails.

*Comment.* Several respondents proposed clarifying that the special use authorization requirement for outfitters and guides to use roads would not mandate a new or additional authorization for operations conducted on National Forest System roads or trails for which outfitters and guides already have authorizations. Accordingly, this respondent proposed adding the following to § 251.50(d): "If a guiding or outfitting entity already holds a special use authorization for which use of National Forest System roads and trails is a necessary or integral part of the authorized activity, no additional or supplemental permit is needed."

*Response.* The Department agrees that under the final rule, a new or supplemental special use authorization is not needed for outfitting and guiding conducted on a National Forest System road or trail that is already covered by a special use authorization or that may be covered by an amendment to an existing special use authorization. However, the Department disagrees that the language in paragraph (d)(1) should be revised. Training of special use permit administrators is a more appropriate way to achieve agency consistency in application of the final rule with respect to the issue identified in this comment.

*Comment.* Several respondents asserted that outfitters and guides should have to pay only a special use fee and not a road use fee. One respondent suggested clarifying that no special fee or assessment other than applicable special use permit fees would be assessed on outfitters and guides for the use of these roads.

*Response.* The authority in the final rule to regulate special uses occurring on National Forest System roads will not supplant Forest Service authority to regulate road use and to require commercial users to perform or pay for maintenance made necessary by their use of National Forest System roads under applicable laws, including the National Forest Roads and Trails Act of 1964 (FRTA). Rather, these two sets of authorities are complementary with

respect to activities occurring on National Forest System roads. For example, a separate road use permit could be issued to an entity (pursuant to FRTA and corresponding direction in Forest Service Manual (FSM) 7731.16 and Forest Service Handbook (FSH) 7709.59, section 24) concerning the responsibilities for commensurate maintenance made necessary by the entity's commercial use of a road, coincidentally with a special use authorization issued under the final rule. Alternatively, the operation and use of the road for commercial purposes, including terms and conditions that address cost-sharing for road maintenance, could be incorporated into a special use authorization issued under the final rule, which also would include a citation of the appropriate statutory authorities concerning road maintenance requirements.

*Comment.* The Forest Service cannot require a permit for activities conducted totally off National Forest System lands.

*Response.* The Forest Service generally does not regulate uses occurring entirely off National Forest System lands. Special uses conducted on National Forest System roads and trails are on National Forest System lands.

*Comment.* Several respondents stated that it is not clear which roads will require a permit and that it is not clear how commercial bus drivers will know when they have crossed onto Bureau of Land Management, State, or county roads.

*Response.* First, this final rule will require a special use authorization for five types of special uses wherever they occur on National Forest System lands, including on National Forest System roads and trails (but not on roads under the jurisdiction of a State, County, or local public road authority).

Second, the Department disagrees that it will be difficult to determine whether a special use authorization is required under the final rule. To comply with the special use authorization requirement under the final rule, it will not be necessary to know where National Forest System roads end and roads under other jurisdictions begin. It will be necessary to know only whether a noncommercial group use, recreation event, outfitting and guiding activity, commercial filming activity, or still photography activity, as defined in § 251.51 of the final rule, will be conducted in whole or in part on a National Forest System road. If so, a special use authorization will be required. National Forest System roads are enumerated in the forest

transportation atlas for each National Forest (§ 212.2) and are commonly posted along the roadway with Forest Service signs. In addition, National Forest maps distinguish National Forest System roads from other types of roads through the use of symbols and colors.

*Comment.* One respondent observed that the proposed rule narrows the exemption from the permit requirement for roads and eliminates the exemption from the permit requirement for trails, but noted that the Forest Service designates some facilities as trails that could be considered roads.

*Response.* Regulations for the classification and management of roads and trails are found at 36 CFR part 212 and are beyond the scope of this rulemaking.

*Comment.* Several respondents observed that §§ 212.6, 251.53, and 251.54 and part 261 distinguish between road use and land use. One respondent commented that the regulation should clarify when a particular use should be regulated by a special use permit and when it should be subject to a cost-share agreement. Another respondent stated that use of the road network should not require a permit.

*Response.* The Department agrees that road use and land use are distinct and separate. However, special uses are land uses regardless of whether they occur on or off roads and trails. Under this final rule, the Forest Service will require special use authorizations and the fees for those authorizations under statutes governing use and occupancy of National Forest System lands.

Specifically, for occupancy and use of National Forest System lands, the Forest Service will require special use authorizations and charge land use fees for commercial filming and still photography under the Act of May 26, 2000, 16 U.S.C. 460J–6d, for outfitting and guiding and recreation events under the Land and Water Conservation Fund Act, 16 U.S.C. 460J–6a(c), and for a landowner's ingress or egress across National Forest System lands that requires travel on a National Forest System road that is not authorized for general public use under Section 1323(a) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3210(a). Permits for noncommercial group uses will be issued under the agency's Organic Act, 16 U.S.C. 551. No fee is assessed for noncommercial group use permits. Further authority for assessing land use fees is found in the Independent Offices Appropriations Act, 31 U.S.C. 9701, Office of Management and Budget Circular No. A–25, and § 251.57(a). For most types of special uses, land use fees are assessed

annually. For temporary uses of less than one year, the land use fee is commonly assessed upon issuance of the authorization. These fees are based upon the market value of the authorized use of National Forest System lands.

The use, operation, and maintenance of National Forest System roads are regulated under separate authority at 16 U.S.C. 532 *et seq.* and 36 CFR part 212. When appropriate, commercial users may be required to contribute to the cost of road maintenance and reconstruction. For holders of special use authorizations, contributing to these costs may be accomplished by adding appropriate clauses to their authorization or by issuing a separate road use permit. To clarify the distinction between road use permits and special use authorizations, the Department has added “sharing use of roads (part 212)” to the list of uses not considered special uses in § 251.50(a).

*Comment.* One respondent pointed out that FSM 2719 and 2734.4 do not require a permit for the commercial use of forest development roads unless closed by order.

*Response.* The Department agrees that there is a discrepancy between the final rule and FSM 2719, paragraph 7. In addition, the Department believes that the introductory text to FSM 2719 is unclear and that paragraph 6 of FSM 2719 needs to be revised to be more consistent with the corresponding regulation at 36 CFR 251.50(c) and to reflect that noncommercial group use and still photography are not exempted from the special use authorization requirement. Consequently, the introductory text and paragraphs 6 and 7 will be revised, a new paragraph 8 will be added, and current paragraphs 8, 9, and 10 will be renumbered. The revised text of FSM 2719 reads as follows:

“Consult with the Office of the General Counsel on a case-by-case basis to confirm that a special use authorization is not required for a proposed use in any of the following categories:

“6. Noncommercial recreational activities, such as camping, picnicking, hiking, fishing, hunting, horseback riding, and boating, as well as noncommercial activities involving the expression of views such as assemblies, meetings, demonstrations, and parades, except for noncommercial group use and still photography. Noncommercial recreational activities that are exempted from the requirement for a special use authorization may require payment of a prescribed fee for use or occupancy of sites having an established schedule of fees.

"7. Temporary occupancy of National Forest System lands without a special use authorization when necessary for the protection of life and property in emergencies, if a special use authorization is applied for and obtained at the earliest opportunity, unless waived pursuant to Title 36, Code of Federal Regulation, section 251.50, paragraphs (c) through (e)(3) (36 CFR 251.50(c) through (e)(3)).

"8. Travel on National Forest System roads, unless the travel is for the purpose of engaging in a noncommercial group use, outfitting and guiding, a recreation event, commercial filming, or still photography, as defined in 36 CFR 251.51, for a landowner's ingress or egress across National Forest System lands that requires travel on a National Forest System road that is not authorized for general public use, pursuant to 36 CFR 251.110(d), or authorization of that use is required by an order issued under 36 CFR 261.50 or by a regulation issued under 36 CFR 261.70."

Additionally, the Department agrees that there is a discrepancy between the final rule and FSM 2734.4. Therefore, FSM 2734.4 will be revised to read as follows:

"Regulations at Title 36, Code of Federal Regulations, section 212.5(a)(1) (36 CFR 212.5(a)(1)) provide that traffic on National Forest System roads is subject to State laws where applicable, except when in conflict with the rules established under 36 CFR part 261. Regulations at 36 CFR 212.5(a)(2) enumerate specific traffic rules that apply on National Forest System roads unless different rules are established in 36 CFR part 261.

"Special use authorizations are not necessary for travel on National Forest System roads, unless:

"1. The travel is for the purpose of engaging in a noncommercial group use, outfitting and guiding, a recreation event, commercial filming, or still photography, as defined in 36 CFR 251.51, or for a landowner's ingress or egress across National Forest System lands that requires travel on a National Forest System road that is not authorized for general public use, pursuant to 36 CFR 251.110(d); or

"2. A special use authorization is required by an order issued under 36 CFR 261.50 or by a regulation issued under 36 CFR 261.70.

"Special use authorizations issued pursuant to 36 CFR part 251, subpart B, should be distinguished from road use permits that are issued pursuant to 16 U.S.C. 532 and 36 CFR part 212. Road use permits may be issued for such activities as construction,

reconstruction, grading, or snow removal.

"Special use authorizations are required for special uses conducted on National Forest System trails. The use of motor vehicles is prohibited on the Appalachian Trail, Pacific Crest Trail, and other Congressionally designated trails pursuant to 16 U.S.C. 1246(c) and on trails within Congressionally designated wilderness areas pursuant to 36 CFR 261.16. Motor vehicle use in other areas may be prohibited or restricted pursuant to 36 CFR 261.12 and 261.55."

*Comment.* One respondent indicated that land use fees should not be grouped with road use fees because they are determined differently. Additionally, this respondent stated that it is not clear how market value would be determined for land use and road use.

*Response.* The Department agrees that land use fees should not be grouped with cost-sharing for road maintenance, and emphasizes that they are separate types of assessments. Forest Service regulations already provide for assessment of land use fees for special use authorizations at § 251.57. These fees are charged under various authorities, and fee systems have been established for the various types of special uses in FSM 2710 and 2720. There is no fee for noncommercial group use. The authority for cost-sharing for road maintenance is independent of the authorities to assess land use fees and accordingly is implemented under separate regulations at 36 CFR part 212.

*Comment.* Respondents asserted that the proposed rule would limit public access, would limit access for seniors and low-or fixed-income visitors, would limit access for church groups and charities, would restrict access to National Forest System roads and trails, or would eliminate most group travel activities. Other respondents suggested that the proposed rule would end use of National Forest System roads and trails by organized dual-sport events.

*Response.* The Department disagrees that the final rule will limit access to National Forest System lands in any of the ways identified in these comments. Rather, the final rule merely requires a special use authorization for six types of special uses wherever they occur on National Forest System lands, including on National Forest System roads and trails (but not on roads under the jurisdiction of a State, County, or local public road authority).

*Comment.* One respondent stated that "use of" should not be changed to "travel on."

*Response.* The Department disagrees with this comment. There are other activities associated with roads that are subject to the special use authorization requirement, such as construction of a road authorized under an easement. Substituting "travel on" for "use of" clarifies the agency's intent not to exempt these activities from the special use authorization requirement. Moreover, "travel on" more clearly describes the type of use of roads associated with noncommercial group use, outfitting and guiding, recreation events, commercial filming, still photography, and a landowner's ingress or egress across National Forest System lands that requires travel on a National Forest System road that is not authorized for general public use.

*Comment.* Several respondents requested that the Forest Service not include in paragraph (d)(1) one or more of the following: noncommercial group use, recreation events, and still photography.

*Response.* The Department does not agree that noncommercial group use, recreation events, and still photography conducted on National Forest System roads and trails should be exempted from the special use authorization requirement. Each of these uses has characteristics that warrant management wherever these uses occur in the National Forest System, including on National Forest System roads and trails (but not on roads under the jurisdiction of a State, County, or local public road authority). Regulating these uses when they are conducted on National Forest System roads and trails meets the objectives of this rulemaking.

*Section § 251.50(e).* This section of the rule provides additional criteria to the authorized officer for determining when a special use authorization is required.

*Comment.* Several respondents requested removal of the phrase "other than noncommercial group use."

*Response.* The Department disagrees that the phrase "other than noncommercial group use" should be removed from the introductory text of paragraph (e). The Department does not intend the waiver provisions in paragraph (e) to apply to noncommercial group use. The criteria for waiver in paragraph (e) involve the exercise of discretion by the authorized officer. If these criteria were applied to noncommercial group use, they could render the permitting scheme for noncommercial group use unconstitutional. The criteria for requiring a special use permit for noncommercial group use are clearly

articulated elsewhere in part 251, subpart B.

*Comment.* Several respondents stated that there are no guidelines for the criteria for determining when a special use authorization is needed.

*Response.* The Department agrees that there is some ambiguity as to the basis upon which a determination to waive the special use authorization requirement will be made under paragraph (e) of § 251.50. Consequently, the Department is proposing to add "based upon a review of a proposal" to the introductory text of paragraph (e), so that it reads as follows: "For proposed uses other than a noncommercial group use, a special use authorization is not required if, based upon a review of a proposal, the authorized officer determines that the proposed use has one or more of the following characteristics." This revision will ensure that the authorized officer is provided sufficient information about the proposed activity to determine whether a special use authorization is required.

*Comment.* One respondent stated that the proposed rule at paragraph (e) conflicts with § 261.10(a), which prohibits constructing, placing, or maintaining any kind of road, trail, or facilities on National Forest System lands without a special use authorization, contract, or approved operating plan.

*Response.* The Department agrees that there is a conflict between paragraph (e) in the proposed rule and § 261.10(a). Therefore, § 261.10(a) is being modified to read as follows: "Constructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure, communications equipment, or other improvement on National Forest System lands or facilities without a special use authorization, contract, or approved operating plan, unless such authorization, contract, or operating plan is waived pursuant to § 251.50(e) of this chapter."

*Comment.* The permit requirement should not be waived. Rather a permit should be required so that the activity will be subject to the National Environmental Policy Act (NEPA). It is the Forest Service's responsibility to review all project proposals for environmental impacts.

*Response.* Under the Forest Service's special use regulations at 36 CFR 251.54(e)(6) and (g)(1) and (2), environmental analysis under NEPA is not required until a special use proposal has met two levels of screening criteria. Paragraph (e)(3) of § 251.50 applies to special use proposals at the initial level of screening.

The Department appreciates the importance of compliance with NEPA and stresses that paragraph (e) is not intended to circumvent NEPA in any way. Rather, paragraph (e) is intended to dispense with the requirement for a special use authorization in specifically identified circumstances based on a case-specific determination by the Forest Service that there is no programmatic need for the authorization.

*Section 251.50(e)(1).* This section of the rule provides for waiver of the special use authorization requirement for uses with nominal effects.

*Comment.* Several respondents stated that the term "nominal" is vague and that a definition should be provided. Another stated that "nominal effects" is unclear. Yet another stated that research scientists should determine whether effects are nominal.

*Response.* The Department disagrees that the phrase "nominal effects" needs to be defined in this regulation. There is adequate guidance on effects in the Forest Service's Environmental Policy and Procedures Handbook (FSH 1909.15) and Forest Service Manual (FSM) 1950.

*Comment.* One respondent proposed that ornithological research be exempt from the permit requirement.

*Response.* The Department disagrees that ornithological research should be categorically exempt from the special use authorization requirement. Whether a specific ornithological research project is exempt from the special use authorization requirement would be determined based on the characteristics of that proposal in accordance with § 251.50(e) of the final rule.

*Comment.* One respondent stated that the phrase "necessary to establish terms and conditions in a special use authorization \* \* \* to avoid conflict with National Forest System programs" most likely would be interpreted by the Forest Service to include any permitted outfitting and guiding operation, so that no proposed outfitting and guiding use would ever qualify for an exemption from the authorization requirement if it is perceived to be in competition with the activities of a permitted outfitter and guide.

*Response.* The Department disagrees with this characterization of how the Forest Service will interpret § 251.50(e)(1) of the final rule. Generally, outfitting and guiding will not qualify for an exemption from the special use authorization requirement under paragraph (e)(1) because an outfitting and guiding use generally has more than nominal effects on National Forest System lands, resources, and

programs. For purposes of paragraph (e)(1), an example of the need to establish terms and conditions in a special use authorization to avoid conflict with agency programs or operations is when a proposed use would conflict with other uses or administrative use by the Forest Service.

*Section 251.50(e)(2).* This section of the rule provides for waiver of the special use authorization requirement for uses that are adequately regulated by a State agency or other Federal agency.

*Comment.* Several respondents stated that the Forest Service should not waive the permit requirement for activities that are regulated by State or other Federal agencies.

*Response.* The Department disagrees with this comment. In 1997 the Forest Service completed a reengineering study of its special uses program that recommended managing special uses in a more businesslike manner. The study found that authorizations are being issued for some special uses that are being regulated by other agencies in a manner that adequately protects National Forest System lands and resources and that avoids conflict with National Forest System programs or operations. The final rule will provide that if an authorized officer concludes that a use is being regulated by another Federal or State agency in a manner that adequately addresses National Forest System lands, resources, and management concerns, the authorized officer may waive the requirement for a special use authorization.

*Comment.* One respondent suggested adding "or other Forest Service authorization or use agreement" to the items that do not require a permit. Another suggested exempting from the permit requirement operations like grooming of snowmobile trails that are covered by an agreement.

*Response.* The Department believes that it would be unnecessary to add special uses that are already covered under a special use authorization to the provision in paragraph (e)(2) waiving the special use authorization requirement. Rather, the Department will emphasize to special use administrators that redundancy in permitting is not appropriate. It would not be appropriate to add "use agreement" to the waiver provision in paragraph (e)(2) because agreements, such as memoranda of understanding or memoranda of agreement, do not constitute special use authorizations. It also would not be appropriate to add grooming of snowmobile trails to the provision in paragraph (e)(2) because grooming of snowmobile trails is not always regulated by another

governmental entity and it is an activity that the Forest Service needs to regulate. This particular activity can be authorized in one of many ways. When the snowmobile trails to be groomed coincide with alignment of a National Forest System road, the activity could be authorized by a road use permit. More commonly, the activity is authorized by either a special use authorization issued specifically for the grooming activity, or by adding provisions to a special use authorization (or its operating plan) for another type of special use when, for example, the grooming activities are ancillary to the operation of a larger special use (such as a ski area or winter resort).

*Section 251.50(e)(3).* This section of the rule provides for waiver of the special use authorization requirement for routine operation or maintenance activities within the scope of an R.S. 2477 or R.S. 2339 right-of-way or within the express scope of a documented linear right-of-way that is not located in a Congressionally designated wilderness area.

*Comment.* Several respondents stated that claimed R.S. 2477 rights-of-way have been proven not to exist and that the existence of such a right-of-way is something a field official may be unable to determine without legal research. These respondents believed that claimants may assert rights that cannot be verified and that there is no requirement in the proposed rule that the claimed right-of-way be proven to exist on the ground before bulldozing can occur. One respondent expressed support for paragraph (e)(3) in the proposed rule because it would streamline the means to maintain R.S. 2477 rights-of-way. Several respondents stated that the proposed rule failed to define "within the scope" of an R.S. 2477 right-of-way and that the proposed rule did not specify the standards to be used to determine what is within the scope of an R.S. 2477 right-of-way.

Many respondents stated that it was not clear how the Forest Service would determine what constitutes a valid property right. They believed that the proposed rule fails to define the terms "outstanding statutory right" and "outstanding property right," and that the latter term could refer to a property right that has not been finally adjudicated or decided. Several respondents indicated that it is not clear whether "within the scope" refers to a clearly articulated activity specified within a "valid reserved, granted, or outstanding property right, such as a right-of-way, easement, or reservation," or whether the definition allows for a

vague, general set of activities not directly specified in a property right.

One respondent expressed concern with the maintenance and improvement of rights-of-way in Congressionally designated wilderness and inventoried roadless areas and on other important public lands, such as national wild and scenic river corridors.

Another respondent stated that it is unclear how the Forest Service could be cognizant of a right-of-way holder's activities if the Forest Service concludes that an authorization is generally not required. Another stated that waiving the requirement for a special use authorization for certain operation or maintenance activities associated with property rights constitutes a give-away to industry. Several respondents believed that authorized officers should not be empowered to make a decision pertaining to what constitutes a routine operation or maintenance activity within the scope of a valid reserved or outstanding property right. Many respondents believed that the Forest Service should continue to require a special use permit for maintenance activities conducted within the scope of rights-of-way to protect land, streams, and wildlife habitat. These respondents believed that decisions to authorize operation or maintenance of R.S. 2477 rights-of-way should be subjected to public notice and comment pursuant to NEPA and expressed opposition to the exemption from the permit requirement in paragraph (e)(3).

Many respondents believed that the proposed rule fails to delineate or define what would constitute operation or maintenance, as opposed to construction, and stated that the proposed rule provides no guidance on or explanation of "routine." One respondent stated that part 212 defines maintenance, but that these rules generally apply only to Forest Service numbered routes that are considered part of the Forest Service's road system, and thus do not apply to R.S. 2477 rights-of-way. Another respondent asked whether property right holders would be required to propose activities that are considered to be routine operation or maintenance within the scope of a right-of-way, or just those that are considered to be other than routine operation or maintenance or outside the scope of an existing right.

*Response.* The Department wishes to clarify that the criteria for determining whether an R.S. 2477 right-of-way has been established are beyond the scope of this rulemaking. Rather, only R.S. 2477 rights-of-way that have been adjudicated by a court or otherwise recognized by the Forest Service will be

subject to the waiver provision in paragraph (e)(3).

The Department agrees that clarification of paragraph (e)(3) is needed. The word "right" in the proposed rule has been replaced with "right-of-way" in the final rule to describe more clearly the nature of R.S. 2477 and R.S. 2339 rights-of-way. Additionally, the final rule adds the phrase "routine operation or maintenance within the express scope of a documented linear right-of-way" and adds a definition for linear right-of-way to delineate more clearly those activities that may be exempt from the special use authorization requirement. The word "outstanding" is superfluous and has been removed. Finally, the Department agrees that property interests located within Congressionally designated wilderness areas require closer scrutiny and that activities conducted in exercising those property interests should not be included in the exemption from the requirement for a special use authorization pursuant to paragraph (e)(3) of the final rule. Therefore, the phrase "the proposed use is not situated in a Congressionally designated wilderness area" has been added in the final rule to limit the waiver to those R.S. 2477 and R.S. 2339 rights-of-way and documented linear rights-of-way that are not located in a Congressionally designated wilderness area.

Consequently, in the final rule, § 251.50(e)(3) reads as follows: "The proposed use is not situated in a Congressionally designated wilderness area, and is a routine operation or maintenance activity within the scope of a statutory right-of-way for a highway pursuant to R.S. 2477 (43 U.S.C. 932, repealed Oct. 21, 1976) or for a ditch or canal pursuant to R.S. 2339 (43 U.S.C. 661, as amended), or the proposed use is a routine operation or maintenance activity within the express scope of a documented linear right-of-way."

The Department disagrees that a special use authorization should be required for routine operation or maintenance activities within the scope of these rights-of-way. Paragraph (e)(3) of the final rule identifies uses for which the special use authorization requirement may be waived. Under paragraph (e)(3) of the final rule, routine operation or maintenance activities that are not in a Congressionally designated wilderness area and that are within the scope of an R.S. 2477 or R.S. 2339 right-of-way or within the express scope of a documented linear right-of-way will not be subject to the requirement for a special use authorization. The Department has determined that

waiving the authorization requirement in this context not only will improve management efficiency, but also will demonstrate recognition of those rights and privileges that have been granted by statute under R.S. 2477 or R.S. 2339 or that are exercised under easements, deeds, or reservations for linear rights-of-way.

The Department does not believe that the activities covered by paragraph (e)(3) should be subject to public notice and comment in connection with NEPA compliance. These types of activities are typically categorically excluded from documentation in an environmental assessment or environmental impact statement under FSH 1909.15, chapter 30.

The Department agrees that under paragraph (e)(3) of the proposed rule there was some ambiguity as to whether right-of-way holders are required to propose for the authorized officer's review activities that are considered to be routine operation or maintenance within the scope of a right-of-way, or just those that are considered to be other than routine operation or maintenance or outside the scope of a right-of-way. Both sets of activities must be proposed for the authorized officer's review. The Forest Service, not the right-of-way holder or applicant, has the authority to determine whether a special use authorization is required. To underscore this point, the Department is adding "based upon a review of a proposal" to the introductory text of § 251.50(e), so that it reads as follows: "For proposed uses other than a noncommercial group use, a special use authorization is not required if, based upon a review of a proposal, the authorized officer determines that the proposed use has one or more of the following characteristics" (the subsequent paragraphs (e)(1) through (e)(3) set out the characteristics). This revision makes it explicit that authority to determine whether a special use authorization is necessary continues to rest with the Forest Service. In addition, the revision ensures that the authorized officer is provided sufficient information about the proposed activity to determine whether a special use authorization is required.

The Department agrees that clarification of "routine operation or maintenance" is needed, but disagrees that this clarification needs to be in the final rule. Therefore, the agency is adding to FSM 2719, paragraph 10, examples of what constitutes routine operation or maintenance within the scope of an R.S. 2477 or R.S. 2339 right-of-way or within the express scope of a documented linear right-of-way.

Paragraph 10 of FSM 2719 has been renumbered to fit the sequence of previously referenced revisions to this section of the FSM made necessary by this rulemaking and has been revised to read as follows:

"10. *Routine Operation and Maintenance Activities Within the Scope of a Statutory Right-of-Way or Documented Linear Right-of-Way.* Routine operation and maintenance activities within the scope of a statutory right-of-way for a highway pursuant to R.S. 2477 (43 U.S.C. 932, repealed Oct. 21, 1976) or for a ditch or canal pursuant to R.S. 2339 (43 U.S.C. 661, as amended), or routine operation or maintenance activities within the express scope of a documented linear right-of-way, when these uses do not occur within a Congressionally designated wilderness area. A formal grant or document is not required under these authorities. Observe the boundaries that existed at the time the grant was accepted, unless State law existing at the time of acceptance provides for a different width.

"a. *Routine Operation or Maintenance Activities Within the Scope of R.S. 2477 Right-of-Way.* Routine operation or maintenance activities within the scope of a statutory right-of-way for a highway pursuant to R.S. 2477 include a variety of activities to preserve the integrity and safe use of the road, such as surface rock replacement; grading; snow removal; seal coats and asphalt overlays; culvert and bridge replacements; removal of rock and landslides from the road prism; repair of washouts and other damage from erosion; and the installation and maintenance of signs and other devices for traffic control, information, and safety.

"b. *Routine Operation or Maintenance Activities Within the Scope of R.S. 2339 Right-of-Way.* Routine operation or maintenance activities within the scope of a statutory right for a ditch or canal pursuant to R.S. 2339 include such activities as recurrent removal and deposition of silt and sediment from fish screens, diversion structures, canals, weirs, and ditches; armoring of dams, ditches, or canals with rocks or other protective materials to prevent or remedy damage from erosion, avalanches, or landslides; lining of ditches to prevent or repair leaks and seepage; minor cutting or pruning of vegetation within or immediately adjacent to a water development facility that might be impeding or precluding the storage, diversion, or free-flowing transmission of water; and recurrent adjustment, opening, and closing of diversions, headgates, valves, and other devices necessary to control the timing

and volume of water flows consistent with the use of the water being stored, diverted, and transmitted within the right-of-way.

"c. *Activities That Require a Special Use Authorization.* A special use authorization is required for any activities other than routine operation or maintenance, such as construction or reconstruction, that are within the scope of an R.S. 2477 or R.S. 2339 right-of-way or within the express scope of a documented linear right-of-way. A special use authorization is also required for any activities (including operation, maintenance, construction, or reconstruction) that are outside the scope of an R.S. 2477 or R.S. 2339 right-of-way or outside the express scope of a documented linear right-of-way."

*Section 251.51 Definitions.* This section of the rule defines technical terms contained in the rule.

*Commercial filming.* No comments were received on the definition of commercial filming.

*Forest road or trail.* No comments were received on this definition in part 251. However, extensive comments were received on this definition in part 261. The response to these comments appears in the following discussion of comments under part 261—Prohibitions at § 261.2. This definition has not been changed in the final rule.

*Guiding. Comment.* One respondent stated that the definition of guiding is too broad. Another stated that an exemption should be made for guiding by noncommercial, nonprofit organizations. Another commented that guiding should not include direction, instruction, or interpretation by nonprofit organizations in exchange for a donation to that organization.

*Response.* The Department disagrees that the definition of guiding in this rule is too broad. The definition of guiding in this rule is the same as the definition of guiding in FSH 2709.11, section 43.53c, which was published in the **Federal Register** for public notice and comment (55 FR 14445, April 18, 1990; 60 FR 30830, June 12, 1995).

The Department also disagrees that an exemption to the definition for guiding should be made for nonprofit entities. Nonprofit entities engaging in outfitting and guiding activities as defined by the final rule and agency policy are considered to be outfitters and guides. The policy governing administration of outfitting and guiding permits specifically refers to institutional and semi-public outfitting and guiding (FSH 2709.11, sec. 41.531). The land use fee policy for outfitters and guides specifically refers to fees for nonprofit organizations and educational

institutions (FSH 2709.11, sec. 37.21j and 37.21k). Both of these policies were published in the **Federal Register** for public notice and comment (55 FR 14445, April 18, 1990; 60 FR 30830, June 12, 1995).

The Department also disagrees that an exemption to the definition for guiding should be made for noncommercial group activities. Noncommercial group activities with fewer than 75 people do not require a special use authorization. Noncommercial group activities involving 75 or more people require a noncommercial group use permit.

*National Forest System road.*

*Comment.* One respondent stated that the terms "National Forest System road" and "National Forest System trail" are not defined in 36 CFR part 212. Another stated that definitions for these terms must be deduced from § 212.20.

*Response.* The Department concurs that "National Forest System road" and "National Forest System trail" are not defined in 36 CFR part 212. They are currently defined in § 261.2. The final rule modifies the definitions for National Forest System road and National Forest System trail in § 261.2 to make them consistent with 23 U.S.C. 101. National Forest System road is also defined in FSM 7705.

*Noncommercial Use or Activity and Group Use. Comment.* Several respondents stated that the Forest Service should clearly define noncommercial group use. Another stated that the two separate definitions for noncommercial use or activity and group use should be combined. One respondent commented that 50 to 100 riders should not trigger the permit requirement. Another stated that noncommercial group use should be defined as "an organized and publicized activity expected to attract 100 or more persons and the use of National Forest System lands, resources, or facilities, except where only National Forest System roads and/or trails will be used, with no minor and incidental use of National Forest System lands, resources, and/or facilities." One respondent stated that the definition for group use should be removed from the current regulation, and that group use should be revised to clarify that it means 75 or more people at one time. Another stated that noncommercial group use is targeted. One respondent recommended changing the definition for commercial use or activity to "any use or activity on National Forest System lands (a) where an entry or participation fee is charged, except where such entry or participation fee is less than \$5.00 per user, or (b) where the primary purpose is the sale of a good or service, and in either case,

regardless of whether the use or activity is intended to produce a profit."

*Response.* The definitions for commercial use or activity, group use, and noncommercial use or activity were not proposed for change in this rulemaking and are therefore beyond its scope. The definition for group use has been included in the regulation at § 251.51 since 1995 and has been very successfully applied in the context of the special uses program. This definition is a key component of the special use authorization requirement for noncommercial group uses. The Department disagrees that noncommercial group use should be defined in such a way as to exclude activities that occur on National Forest System roads or trails. For the reasons previously identified for revising § 251.50(d), the Department believes that regulating special uses occurring on National Forest System roads and trails, including noncommercial group uses, is appropriate. Noncommercial group use is not targeted in any way in the final rule. To the contrary, for purposes of the special use authorization requirement in the final rule, noncommercial group use is treated equally with outfitting and guiding, commercial filming, still photography, and recreation event special uses that are conducted on National Forest System roads or trails. The definition for commercial use or activity is beyond the scope of this rulemaking and does not warrant any revision.

*Outfitting.* No comments were received on the definition of outfitting.

*Recreation event. Comment.* One respondent stated that the definition for recreation event should be revised to exclude events when entry fees only recover costs. One respondent stated that donations should not be considered an entry fee. Another stated that recreation events should not require a permit. Another commented that a permit should not be required for non-speed competitive events, but that a permit should be required for speed competitive events, unless only one person is participating. This respondent also stated that marking a course should require a permit.

*Response.* The Department disagrees that the definition for recreation event should exempt events that limit entry fees to amounts that only recover event costs. The Department also disagrees that donations should not be considered an entry fee. The definition for recreation event tracks the definition for commercial use or activity in the current regulations and is based on current agency policy and practice. The definition in the current regulations

does not exempt certain types of events or provide that donations should not be considered entry fees. In addition, exempting events when entry fees only recover event costs or when a donation, rather than an entry fee, is collected would require the Forest Service to engage in an intensive, fact-specific inquiry to determine whether a recreation event requires a special use authorization.

*Comment.* One respondent believed that under the proposed rule, any recreational activity for which an entry or participation fee is charged would be treated as commercial and would require a permit. Another stated that unorganized groups are not commercial and should not be treated as commercial. Another stated that the definition for commercial use should be revised to exclude events conducted by nonprofits. Several respondents stated that permits and fees should not apply to certain nonprofit and noncommercial organizations. A respondent commented that volunteer work should be excluded from a permit requirement. Another stated that event preparation often provides the Forest Service with valuable volunteer work such as trail maintenance. Another noted that organized clubs pick up trash, clear trails, and exhibit care for the land and resources because they are gratified to have the opportunity to use National Forest System lands. One respondent stated that a fee should not be charged for an organizational ride. Another respondent asserted that special use permits and fees should not be required for recreation events when there is no fee-based requirement for attendance. One respondent commented that if a group with 75 or more bikes wants to ride when no fee is to be charged and no money is to be raised, then no permit should be required. One respondent stated that permits and permit fees will create a hardship for nonprofit recreation groups. Another respondent commented that there should be an exemption for minimal-impact users such as recreational outfitters, clubs, and groups like the girl scouts, the YWCA, and seniors.

*Response.* A recreation event requires a special use authorization. In the final rule, a recreation event is any recreation activity conducted on National Forest System lands for which an entry or participation fee is charged, such as animal, vehicle, or boat races; dog trials; fishing contests; rodeos; adventure games; and fairs. Under this definition, the fee is being charged by a person or entity other than the Forest Service for participation in an organized event. An entry or participation fee for an

organized event should be distinguished from a fee charged to the public by the Forest Service for admission to or use of National Forest System lands for recreational purposes.

The Department disagrees that activities conducted by unorganized or nonprofit groups can never be commercial. Under the current regulations at § 251.51, commercial use or activity is defined as “any use or activity on National Forest System lands (a) where an entry or participation fee is charged, or (b) where the primary purpose is the sale of a good or service, and in either case, regardless of whether the use or activity is intended to produce a profit.” Thus, under the final rule, any recreation activity conducted on National Forest System lands for which an entry or participation fee is charged is commercial and requires a special use authorization, regardless of whether the activity is conducted by an organized or unorganized group or by a for-profit or nonprofit entity.

Whether land use fees should be charged for particular special use authorizations is beyond the scope of this rulemaking and is already addressed in § 251.57 and agency policy. Section 251.57(b)(2) authorizes waiver, subject to certain conditions, of all or part of the land use fee for a special use authorization for nonprofit entities engaged in a public or semi-public activity to further public health, safety, or welfare. This provision recognizes and encourages the contributions these entities make to National Forest management.

Volunteers working under the supervision of the Forest Service do not require a special use authorization. Groups of fewer than 75 volunteers organized by an individual or entity other than the Forest Service to perform environmental stewardship on National Forest System lands do not require a special use authorization. If such a group has 75 or more volunteers, it would require a noncommercial group use permit. However, fees are not charged for noncommercial group use permits. If an event is organized involving 75 or more people and there is no entry or participation fee and the primary purpose is not the sale of a good or service, the event would be noncommercial, but would still require a permit as a noncommercial group use.

The Department disagrees that special use authorizations and special use authorization fees will create a hardship for nonprofit recreation groups, many of whom already hold a special use authorization. The Department does not want to create an exemption from the special use authorization requirement

for minimal-impact users. Applying such an exemption would require the Forest Service to engage in a subjective, fact-intensive inquiry as to what constitutes minimal impact. In addition, the special use authorization requirement serves other purposes besides addressing resource impacts.

*Comment.* One respondent stated that there should be two categories of permits: a one-time event permit and a yearly tour operator permit.

*Response.* The definitions in the final rule and current agency policy distinguish between one-time, short-term recreation events and noncommercial group uses versus ongoing, long-term outfitting and guiding activities. The Forest Service has the authority to issue special use authorizations for either a one-time event or for yearlong or ongoing uses and occupancies. That authority is outside the scope of this rulemaking and is not affected by this final rule.

*Still photography. Comment.* Respondents observed that still photography should not require a permit, that the proposed rule appears to extend the permit requirement to noncommercial photography, and that the rule does not differentiate “models or props” from picnic tables, volleyball nets, teepees, and campsite decorations that might show up in a photograph. They suggested that there is no apparent Governmental interest in regulating commercial filming and still photography other than for large-scale commercial filming and still photography productions.

*Response.* The Department disagrees that the definition for still photography should be modified. The Act of May 26, 2000 (16 U.S.C. 460l-6d) specifies the types of still photography that require a special use authorization on National Forest System lands. The agency’s definition of still photography in the final rule is consistent with the provisions of the act and agency policy. Pursuant to 16 U.S.C. 460l-6d and FSM Interim Directive 2720-2003-1, National Forest visitors and recreational, professional, and amateur photographers do not need a special use authorization for still photography unless the activity (1) uses models, sets, or props that are not part of the site’s natural or cultural resources or administrative facilities; (2) takes place where members of the public generally are not allowed; or (3) takes place at a location where additional administrative costs are likely. Definitions of models and props also are included in FSM Interim Directive 2720-2003-1.

The determination of when a special use authorization is required under 16 U.S.C. 460l-6d and the definition for still photography in the final rule do not depend on whether still photography is commercial or noncommercial. Thus, a noncommercial activity that meets the criteria for still photography in 16 U.S.C. 460l-6d and § 251.51 requires a special use authorization. This requirement, however, conflicts with the exemption from the special use authorization requirement for noncommercial recreation activities in § 251.50(c). To make § 251.50(c) consistent with 16 U.S.C. 460l-6d and the definition for still photography in § 251.51, the Department is adding a new paragraph (2) to § 251.50(c) to read as follows: “(2) The proposed use is still photography as defined in § 251.51 of this subpart.”

#### Part 261—Prohibitions

*Section 261.2.* This section of the rule defines technical terms contained in the rule.

*Forest road or trail. Comment.* One respondent stated that the definition of “forest road or trail” should be revised to read, “a road or trail wholly or partly within or adjacent to and serving the National Forest System, and which is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources, except those roads or trails in which another entity holds a superior right-of-way, to which roads or trails the Forest Service makes no claim of title or jurisdiction.”

*Response.* The Department disagrees with changing the definition for forest road or trail in the final rule because that definition is taken verbatim from 23 U.S.C. 101.

*National Forest System road. Comment.* One respondent suggested that the definition of National Forest System road should be revised to read, “a road under the jurisdiction of the Forest Service that is listed in the appropriate forest transportation atlas.”

*Response.* The Department disagrees that this change should be made. The Department has modified the definition for National Forest System road in § 261.2 to make it consistent with the definition for forest development road in 23 U.S.C. 101. The final rule does not remove the requirement that a National Forest System road or trail be listed in the appropriate forest transportation atlas. This requirement is set out in § 212.2.

*Comment.* One respondent stated that the new definitions for National Forest System road and National Forest System trail blur the distinction among an area,

a National Forest System road, and a National Forest System trail that is critical for law enforcement purposes. Another respondent stated that it is not clear how a road will be deemed “necessary.”

*Response.* The Department disagrees that the definitions for National Forest System road and National Forest System trail blur the distinction among an area, a National Forest System road, and a National Forest System trail. The definitions of a National Forest System road and a National Forest System trail in the final rule will simplify the determination of what constitutes a National Forest System road or trail. To qualify as a National Forest System road or trail, a forest road or trail only needs to fall under the jurisdiction of the Forest Service. No determination of the necessity of the road or trail or its inclusion in a forest transportation atlas is required.

#### *National Forest System trail.*

*Comment.* One respondent objected to replacing “forest development trail” in § 261.55 with “National Forest System trail.” This respondent stated that the term “National Forest System trail” is neither used nor defined in 23 U.S.C. 101 and, therefore, replacing “forest development trail” with “National Forest System trail” does not bring about conformance with 23 U.S.C. 101.

*Response.* “National Forest System trail” is currently defined in § 261.2. The term “National Forest System trail” in the final rule is intended to be synonymous with the term “forest development trail” in 23 U.S.C. 101. Therefore, the Department has modified the definition for National Forest System trail in the final rule to make it consistent with the definition for forest development trail in 23 U.S.C. 101. The Department concurs that this change in terminology is not reflected in Forest Service policy. FSM 2350 is currently being revised, and during the course of those revisions, “forest development trail” will be changed to “National Forest System trail.”

*Comment.* One respondent stated that the definition of National Forest System trail should be revised to read, “a trail under the jurisdiction of the Forest Service that is listed in the appropriate forest transportation atlas,” and observed that the revised definition removes the requirement that a National Forest System trail be listed in the appropriate forest transportation atlas.

*Response.* The Department disagrees that this change should be made. The Department has modified the definition for National Forest System trail in § 261.2 to make it consistent with the definition for forest development trail in

23 U.S.C. 101. The final rule does not remove the requirement that a National Forest System trail be listed in the appropriate forest transportation atlas. This requirement is set out in § 212.2.

*Comment.* One respondent observed that when read in conjunction with the definition of forest road or trail, the proposed definition of National Forest System trail would define a National Forest System trail as a trail under the jurisdiction of the Forest Service wholly or partly within or adjacent to and serving the National Forest System, and which is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources. This respondent objected to the proposed definition of National Forest System trail because this respondent believed that it could significantly reduce the number of forest trails that would be subject to special use regulation. This respondent noted that pioneered trails and other trails not considered “necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources” would not be included in the new definition and that therefore special uses on pioneered trails would not be subject to the special use authorization requirement under the proposed regulation.

*Response.* The terms “forest development trail” and “National Forest System trail” are synonymous. The final rule defines “National Forest System trail” as a forest trail under the jurisdiction of the Forest Service.

The Department disagrees that the definition for National Forest System trail in the final rule creates an exemption from the permit requirement for special uses on pioneered and other trails that are not National Forest System trails. The final rule will remove National Forest System trails from the exemption from the special use authorization requirement in § 251.50(d). Special uses on National Forest System lands, including special uses conducted on National Forest System and non-National Forest System trails, will require a special use authorization under the final rule. Therefore, it is immaterial whether pioneered trails are National Forest System trails for purposes of applicability of the permit requirement in the final rule. A special use occurring on a pioneered trail will require a special use permit.

*Section 261.55.* This section of the rule changes “forest development trail” to “National Forest System trail” in the heading and introductory text.

No comments were received on this section.

#### Part 295—Use of Motor Vehicles Off National Forest System Roads

No comments were received on this part.

#### *Regulatory Certifications in the Proposed Rule*

##### Environmental Impact

*Comment.* Two respondents asserted that the agency did not follow applicable environmental policy and procedures for this rulemaking and that scoping for this rulemaking was inadequate. One respondent stated that there is no categorical exclusion that applies to this rulemaking and that extraordinary circumstances are implicated by this rulemaking.

*Response.* The Department has determined that this final rule falls within the category of actions excluded from documentation in an environmental assessment or environmental impact statement (FSH 1909.15, section 31.1b). This provision 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. No extraordinary circumstances enumerated in the Forest Service NEPA procedures exist in conjunction with this rulemaking that would preclude reliance on this categorical exclusion. Issuance of a special use authorization for a specific use as provided in this rule, however, may trigger the need for documentation of environmental analysis on a case-by-case basis under NEPA.

##### Regulatory Impact

*Comment.* Several respondents asserted that the proposed rule would have significant economic impacts on a substantial number of small businesses and that its economic effects would exceed the \$100 million threshold for determining that effects are insignificant under the Regulatory Flexibility Act.

*Response.* Section 251.50(d) of the final rule requires a special use authorization and land use fee for special uses conducted on National Forest System roads and trails. The net regulatory effect of this section of the final rule is the difference between the current special uses program and the special uses program under the final rule. The following is a breakdown of the revenue generated nationally by the special uses affected by § 251.50(d) of the final rule:

Commercial Filming and Still Photography—  
\$ .2 million  
Noncommercial Group Use—No fee  
Outfitting and Guiding—\$4.5 million  
Recreation Events—\$ .4 million

The Forest Service estimates that there will be a 2 percent increase in the number of special use authorizations for outfitting and guiding and a 4 percent increase in the number of authorizations for recreation events issued as a result of the final rule. It is not likely that there will be much of an increase in the number of commercial filming, still photography, or noncommercial group use special use authorizations. There may be an increase in special use authorizations for noncommercial group use if organizers of recreation events, to avoid having to pay a land use fee and the cost of insurance, redesign their activities so that they are not charging entry or participation fees, thus making their activities qualify as noncommercial group uses. No land use fee is charged for noncommercial group use. The estimated increase in the number of authorizations and their associated land use fees (which includes authorizations issued to and fees paid by all individuals and entities, not just small businesses) would not have significant economic impacts on a substantial number of small businesses, nor does the increase in authorizations and fees rise to the \$100 million threshold for determining whether a regulation is significant.

Moreover, the comment fails to address benefits associated with this rulemaking. The final rule levels the playing field for special uses by closing the regulatory gap for uses conducted entirely on National Forest System roads and trails. In addition, there will be a decrease in impacts on small businesses under the final rule. Section 251.50(e) of the final rule provides the authorized officer with the discretion, under specific circumstances, to waive the requirement for a special use authorization, thereby decreasing the economic impact on small businesses to the extent that they otherwise would have had to obtain an authorization and pay a land use fee for certain types of special uses.

The Department has prepared an analysis of the economic effects of this rulemaking, which is included in the rulemaking record.

#### No Takings Implications

*Comment.* One respondent stated that the proposed rule effects a taking of small business.

*Response.* There is no taking, either express or implied, of any property

rights or any other constitutional violation from implementation of this rule. The final rule merely requires a special use authorization for special uses wherever they occur on National Forest System lands, including on National Forest System roads and trails (but not on roads under the jurisdiction of a State, County, or local public road authority).

#### Civil Justice Reform

*Comment.* One respondent stated that it is not clear what is meant by the determination that this rule will not have any retroactive effect for purposes of Executive Order 12988 on civil justice reform.

*Response.* The determination that the final rule will not have any retroactive effect for purposes of Executive Order 12988 means that the final rule will not be applied retroactively, that is, it will not be applied before its effective date.

#### Federalism and Consultation and Coordination With Indian Tribal Governments

*Comment.* One respondent asserted that the proposed rule has tribal implications and may pose a taking of Indian Tribal rights with respect to economic development.

*Response.* The proposed rule does not have Tribal implications pursuant to Executive Order 13175.

#### Energy Effects

No comments were received on this section.

#### Unfunded Mandates

No comments were received on this section.

#### Controlling Paperwork Burdens on the Public

*Comment.* One respondent observed that there is no paperwork reduction associated with the proposed rule.

*Response.* This rulemaking fully complies with the Paperwork Reduction Act and its implementing regulations. The forms for special use applications and authorizations have been approved for use by the Office of Management and Budget (OMB) and assigned OMB control number 0596-0082. Therefore, this final rule does not contain any record-keeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use.

#### Comments Beyond the Scope of This Rulemaking

*Comment.* Some respondents stated that roads and trails on National Forest

System lands should be kept open for motorized recreationists.

*Response.* The final rule merely requires a special use authorization for special uses occurring on National Forest System roads and trails. The final rule does not effectuate decisions as to which roads or trails should be kept open for motor vehicle use. Such decisions are made through the forest planning process and through project-specific environmental analysis, typically by Forest Supervisors at the National Forest level. Decisions involving management, operation, and maintenance of National Forest System roads are made pursuant to a roads analysis conducted in accordance with FSM 7712.1.

*Comment.* One respondent observed that general public use, not commercial use, should be regulated.

*Response.* The rule at 36 CFR part 251, subpart B, regulates special uses, not general public use. With limited exceptions, the rule exempts general public use from the special use authorization requirement (§ 251.50(c)). The final rule clarifies which activities require a special use authorization. In situations where resource management concerns arise as a result of heavy public use, management alternatives would be evaluated at the local level in accordance with procedures in FSH 1909.15.

*Comment.* Several respondents requested designation of land for off-highway vehicle use. They noted that wilderness for them is a drive-through experience. They are concerned that available land for off-highway vehicle use is diminishing and that the proposed rule would take away land for off-highway vehicle use.

*Response.* The final rule does not address allocation of National Forest System lands for off-highway vehicle use. The final rule does not impose any additional restrictions on off-highway vehicle use or any other use of a road or trail, unless it constitutes one of the six special uses identified in the final rule, that is, noncommercial group use (which involves 75 or more people), outfitting and guiding, a recreation event, commercial filming, still photography, or a landowner's ingress or egress across National Forest System lands that requires travel on a National Forest System road that is not authorized for general public use. Designation of lands for off-highway vehicle use is conducted at the local level, through each Forest's land management planning process and environmental analysis.

*Comment.* Several respondents observed that use restrictions may be

necessary, and that it is not clear how the agency will allocate use. Other respondents observed that it is not in the interest of the public to grant all permits to one company. These respondents were concerned that some companies do not utilize all of their allocation, that some companies have too much use, and that there needs to be a redistribution of existing use. Some respondents observed that there is a need to strike a fair balance between commercial and noncommercial programs in the allocation of use and that only commercial providers receive permits. Others observed that there is too much bias against commercial operations.

*Response.* This final rule does not affect allocation of use on National Forest System lands. Allocation of use is established through forest planning and site-specific environmental analysis. For outfitting and guiding, allocation is addressed in FSH 2709.11, sections 41.53(f) (Applications and Issuance of Permits), 41.53(g) (Assignment and Management of Temporary Use), 41.53(h) (Assignment and Management of Priority Use), and 41.53(i) (Reduction of Use in Service Days). These procedures for outfitting and guiding were implemented after publication for public notice and comment (55 FR 14445, April 18, 1990; 60 FR 30830, June 12, 1995).

*Comment.* One respondent stated that nonprofit institutional groups should be able to provide visitor services and that the Forest Service should not award all use to commercial outfitters.

*Response.* The final rule specifies which uses require special use authorizations; it does not affect allocation of use at the local level. Nonprofit groups, as well as for-profit entities, are valued providers of recreation experiences to the public on the National Forests. Nonprofit entities are not precluded from obtaining a special use authorization. To the contrary, Forest Service outfitting and guiding policy specifically refers to institutional and semi-public outfitting and guiding and land use fees for nonprofit organizations and educational institutions (FSH 2709.11, sec. 37.21j, 37.21k, and 41.53l).

*Comment.* Several respondents stated that permit fees for recreation events should not be based on costs incurred in organizing an event.

*Response.* The regulations governing land use fees are found at § 251.57 and are beyond the scope of this rulemaking. Revenue exclusions for recreation events are addressed in FSM 2721.49 and include the cost of prizes awarded.

*Comment.* Several respondents observed that because there are so many fees, it seems that one pays twice for the same thing. Another respondent stated that charging a fee for a special use authorization is unfair when the public is already paying taxes and, in some cases, other use fees, or when a member of the public has limited income. Respondents objected to the proposed rule on the grounds that they already pay an annual all-terrain vehicle fee or that parks have already been paid for by tax dollars. One respondent opposed any regulation that would result in fees of any kind. One respondent suggested that only organized events should pay fees. Another respondent stated that individual participants should be required to have Adventure Passes. Another commented that it is not clear how special use fees relate to individual use fees.

*Response.* Fees charged by the Forest Service are beyond the scope of this rulemaking.

The Department disagrees that charging a public admission or use fee and charging a land use fee for a special use authorization are equivalent or duplicative. The Forest Service has the authority under the Land and Water Conservation Fund Act and the Recreational Fee Demonstration Program to charge fees to the public for admission to or use of recreation sites, facilities, and services. The authority to charge public admission and use fees is set out in 16 U.S.C. 460l-6a and section 315 of Public Law 104-134. (The Adventure Pass is required under the Recreational Fee Demonstration Program for recreational use and is assessed for vehicular access on the four Southern California National Forests.) These public admission and use fees are different from land use fees charged for commercial special use authorizations under 36 CFR 251.57. The regulations at § 251.57(b) and Forest Service policy in Forest Service Handbook (FSH) 2709.11, chapter 30, provide that land use fees for special use authorizations may be waived in a number of circumstances when equitable and in the public interest.

*Comment.* One respondent suggested that the agency should charge a fee for an annual license for travel on forest trails, rather than requiring a special use permit.

*Response.* For the reasons identified above, the Forest Service is regulating special uses that are conducted on National Forest System trails, not travel on National Forest System trails. Charging a fee for an annual license for travel on National Forest System trails

is therefore beyond the scope of this rulemaking.

*Comment.* One respondent asserted that club dues and other membership charges should not be subject to a permit fee and that there should not be invasive inquiries for membership names, telephone numbers, income, and dues.

*Response.* Land use fees charged for special use authorizations issued to clubs, and the administration of such authorizations, are addressed in existing regulations at § 251.57 and agency policy in Forest Service Manual (FSM) 2340 and Forest Service Handbook (FSH) 2709.11, and are beyond the scope of this rulemaking.

*Comment.* The Forest Service does not have authority to charge fees for use of R.S. 2477 rights-of-way.

*Response.* This final rule does not establish a requirement to assess land use fees or in any way address fees for use of R.S. 2477 rights-of-way. Rather, this rule exempts certain activities that are conducted within the scope of R.S. 2477 rights-of-way from the requirement to obtain a special use authorization. Therefore, the concern expressed in this comment is beyond the scope of this rulemaking.

*Comment.* One respondent stated that the criteria for issuing permits and the number of permits to be issued should be disclosed.

*Response.* This comment is beyond the scope of this rulemaking. Procedures for issuing new special use authorizations are found at § 251.54. Procedures for issuing new outfitting and guiding permits are set out in FSH 2709.11, section 41.53f, paragraph 2. The Forest Service prospectus process, which is used when competitive interest exists, is set out at FSM 2712.1. The competitive selection process requires that the prospectus specify the criteria to be used for issuing special use authorizations. Further direction on allocation of authorized outfitting and guiding use is found at FSH 2709.11, sections 41.53(f) through 41.53(i). The number of special use authorizations to be issued is a local decision subject to the forest planning process and environmental analysis as provided in FSH 1909.15.

*Comment.* Several respondents are concerned that the regulations do not provide enough detail on requiring that applicants for special use permits obtain consistent treatment from different Forests in the application process.

*Response.* The existing regulation at § 251.54 provides guidance for screening proposals and evaluating applications. This portion of the

existing regulation is beyond the scope of this rulemaking.

*Comment.* Several respondents stated that District Rangers have too much power to regulate outfitting and guiding.

*Response.* District Rangers have delegated authority to issue and administer special use authorizations as set out in FSM 2703.34. Delegations of authority are not the subject of this rulemaking.

*Comment.* One respondent commented that it was burdensome to have to get permits from three different agencies.

*Response.* The Federal land management agencies operate under different laws, regulations, and policies, which often dictate the need for each agency to issue an authorization for activities that are limited to the Federal lands and resources administered by that agency. The necessity for separate Federal permitting procedures is beyond the scope of this rulemaking.

*Comment.* The public needs freedom to change activities without government oversight.

*Response.* The final rule does not affect the public's ability to change activities without government oversight. Rather, the final rule merely specifies the activities for which special use authorizations are required.

*Comment.* One respondent asked numerous specific questions that do not relate directly to this rulemaking and that involve issues that are the subject of pending litigation.

*Response.* The Department believes that it is inappropriate to respond to these questions because they are beyond the scope of this rulemaking and because they involve issues that are the subject of pending litigation.

*Comment.* One respondent observed that there should be more outfitter and guide involvement in visitor education and management.

*Response.* The final rule does not address outfitter and guide involvement in visitor education and management. Outfitters and guides are encouraged to work with their local District Ranger to identify such opportunities.

*Comment.* One respondent suggested that trails should have a separate set of guidelines or regulations.

*Response.* Policy pertaining to trail management can be found in FSM 2353 and FSH 2309.18 (Trails Management Handbook). Regulations relating to trail management can be found at 36 CFR parts 212, 261, and 295. The only aspect of trail management related to this rulemaking is the requirement for a special use authorization for special uses conducted on National Forest System trails.

*Comment.* One respondent stated that the rule would reverse the burden of proof in the exercise of regulatory power.

*Response.* The concept of burden of proof does not apply in this context. The final rule identifies the Forest Service's authorities for requiring a special use authorization for special uses occurring on National Forest System roads and trails. All of these special uses are already regulated elsewhere in the National Forest System.

*Comment.* One respondent objected to any special use authorization that would include a fee for noncommercial group use, outfitting and guiding, and recreation events.

*Response.* The regulations that address land use fees are found at § 251.57 and are beyond the scope of this rulemaking.

*Comment.* One respondent suggested that by foreclosing any permit exemption for noncommercial group uses, the proposed rule would subject them to the National Environmental Policy Act (NEPA), which would render the proposed rule constitutionally invalid.

*Response.* The Department disagrees with this assertion. Compliance with both NEPA and constitutional requirements was fully addressed in promulgating the final noncommercial group use rule (60 FR 45258) and is embodied at § 251.54(g)(3)(ii)(C). Numerous Federal district courts and courts of appeals have upheld the constitutionality of the noncommercial group use regulation.

*Comment.* Two respondents were concerned that costs for environmental assessments are high. One respondent believed that these costs should be borne by permit applicants.

*Response.* The Department recognizes that conducting environmental assessments is costly. Recovery of these costs is the subject of a separate rulemaking, which was published for public notice and comment November 24, 1999 (64 FR 66343).

*Comment.* Several respondents stated that permit fees should be spent on upkeep of trails and alleviating environmental impacts, but that permit fees instead have been spent on forest fires.

*Response.* The Forest Service's authority to retain and spend land use fees collected for special use authorizations is beyond the scope of this rulemaking.

*Comment.* One respondent suggested that the Forest Service include language in the FSM requiring that roads and trails be listed in the appropriate forest

transportation atlas and require each National Forest to maintain a list of National Forest System roads and trails.

*Response.* The requirement for inclusion of forest roads and trails in a forest transportation atlas is contained in § 212.2 and is not the subject of this rulemaking.

### 3. Regulatory Certifications

#### *Environmental Impact*

The changes in the final rule at § 251.50 and § 251.51 provide more consistent procedures for processing special use proposals and applications and administering special use authorizations for use and occupancy of National Forest System lands. The final rule also makes terminology consistent in parts 251, 261, and 295. 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 Department's conclusion 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 (OMB) review under Executive Order 12866.

#### *Regulatory Flexibility Act*

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 record-keeping 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.

This final rule does not impact a substantial number of small entities because the Forest Service estimates that fewer than 40 recreation event authorizations, 50 outfitting and guiding authorizations, 3 still photography authorizations, 4 commercial filming authorizations, and 64 noncommercial group use permits will be issued as a result of this rule. The efficiencies to be achieved by this rule should benefit small businesses that seek to use and occupy National Forest System lands by ensuring consistency in procedures across National Forests and regions and by eliminating costly, time-consuming, and unnecessary processing of certain special use applications and administration of certain special use authorizations. The benefits, most of which cannot be quantified, are not likely to alter costs substantially to small businesses.

#### 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) it 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 determined 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 forms for special use applications and authorizations have been approved for use by OMB and assigned OMB control number 0596–0082. Therefore, this final rule does not contain any record-keeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Moreover, the final rule should reduce the number of applicants for special use authorizations by clarifying those circumstances when special use authorizations are not required. 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 not apply.

#### 4. Text of the Final Rule

##### List of Subjects

##### 36 CFR Part 251

Administrative practice and procedure, Electric power, National

forests, Public lands rights-of-way, Reporting and record-keeping requirements, Water resources.

##### 36 CFR Part 261

Law enforcement, National forests.

##### 36 CFR Part 295

National forests, Traffic regulations.

■ For the reasons set out in the preamble, amend subparts B and D of part 251, subpart A of part 261, and part 295 of Title 36 of the Code of Federal Regulations to read as follows:

#### PART 251—LAND USES

##### Subpart B—Special Uses

■ 1. Revise the authority citation for subpart B to read as follows:

**Authority:** 7 U.S.C. 1011(f); 16 U.S.C. 460l–6a(c), 460l–6d, 472, 497b, 497c, 551, 580d, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761–1771.

■ 2. Revise § 251.50 to read as follows:

##### § 251.50 Scope.

(a) All uses of National Forest System lands, improvements, and resources, except those authorized by the regulations governing sharing use of roads (§ 212.9); grazing and livestock use (part 222); the sale and disposal of timber and special forest products, such as greens, mushrooms, and medicinal plants (part 223); and minerals (part 228) are designated “special uses.” Before conducting a special use, individuals or entities must submit a proposal to the authorized officer and must obtain a special use authorization from the authorized officer, unless that requirement is waived by paragraphs (c) through (e)(3) of this section.

(b) Nothing in this section prohibits the temporary occupancy of National Forest System lands without a special use authorization when necessary for the protection of life and property in emergencies, if a special use authorization is applied for and obtained at the earliest opportunity, unless waived pursuant to paragraphs (c) through (e)(3) of this section. The authorized officer may, pursuant to § 251.56 of this subpart, impose in that authorization such terms and conditions as are deemed necessary or appropriate and may require changes to the temporary occupancy to conform to those terms and conditions. Those temporarily occupying National Forest System lands without a special use authorization assume liability, and must indemnify the United States, for all injury, loss, or damage arising in connection with the temporary occupancy.

(c) A special use authorization is not required for noncommercial recreational activities, such as camping, picnicking, hiking, fishing, boating, hunting, and horseback riding, or for noncommercial activities involving the expression of views, such as assemblies, meetings, demonstrations, and parades, unless:

(1) The proposed use is a noncommercial group use as defined in § 251.51 of this subpart;

(2) The proposed use is still photography as defined in § 251.51 of this subpart; or

(3) Authorization of that use is required by an order issued under § 261.50 or by a regulation issued under § 261.70 of this chapter.

(d) Travel on any National Forest System road shall comply with all Federal and State laws governing the road to be used and does not require a special use authorization, unless:

(1) The travel is for the purpose of engaging in a noncommercial group use, outfitting or guiding, a recreation event, commercial filming, or still photography, as defined in § 251.51 of this subpart, or for a landowner's ingress or egress across National Forest System lands that requires travel on a National Forest System road that is not authorized for general public use under § 251.110(d) of this part; or

(2) Authorization of that use is required by an order issued under § 261.50 or by a regulation issued under § 261.70 of this chapter.

(e) For proposed uses other than a noncommercial group use, a special use authorization is not required if, based upon review of a proposal, the authorized officer determines that the proposed use has one or more of the following characteristics:

(1) The proposed use will have such nominal effects on National Forest System lands, resources, or programs that it is not necessary to establish terms and conditions in a special use authorization to protect National Forest System lands and resources or to avoid conflict with National Forest System programs or operations;

(2) The proposed use is regulated by a State agency or another Federal agency in a manner that is adequate to protect National Forest System lands and resources and to avoid conflict with National Forest System programs or operations; or

(3) The proposed use is not situated in a congressionally designated wilderness area, and is a routine operation or maintenance activity within the scope of a statutory right-of-way for a highway pursuant to R.S. 2477 (43 U.S.C. 932, repealed Oct. 21, 1976) or for a ditch or canal pursuant to R.S.

2339 (43 U.S.C. 661, as amended), or the proposed use is a routine operation or maintenance activity within the express scope of a documented linear right-of-way.

■ 3. Add the following definitions in alphabetical order to § 251.51:

**§ 251.51 Definitions.**

\* \* \* \* \*

*Commercial filming*—use of motion picture, videotaping, sound recording, or any other moving image or audio recording equipment on National Forest System lands that involves the advertisement of a product or service, the creation of a product for sale, or the use of models, actors, sets, or props, but not including activities associated with broadcasting breaking news, as defined in FSH 2709.11, chapter 40.

\* \* \* \* \*

*Forest road or trail*—a road or trail wholly or partly within or adjacent to and serving the National Forest System that the Forest Service determines is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources, and that is included in a forest transportation atlas.

\* \* \* \* \*

*Guiding*—providing services or assistance (such as supervision, protection, education, training, packing, touring, subsistence, transporting people, or interpretation) for pecuniary remuneration or other gain to individuals or groups on National Forest System lands.

\* \* \* \* \*

*Linear right-of-way*—a right-of-way for a linear facility, such as a road, trail, pipeline, electronic transmission line, fence, water transmission facility, or fiber optic cable.

\* \* \* \* \*

*National Forest System road*—a forest road under the jurisdiction of the Forest Service.

\* \* \* \* \*

*Outfitting*—renting on or delivering to National Forest System lands for pecuniary remuneration or other gain any saddle or pack animal, vehicle, boat, camping gear, or similar supplies or equipment.

\* \* \* \* \*

*Recreation event*—a recreational activity conducted on National Forest System lands for which an entry or participation fee is charged, such as animal, vehicle, or boat races; dog trials; fishing contests; rodeos; adventure games; and fairs.

\* \* \* \* \*

*Still photography*—use of still photographic equipment on National

Forest System lands that takes place at a location where members of the public generally are not allowed or where additional administrative costs are likely, or uses models, sets, or props that are not a part of the site's natural or cultural resources or administrative facilities.

\* \* \* \* \*

**PART 261—PROHIBITIONS**

**Subpart A—General Prohibitions**

■ 4. Revise the authority citation for part 261 to read as follows:

**Authority:** 7 U.S.C. 1011(f); 16 U.S.C. 472, 551, 620(f), 1133(c), (d)(1), 1246(i).

■ 5. Amend § 261.2 to add a definition for “Forest road or trail” in alphabetical order and to revise the definitions for “National Forest System road” and “National Forest System trail” to read as follows:

**§ 261.2 Definitions.**

\* \* \* \* \*

*Forest road or trail*—a road or trail wholly or partly within or adjacent to and serving the National Forest System that the Forest Service determines is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources, and that is included in a forest transportation atlas.

\* \* \* \* \*

*National Forest System road*—a forest road under the jurisdiction of the Forest Service.

*National Forest System trail*—a forest trail under the jurisdiction of the Forest Service.

\* \* \* \* \*

■ 6. Revise § 261.10(a) to read as follows:

**§ 261.10 Occupancy and use.**

\* \* \* \* \*

(a) Constructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure, communications equipment, or other improvement on National Forest System lands or facilities without a special use authorization, contract, or approved operating plan, unless such authorization, contract, or operating plan is waived pursuant to § 251.50(e) of this chapter.

■ 7. Revise the heading and introductory text of § 261.55 to read as follows:

**§ 261.55 National Forest System trails.**

When pursuant to an order issued in accordance with § 261.50 of this subpart, the following are prohibited on a National Forest System trail: \* \* \*

\* \* \* \* \*

**PART 295—USE OF MOTOR VEHICLES OFF NATIONAL FOREST SYSTEM ROADS**

■ 8. Revise the authority citation for part 295 to read as follows:

**Authority:** 7 U.S.C. 1011(f); 16 U.S.C. 551; E.O. 11644, 11989 (42 FR 26959).

■ 9. Revise the heading for part 295 to read as set forth above.

Dated: July 4, 2004.

**Mark Rey,**

*Under Secretary, Natural Resources and Environment.*

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

**5. Summary of Provisions in the Final Rules at 36 CFR Parts 251, 261, and 295**

**TABLE I.—SECTION-BY-SECTION COMPARISON FOR THE PREVIOUS, PROPOSED, AND FINAL RULES**

Previous rule	Proposed rule	Final rule
§ 251.50(a)—Specified that all uses of National Forest System lands are special uses, except for disposal of timber and minerals and grazing of livestock. Also specified actions required prior to conducting a special use.	§ 251.50(a)—Added disposal of forest products, such as greens, mushrooms, and medicinal plants (part 223) to the list of uses that are not considered special uses.	§ 251.50(a)—In numerical order, adds sharing use of roads (part 212) and disposal of forest products, such as greens, mushrooms, and medicinal plants (part 223), to the list of uses that are not considered special uses.
§ 251.50(b)—Allowed temporary occupancy without a special use authorization for emergencies, if a special use authorization was obtained at the earliest opportunity.	§ 251.50(b)—Provided that the requirement to obtain a special use authorization at the earliest opportunity is subject to the waiver provisions in paragraphs (c) through (e). Clarified that the temporary occupant has liability similar to that imposed on a permit holder under § 251.56(d)(1).	§ 251.50(b)—Retains the changes in the proposed rule and adds the phrases “when necessary” and “is applied for and” to qualify temporary occupancy. Also clarifies that when an authorization is issued, it may be conditioned pursuant to § 251.56 and that changes may be required to bring the occupancy into compliance.
§ 251.50(c)—Identified noncommercial recreational activities for which no special use authorization was required.	§ 251.50(c)—Changed the sequence of activities listed but not the activities themselves. Substituted the word “unless” for “except for”.	§ 251.50(c)—Makes changes similar to the proposed rule, but also excludes still photography from the exemption from the special use authorization requirement for non-commercial recreational activities.
§ 251.50(d)—Specified that use of forest roads and trails did not require a special use authorization unless required by order.	§ 251.50(d)—Specified that travel on National Forest System roads does not require a special use authorization, unless required by order or regulation issued under part 261, or the travel is for the purpose of engaging in a noncommercial group use, outfitting or guiding, a recreation event, commercial filming, or still photography as defined in § 251.51. Removed trails from the exemption from a special use authorization.	§ 251.50(d)(1)—Makes technical change to confirm preexisting authority to issue special use authorizations under 16 U.S.C. 3210(a) and 36 CFR 251.110(d), by adding to the list of special uses occurring on National Forest System roads that require a special use authorization a landowner’s ingress or egress across National Forest System lands that requires travel on a National Forest System road that is not authorized for general public use.
§ 251.50(e)—These provisions are new and did not exist in the previous regulations.	<p>§ 251.50(e)—Provided for the authorized officer to waive the requirement for a special use authorization if the proposed use had certain characteristics.</p> <p>§ 251.50(e)(1)—Provided for waiver of the special use authorization requirement for uses with nominal effects.</p> <p>§ 251.50(e)(2)—Provided for waiver of the special use authorization requirement for uses that were adequately regulated by a State agency or other Federal agency..</p> <p>§ 251.50(e)(3)—Provided for waiver of the special use authorization requirement for activities within the scope of a valid reserved right or outstanding property right, or for routine operation and maintenance activity within the scope of an outstanding statutory right.</p>	<p>§ 251.50(e)—Retains the language of the proposed rule and adds the requirement that a waiver decision be based upon review of a proposal.</p> <p>§ 251.50(e)(1)—Makes no change from the proposed rule.</p> <p>§ 251.50(e)(2)—Makes no change from the proposed rule.</p> <p>§ 251.50(e)(3)—Clarifies that a right in the context of R.S. 2477 and R.S. 2339 means a right-of-way. Narrows the scope of the waiver so that it applies only to routine operation or maintenance activities within the scope of an R.S. 2477 or R.S. 2339 right-of-way or within the express scope of a documented linear right-of-way that are not located in a Congressionally designated wilderness area.</p>
§ 251.51—Defined terminology used in the rule	§ 251.51—Added definitions for commercial filming, Forest road or trail, guiding, National Forest System road, outfitting, recreation event, and still photography.	§ 251.51—Makes no changes from the proposed rule.
§ 261.2—Used a definition for National Forest System road and National Forest System trail different from that in the proposed and final rules.	§ 261.2—Added a definition for forest road or trail and revised definitions for National Forest System road and National Forest System trail.	§ 261.2—Makes no changes from the proposed rule.

TABLE I.—SECTION-BY-SECTION COMPARISON FOR THE PREVIOUS, PROPOSED, AND FINAL RULES—Continued

Previous rule	Proposed rule	Final rule
§ 261.10(a)—Prohibited improvements on National Forest System land or facilities without a special use authorization, contract, or approved operating plan.	§ 261.10(a)—Not addressed by the proposed rule.	§ 261.10(a)—Provides that this prohibition is subject to the waiver provisions in § 251.50(c) through (e).
§ 261.55—Specified prohibitions on trails .....	§ 261.55—Changed “forest development trail” to “National Forest System trail” in the heading and introductory text.	§ 261.55—Makes no change from the proposed rule.
Part 295—Pertained to the administration of motor vehicle use off National Forest System roads.	Part 295—Changed “Forest Service roads” to “National Forest System roads”.	Part 295—Makes no change from the proposed rule.

[FR Doc. 04–15728 Filed 7–12–04; 8:45 am]

BILLING CODE 3410–11–P

**DEPARTMENT OF TRANSPORTATION****Research and Special Programs Administration****49 CFR Part 172**

[Docket No. RSPA–2004–18575 (HM–189X)]

RIN 2137–AE03

**Hazardous Materials Regulations: Minor Editorial Corrections****AGENCY:** Research and Special Programs Administration (RSPA), DOT.**ACTION:** Final rule; editorial corrections.

**SUMMARY:** This final rule corrects errors in the 49 CFR 172.101 Hazardous Materials Table (HMT) made during the recent publication of 49 CFR Parts 100 to 185. In the most recent publication of 49 CFR Parts 100–185, a number of entries in the HMT were inadvertently removed.

**DATES:** The effective date of the amendments adopted herein is October 1, 2004. Immediate compliance is authorized.

**FOR FURTHER INFORMATION CONTACT:** T. Glenn Foster, Office of Hazardous Materials Standards, (202) 366–8553, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001.

**SUPPLEMENTARY INFORMATION:****I. Background**

This final rule corrects the inadvertent deletion of certain entries in the § 172.101 Hazardous Materials Table (HMT) primarily made during the recent publication of 49 CFR Parts 100 to 185. These errors were the result of a misunderstanding concerning the amendatory language in final rules that affected the HMT, in particular, Docket HM–215E (July 31, 2003; 68 FR 44992).

The amendments contained in this rule are minor changes and do not impose new requirements. Because these amendments do not impose new requirements, notice and public procedure are unnecessary. The following is a summary of the amendments made under this final rule.

We are amending the HMT to correct certain entries as follows:

1. The following entries, that were inadvertently removed, are being reinserted:

- “Adhesives, containing a flammable liquid, UN1133,” Packing Groups I and III;
- “Coating Solution (includes surface treatments or coatings used for industrial or other purposes such as vehicle undercoating, drum or barrel lining), UN1139,” Packing Groups I and III;
- “Extracts, aromatic, liquid, UN1169,” Packing Group III;
- “Flammable liquids, n.o.s., UN1993,” Packing Groups II and III;
- “Hydrobromic acid, with not more than 49 percent hydrobromic acid, UN1788,” Packing Group II;
- “Hydrocarbons, liquid, n.o.s., UN3295,” Packing Groups II and III;
- “Organochlorine pesticides, liquid, toxic, flammable, flash point not less than 23 degrees C, UN2995,” Packing Group I;
- “Paint including paint, lacquer, enamel, stain, shellac solutions, varnish, polish, liquid filler, and liquid lacquer base, UN1263,” Packing Groups I and III;
- “Paint related material including paint thinning, drying, removing, or reducing compound, UN1263,” Packing Groups I and III;
- “Pentanes, UN1265,” Packing Groups I;
- “Perfumery products with flammable solvents, UN1266,” Packing Group III;
- “Printing ink, flammable or Printing ink related material (including printing ink thinning or reducing compound), flammable, UN1210,” Packing Groups I and III;

- “Resin solution, flammable, UN1866,” Packing Groups I and III;
- “Rubber solution, UN1287,” Packing Group III;
- Tars, liquid, including road asphalt and oils, bitumen and cut backs, UN1999,” Packing Group III; and
- “Wood preservatives, liquid, UN1306,” Packing Group III.

2. The first occurrence of the entry “Organochlorine pesticides, liquid, toxic, flammable, flash point not less than 23 degrees C, UN2995,” Packing Group III, is removed.

3. The entry “[PG II],” immediately preceding the entry “Pentanes, UN1265,” is removed.

4. The entry “Gasohol gasoline mixed with ethyl alcohol, with not more than 20 percent alcohol, NA1203,” Packing Group I, is replaced with “Gasohol gasoline mixed with ethyl alcohol, with not more than 20 percent alcohol, NA1203,” Packing Group II.

**II. Rulemaking Analyses and Notices****A. Executive Order 12866 and DOT Regulatory Policies and Procedures**

This final rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and therefore, was not reviewed by the Office of Management and Budget. This final rule is not a significant rule under the Regulatory Policies and Procedures of the Department of Transportation [44 FR 11034]. Because there is no impact of this rule, preparation of a regulatory impact analysis is not warranted.

**B. Executive Order 13132**

RSPA is not aware of any State, local, or Indian tribe requirements that would be preempted by correcting editorial errors and making minor regulatory changes. This final rule does not have sufficient federalism impacts to warrant the preparation of a federalism assessment.

**C. Executive Order 13175**

This final rule was analyzed in accordance with the principles and