DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 251 and 261

[RIN 0596–AA80]

Land Uses and Prohibitions

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule revises the existing rules governing noncommercial group uses and noncommercial distribution of printed material within the National Forest System. These revisions ensure that the authorization procedures for these activities comply with First Amendment requirements of freedom of speech, assembly, and religion, while providing a reasonable administrative system for allocating space among scheduled and existing uses and activities, addressing concerns of public health and safety, and controlling or preventing adverse impacts on forest resources.

EFFECTIVE DATE: This rule is effective September 29, 1995.

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SUPPLEMENTARY INFORMATION:

Statutory and Regulatory Background

The First Amendment of the United States Constitution provides in part that the government may not abridge the freedom of speech or the right to assemble peaceably and that the government may not pass laws prohibiting the free exercise of religion (U.S. Const., amend. I). Freedom of speech means the right to disseminate ideas freely, both orally or in writing. Free exercise of religion means the right to practice one's religion freely.

It is well established that the government may enforce reasonable time, place, and manner restrictions on First Amendment activities. Such restrictions are constitutional when justified without regard to the content of the regulated speech, when narrowly tailored to further a significant governmental interest, and when they leave open ample alternative channels for communication of information. *Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984). Permits have been recognized as constitutional restrictions of time, place, and manner for activities involving the expression of views, including religious gatherings, when specific and objective standards guide the licensing authority. *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147, 150–51, 153 (1969); *Cantwell* v. *Connecticut,* 310 U.S. 296, 304–05 (1940).

On March 3, 1891, Congress authorized the President to set aside federal lands as public forest reservations (16 U.S.C. 471). On June 4, 1897, Congress directed the Secretary of the Interior to protect the forests within those reservations and to regulate their occupancy and use (16 U.S.C. 551). On February 1, 1905, Congress transferred the authority to manage the national forest from the Secretary of the Interior to the Secretary of Agriculture (16 U.S.C. 472).

Today there is 155 national forests comprising approximately 191 million acres in 42 States, the Virgin Islands, and Puerto Rico. These forests, together with 20 national grasslands, land utilization projects, purchase units, and other lands, constitute the National Forest System.

The Forest Service, an agency of the United States Department of Agriculture, is charged with managing the resources of the National Forest System for multiple uses as well as for the provision of goods, services, and other amenities for current and future generations. The Multiple-Use Sustained-Yield Act of 1960 (MUSY) (16 U.S.C. 528–531) authorizes the Forest Service to manage diverse public, private, governmental, and commercial uses of National Forest System lands. These uses are collectively known as special uses.

The Forest Service regulates activity on National Forest System lands by issuing special use authorizations. Issuing special use authorizations allows the Forest Service to protect resources and improvements on National Forest System lands, to allocate space among potential or existing uses and activities, and to address concerns of public health and safety. The rules at 36 CFR part 251, subpart B, govern the issuance of special use authorizations for all uses of National Forest System lands, improvements, and resources, except for the disposal of timber (part 223) and minerals (part 228) and the grazing of livestock (part 222).

The Forest Service administers approximately 65,000 special use authorizations annually. Examples of authorized uses include ski resorts and marinas, campground concessions, pipelines, communication sites, and commercial outfitting and guiding services. Competition for available sites for these uses and activities has increased as more legal restrictions, such as the Endangered Species Act (ESA) (16 U.S.C. 531 *et seq.*) and the National Historic Preservation Act (NHPA) (16 U.S.C. 470 *et seq.*), have been placed on the use of National Forest System lands.

The Forest Service hosts many types of group activities, both commercial and noncommercial, on National Forest System lands. Examples of these activities include fishing contests, mountain bicycle and motorcycle races, group camping, hikes, and horseback rides, and demonstrations and assemblies.

Large group gatherings in the national forests have significant adverse impacts on forest resources, public health and safety, and the agency's ability to allocate space in the face of increasing constraints on the use of National Forest System lands. These adverse impacts include the spread of disease, pollution from inadequate site cleanup, soil compaction from inadequate site restoration, damage to archaeological sites, and traffic congestion.

On June 21, 1984, the Secretary of Agriculture promulgated a revision to 36 CFR part 251, subpart B. The purpose of the rule was to allow the Forest Service to protect forest resources, to address concerns of public health and safety, and to allocate space among uses and activities by regulating all types of noncommercial group uses. The rule required a special use authorization for two types of noncommercial group uses, recreation events and special events, both of which involved ten or more participants or spectators. As defined, recreation events included activities involving competition, entertainment, or training, and special events included meetings, assemblies, demonstrations, parades, or other activities involving the expression of views. Noncommercial groups that did not fall into either of these categories did not require a special use authorization. Moreover, the rule contained different standards for denying a special use authorization for each type of group use (49 FR 25449).

Subsequently, a federal district court held that it is unconstitutional to require a group to obtain a special use authorization simply because its members gather to exercise their constitutional right of free speech. The court explained that the Forest Service has the right to regulate large group activities on government land, but only if the regulation is content-neutral and

applies to all large groups. *United States* v. *Israel,* No. CR–86–027–TUC–RMB (D. Ariz. May 10, 1986).

On May 10, 1988, the Forest Service published an interim rule amending 36 CFR 251.50 through 251.54 to comport with First Amendment rights of assembly and free speech within the National Forest System (53 FR 16548). Upon challenge of this rule, a federal district court held that the Forest Service had failed to show good cause for adopting the interim rule without prior notice as required by the Administrative Procedure Act (APA) under 5 U.S.C. 553. *United States* v. *Rainbow Family,* 695 F. Supp. 294, 302–06 (E.D. Tex. 1988). In addition, the court invalidated the classification established by the 1984 rule, which on its face singled out group uses involving expressive activities and required that they be treated differently from other types of group uses. The court held that the 1984 rule lacked clear and objective standards for determining when a group activity is a ''recreation event'' and when it is a ''special event'' involving the exercise of free speech. *Rainbow Family,* 695 F. Supp. at 309, 312. The court further held that the standards for evaluating an application for an authorization for expressive conduct were unconstitutionally vague as they vested too much discretion in the authorized officer. *Id.* at 309–12. The court also ruled that the 1984 regulations were invalid for failure to impose a timeframe for filing and acting on an application and that the absence of any requirement in the 1984 regulations that a reason be stated for denial of a special use authorization made it impossible to discern the grounds for an authorized officer's decision. *Id.* at 311–12. Finally, the court held that the 1984 rule was invalid for failure to provide for judicial review of the administrative determination. *Id.* at 311.

As a result of these court rulings, on May 6, 1993, the Forest Service published a proposed rule to regulate noncommercial group uses and noncommercial distribution of printed material on National Forest System lands in compliance with First Amendment requirements of assembly and free speech (58 FR 26940). To achieve this goal, the proposed rule contained specific, content-neutral criteria for evaluating applications for noncommercial group uses and noncommercial distribution of printed material and required that the same criteria be applied to those activities regardless of whether they involve the exercise of First Amendment rights. The proposed rule also required an authorized officer to notify an applicant in writing of the reasons for denial of a special use authorization and provided for immediate judicial review of a decision denying an authorization.

In addition to publishing the proposed rule in the **Federal Register**, the Forest Service gave direct notice of the proposed rule to numerous interested parties and invited their comments. The comment period for the proposed rule lasted 90 days, closing August 4, 1993.

Summary of Comments and Responses

A total of 603 comments were received during the comment period. Of these, 590 comments were received from individuals, two from elected officials, one from a State department of health, and ten from organizations, including two chapters of the American Civil Liberties Union. Most comments were individually written letters or postcards; several comments were form letters and some were petitions containing 20,451 signatures. All comments have been given full consideration in adoption of this final rule.

General Comments

Comment. Freedom of Assembly. Approximately 175 respondents stated that requiring permits for expressive activities violates the constitutional right of assembly. Most of these respondents indicated that the First Amendment right of assembly is absolute and that any attempt to regulate assemblies on public land is invalid *per se.* Specific and recurrent comments from these respondents were as follows:

—That the special use authorization requirement in the proposed rule is generally illegal;
—That no possible governmental interest can justify restrictions on free speech;
—That any regulation of First Amendment activities is content-based *per se;*
—That there are no acceptable criteria by which to judge an application for authorization of First Amendment activities;
—That *Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288 (1984), a case cited in the preamble in support of the proposed rule, violates both the letter and spirit of the Bill of Rights;
—That the significant governmental interest standard should not apply because it is too low to justify abridgment of constitutional rights, and that the standards of compelling governmental interest and clear and present danger should apply instead;
—That *Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288 (1984), and *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969), cases cited in the preamble in support of the proposed rule, are too recent and untested;
—That although courts may allow reasonable time, place, and manner restrictions on First Amendment activities, the United States Constitution is still the highest law of the land;
—That the United States Constitution is a permit;
—That humanity is a permit;
—That Americans do not need authorization to exercise basic constitutional rights;
—That the proposed rule imposes a prior restraint and is an undue burden on the public;
—That the Rainbow Family cannot comply with the permit requirement;
—That rights cannot be extinguished by decree of an executive agency;
—That one person should not be able to tell another person what to do;
—That everyone should be able to choose when and where they want to gather on public land and distribute noncommercial printed material;
—That in exercising their First Amendment right of assembly, people should be able to act as they please;
—That national forests should remain open to all;
—That national forests are supported by tax dollars and that taxpayers have a right to gather on public lands;
—That public land belongs to the people and that they should be able to use it without a permit;
—That the proposed rule discriminates against humans, who are given fewer rights than animals to gather in the national forests;
—That assemblies on the national forests provide thousands of people with a fine vacation; and
—That if a similar rule were applied in cities or towns, the rule would amount to imposition of martial law.

Response. The United States Supreme Court, the highest court in the country, is the ultimate arbiter of the United States Constitution. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 177–78 (1803). As noted in the preamble to the proposed rule and the preamble to this final rule, the Supreme Court has repeatedly held that the government may enforce reasonable time, place, and manner restrictions on First Amendment activities. Such restrictions are appropriate where they are content-neutral, where they are narrowly tailored to further a significant

governmental interest, and where they leave open ample alternative channels for communication of information. *Clark* v. *CCNV*, 468 U.S. at 293. Permits have been recognized as constitutional restrictions of time, place, and manner for expressive activities when specific and objective standards guide the licensing authority. *Shuttlesworth*, 394 U.S. at 150–51, 153. Both *Clark* v. *CCNV* and *Shuttlesworth* involve time, place, and manner restrictions on demonstrations in urban areas. *Clark* v. *CCNV* has been cited nearly 400 times by numerous courts, including over 40 times by the Supreme Court. *Shuttlesworth* has been cited over 600 times by numerous courts, including over 50 times by the Supreme Court. These cases have been extensively tested.

The final rule meets the constitutional requirements of *Clark* v. *CCNV* and *Shuttlesworth*. The final rule does not restrict, and is not intended to restrict, freedom of thought or expression, nor does the final rule prohibit expressive activities. Rather, the final rule establishes a permit system with specific and objective standards that further the significant governmental interests of resource protection, allocation of space in the face of greater restrictions on the use of public land, and promotion of public health and safety. The final rule presumes that a special use authorization will be granted and restricts the content of an application to information concerning time, place, and manner for activities subject to the rule. Under the final rule, if an application is denied and an alternative time, place, or manner will allow the applicant to meet the evaluation criteria, the authorized officer must offer that alternative.

Comment: Free Exercise of Religion. Forty-eight respondents commented that the proposed rule infringes on the free exercise of religion. Specifically, these respondents stated that permits are unconstitutional as applied to religious activity, citing *Shuttlesworth* and *Cantwell*; that Rainbow Family Gatherings are protected under the free exercise clause of the United States Constitution; that Rainbow Family Gatherings involve the exercise of religion; that Rainbow Family Gatherings are a religious experience; that Rainbow Gatherings provide spiritual growth; that the woods are the Rainbow Family's church; that people choose to gather with those of similar religious beliefs in the cathedral of nature; that the proposed rule would restrict gatherings for the purpose of spiritual expression; that the proposed rule targets those who go to the forest to worship; and that, to many, particularly Native Americans, public land includes sacred ground.

Response. The final rule does not infringe and is not intended to infringe upon the free exercise of religion. Under *Shuttlesworth* and *Cantwell*, permits have been recognized as constitutional restrictions of time, place, and manner for activities involving the expression of views, including religious gatherings, when specific and objective standards guide the licensing authority. 394 U.S. at 150–51, 153; 310 U.S. at 304–05. In *Cantwell*, the Supreme Court stated that the regulation of solicitation generally in the public interest is constitutional where the regulation does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, even if the collection is for a religious purpose. The Court held that this type of regulation does not constitute a prohibited prior restraint or impose an impermissible burden on the free exercise of religion. *Id*. at 305.

Similarly, this final rule is a general regulation in the public interest, does not involve any religious test, and does not unreasonably obstruct or delay activities subject to the rule. Therefore, the final rule is not open to any constitutional objection under the Free Exercise Clause of the First Amendment, even if some of the activities subject to the rule are for a religious purpose.

Requiring a special use authorization for all group uses of National Forest System lands does not substantially burden the free exercise of religion and therefore does not trigger the compelling interest standard under the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb note).

The Supreme Court has held that the nature of the burden is relevant to the standard the government must meet to justify the burden. *Bowen, Secretary of Health and Human Serv.* v. *Roy*, 476 U.S. 693, 707 (1986). In cases in which the Supreme Court has invalidated a governmental action that interfered with an individual's practice of religion, the Court has relied directly or indirectly on the coercive nature of the governmental action or regulation and the imposition of penalties on the free exercise of religion. *See, e.g., Thomas* v. *Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716–17 (1991) (denial of unemployment benefits to applicant whose religion forbade him to fabricate weapons); *Wisconsin* v. *Yoder*, 406 U.S. 205, 218–19 (1972) (enforcement of compulsory high school attendance law against Amish, in violation of their religion and way of life); *Sherbert* v. *Verner*, 374 U.S. 398, 403–06 (1963) (denial of unemployment compensation benefits to applicant who refused to accept work requiring her to violate the Sabbath). In these cases, the governmental action or legislation criminalized religiously inspired activity or inescapably compelled conduct that some find objectionable for religious reasons.

In contrast, the Supreme Court has upheld governmental action or regulation that indirectly and incidentally imposes a burden on the practice of religious beliefs or calls for a choice between securing a governmental benefit and adherence to religious beliefs. *See, e.g., Roy*, 476 U.S. at 707–08 (federal statute requiring states in administering certain welfare programs to use Social Security numbers, where use of these numbers violated Native American applicants' religious beliefs); *Hamilton* v. *Regents of University of California*, 293 U.S. 245, 262–65 (1934) (curriculum in state university requiring all students to take military courses, where some students sought exclusion from those courses on grounds of their religious beliefs and conscientious objections to war). In these cases, the challenged governmental action interfered significantly with the ability of private persons to pursue spiritual fulfillment according to their own religious beliefs. In none of these cases, however, were the affected individuals coerced by the government's action into violating their religious beliefs, nor did the governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens. *Roy*, 476 U.S. at 703. Under these cases, absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest. *Id*. at 707–08.

Like the governmental action in *Hamilton* and *Roy*, this final rule has no direct or indirect tendency to coerce individuals into acting contrary to their religious beliefs. Nothing in the final rule suggests antagonism by the Department towards religion generally or towards any particular religious beliefs. The special use authorization requirement for group uses is facially neutral and applies to all types of these activities. The Department has made no provisions for individual exemptions to this requirement. Moreover, the requirement is a reasonable means of

promoting the legitimate public interests of resource protection, allocation of space in the face of increasing competition for the use of National Forest System lands, and promotion of public health and safety.

Comment: Noncommercial Distribution of Printed Material. Several respondents commented on some issues pertaining to the requirement to obtain a special use authorization for noncommercial distribution of printed material. Approximately 19 respondents stated that the agency's concerns about adverse impacts associated with noncommercial distribution of printed material are hypothetical or inadequate to justify the regulation. One respondent stated that the Bible or other religious tracts could be banned under the proposed rule. Four respondents stated that the special use authorization requirement for noncommercial distribution would allow the agency to censor printed material. Six respondents stated that the proposed rule singles out expressive conduct in regulating noncommercial distribution of printed material. Three respondents stated that the agency can address resource problems associated with noncommercial distribution by establishing a specific and objective policy on posting, fixing, or erecting printed material and on maintaining safe traffic conditions, rather than deciding on a case-by-case basis where and when the activity will be allowed.

One respondent, citing *United States* v. *Picciotto,* 875 F.2d 345 (D.C. Cir. 1989), argued that resource problems associated with posting, affixing, or erecting printed material cannot be addressed by adding unpublished conditions to special use authorizations, and that any desired restrictions must be published in a rule. Another respondent advised the agency to promulgate regulations making each group responsible for its own discarded printed material. Three respondents commented that regulations already exist for dealing with resource impacts associated with distribution of printed material. Seven respondents questioned where they could distribute noncommercial printed material if they could not do it on public lands. One respondent stated that distribution is defined too broadly in the proposed rule to allow for ample alternative channels of communication. Five respondents stated that the special use authorization requirement for noncommercial distribution of printed material could have the effect of stifling legitimate public protests of Forest Service activities. One respondent commented that a permit for noncommercial distribution of printed material could be denied for any reason.

Response. The Department has carefully examined the special use authorization requirement for noncommercial distribution of printed material. Based on the comments received on resource impacts and on the Department's review of resource impacts associated with noncommercial distribution of printed material, the Department has determined that these impacts are not significant enough to warrant regulation at this time. Therefore, the Department has removed from the final rule the special use authorization requirement for noncommercial distribution of printed material.

Comment: Significant Governmental Interests. Approximately 75 respondents commented that the Forest Service had not established a significant interest in promulgating the rule. Specifically, these respondents stated that there is no significant governmental interest in protecting the nation's public lands; that the Forest Service's mandate to protect the national forests under 16 U.S.C. 551 is not at issue; that there is no beneficial reason for the regulation; that the proposed rule fails the significant governmental interest test in *Clark* v. *CCNV*; that time, place, and manner restrictions are being imposed without an initial finding that they are required; and that restrictions on group uses should exist only when there is a clear environmental reason.

Respondents also stated that the agency's concerns about resource impacts are hypothetical or vague and insignificant; that the agency needs proof of resource damage in order to justify the proposed rule; that the agency has not cited evidence that 25 or more people have a greater impact on forest resources and facilities than fewer than 25 people; that 25 or even several hundreds of people gathered for peaceful purposes cannot be a threat to public safety or the environment; that the collective impact on forest resources by a group is equal to or less than the cumulative impact of an identical number of individuals; that it is easier to monitor large group gatherings than small bands of individuals; that individuals in aware groups can monitor each other; that the respondent takes care of the land; that the respondents are not harming the land; that unlike off-road motorcycle races, activities involving the expression of views do not harm forest resources; that group uses cannot cause irreparable damage; that the proposed regulation would take the national forests away from people who gather there at no one else's expense; that large group gatherings do not cost the government a lot of money; and that there have not been any public health problems associated with group uses.

Approximately 30 respondents recognized the Forest Service's significant interest in protection of forest resources. In particular, these respondents stated the following:

—That requiring a special use authorization is appropriate if the size of a group exceeds the capacity of a given area, including campgrounds and parking and staging areas;
—That to protect natural resources, it may be necessary for the Forest Service to regulate activity on National Forest System lands through issuance of special use authorizations;
—That to further the public interest, there is sometimes a need for the government to require a special use authorization for some First Amendment activities;
—That the concerns associated with large numbers of people gathering on unspoiled land are a challenge and that the people's right to assemble needs to be balanced against the custodial responsibility of the Forest Service;
—That any reasonable rules that would protect and preserve the integrity of the National Forest System are appropriate, that the National Forest is an invaluable asset that must be accessible to responsible public use, and that the Forest Service is charged with balancing these concerns;
—That the Forest Service has a mandate to manage National Forest System lands;
—That gatherings on public lands should be subject to guidelines established by the Forest Service;
—That some rules and regulations are essential;
—That regulations protecting natural resources are warranted, provided the rules do not infringe upon constitutional rights and provided they target only those who damage natural resources;
—That any rule that helps preserve the national forests is appropriate;
—That restricting access to National Forest System lands is permissible where human impact would harm native wildlife;
—That sanitation and site clean-up are important;
—That the agency's concern for the safety and integrity of the national forests is appropriate;
—That Forest Service employees are to be commended for dedicating their lives to protecting the national forests so that all can enjoy them;

—That the Forest Service gets paid to protect the national forests and the safety of forest visitors;
—That the agency should be concerned about the well-being of the national forests and those who use them;
—That more people have a greater impact on forests;
—That 25 or more people would definitely have a greater impact on resources and facilities than a smaller group of people.

Response. As numerous respondents noted, the Forest Service has a mandate to protect the 155 national forests and regulate their occupancy and use for all members of the public (16 U.S.C. 472, 551). Under that mandate, the Department has established three significant interests in promulgating this rule: (1) Protection of forest resources and facilities; (2) promotion of public health and safety; and (3) allocation of space in the face of greater competition for the use of National Forest System lands. While noncommercial group use is an appropriate use of National Forest System lands and exercise of First Amendment rights is extremely important, it is vital to address these significant interests. Numerous respondents have also recognized that these interests are significant. In addition, the Supreme Court has specifically held that protection of public lands for current and future generations is a significant governmental interest. *See Clark* v. *CCNV,* 468 U.S. at 296.

The Forest Service has encountered a variety of problems in connection with noncommercial group use of National Forest System lands. These problems, which are attributable to the size of groups, the concentration of people in a given area, and the physical intensity of the use, have arisen in connection with many different types of noncommercial group uses, both those involving and those not involving the expression of views. These problems have included the spread of disease, pollution from inadequate site clean-up, soil compaction from inadequate site restoration, resource damage in critical salmon habitat, resource damage in riparian zones and meadows, damage to archaeological sites, and traffic congestion.

Although one individual could cause much damage, for example, by setting a forest fire, and a series of individuals could perhaps over time have a significant impact on forest resources, in the Forest Service's experience large groups typically have more impact on a given area than individuals and, with limited exceptions, a special use authorization is not needed for individual uses. Regardless of whether the damage caused by these problems is irreparable, the Department believes that it would further the public interest to control or prevent the damage through a special use authorization system for noncommercial group uses. The authorization system also will allow the Forest Service to allocate space among noncommercial group uses and scheduled and existing uses and activities, including protection of habitat for endangered, threatened, or other plant and animal species.

Comment. Adverse Impacts of Group Uses. Approximately 64 respondents argued that other activities, such as off-road motorcycling, clear-cutting, mining, and grazing, have a greater impact on forest resources than noncommercial group uses. Specifically, these respondents stated:

—That the agency's resource impacts rationale seems inadequate, given that the disposal of timber and minerals and the grazing of livestock are exempted from regulation;
—That noncommercial uses and activities are regulated more stringently than other uses that have greater impacts;
—That noncommercial uses and activities should not be included in the same regulatory framework as other special uses, such as the disposal of timber and minerals and the grazing of livestock, that have greater impacts;
—That under the proposed rule, exploitation of the forest for monetary gain would take precedence over the right to assemble;
—That the Forest Service has done more damage to public lands than noncommercial group uses;
—That commercial uses of the national forests should be banned; and
—That clear-cutting authorized by the agency was responsible for the listing as an endangered species of a fresh water mussel in a creek at the site of the 1993 Alabama Rainbow Family Gathering.

Response. The Department disagrees with these comments. The disposal of timber and minerals and the grazing of livestock are not exempted from regulation. As noted in the preamble to the proposed and final rules, the disposal of timber is regulated in 36 CFR part 223; the disposal of minerals is regulated in 36 CFR part 228; and the grazing of livestock is regulated in 36 CFR part 222. The disposal of timber and minerals and the grazing of livestock are thus subject to separate regulations from noncommercial uses and activities. The regulation of timber and mineral disposal and livestock grazing has no bearing on the regulation of noncommercial uses and activities, including activities involving the expression of views. All other commercial uses and activities of National Forest System land require a special use authorization under 36 CFR part 251, subpart B. All commercial uses of National Forest System lands undergo environmental and other reviews prior to approval of any on-the-ground activities.

Commercial use of the National Forest System is appropriate. MUSY authorizes the Forest Service to manage National Forest System lands for both commercial and noncommercial uses (16 U.S.C. 528–531). The agency's regulation of the disposal of timber and minerals and the grazing of livestock is beyond the scope of this rulemaking. The relative impacts of commercial uses and noncommercial group uses are not relevant to this rulemaking. What is relevant are the impacts of noncommercial group uses and whether controlling and preventing those impacts warrant regulation of noncommercial group uses. This Department believes that mitigation and prevention of the impacts associated with noncommercial group uses are significant interests that justify the special use authorization requirement.

Noncommercial group uses will not be regulated more stringently under the final rule than other uses and activities that have greater impacts. The final rule restricts the content of an application to information concerning time, place, and manner for noncommercial group uses and establishes very limited circumstances under which an authorized officer can deny or revoke a special use authorization for noncommercial group uses. In contrast, commercial uses and activities subject to 36 CFR parts 222, 223, 228, and 251 are governed by complex regulations that give the authorized officer broad discretion administering the applicable authorization.

Comment. Significant Governmental Interests With Respect to Rainbow Family Gatherings. The Rainbow Family of Living Light organizes regular gatherings in the national forests to celebrate life, worship, express ideas and values, and associate with others who share their beliefs. The largest of these meetings is the annual Rainbow Family Gathering. The annual Gathering is held at an undeveloped site in a different national forest each summer and attracts as many as 20,000 people from across the Nation and around the world.

Approximately 130 respondents wrote that the Forest Service has not established a significant interest in requiring a special use authorization for Rainbow Family Gatherings. These respondents stated that concerns associated with Rainbow Family Gatherings have not materialized; that there has been no significant damage in 20 years of Rainbow Family Gatherings; that the Rainbow Family has had gatherings of up to a few thousand people for over a two-week period without major impact to the land or input from the Forest Service; that there is no reason to believe that any similar group would behave differently; and that reports of Rainbow Family Gatherings do not describe any adverse impacts associated with the Gatherings, which have less impact on forest resources than twelve Boy Scouts.

These respondents further stated that there is no hazardous situation, taking of an endangered species, or out of the ordinary resource damage associated with Rainbow Family Gatherings; that the forest is left in better condition after Rainbow Family Gatherings, unlike the way most campers and hunters leave public lands; that at the 1993 Rainbow Family Gathering in Alabama, campsites were carefully planned, garbage was neatly collected and recyclables separated, signs were posted so as to ensure no significant impact on trees, latrines were strategically placed and plainly marked, and an effort was made to notify all Rainbow Family members of the presence of endangered fresh water mussels in a creek at the site; that there has never been a serious illness or public health problem at a Rainbow Family gathering; that Rainbow Family Gatherings usually occur without adverse impact to public health, safety, land, or property; that the Rainbow Family does not need to be regulated by the Forest Service because it has an internal consensus process for regulating itself; that the Rainbow Family takes care of parking; water supply, kitchen hygiene, latrines, and camp safety; that the agency's concern for public health and safety is specious; and that considerations of public health are not related to the purposes of the rule.

Four respondents acknowledged that the annual Rainbow Family Gatherings have a significant impact on the national forests. One respondent stated that camping by any group the size of the annual Rainbow Family Gathering will necessarily have some noticeable impact on the land. Another commented that national forests should be protected and that Rainbow Family Gatherings have a detrimental effect on the plants and animals in the forests. A third acknowledged that Rainbow Family Gatherings take their toll on the ecosystem, and a fourth noted that the annual Rainbow Family Gatherings have a considerable impact on the undeveloped sites chosen for the Gatherings. One respondent noted that many Rainbow Family members required emergency room care during the 1993 Gathering and suggested that the Rainbow Family should arrange for community liaisons prior to the annual Gathering. Two respondents commented that water pollution is evident in the National Forest System: one respondent stated that all water on National Forest System lands should be tested; the other stated that Rainbow Family Gatherings must address the sufficiency of potable drinking water before the Gatherings take place.

Response. Forest Service experience is that the Rainbow Family has encouraged gatherers to pick up trash, recycle, compost, protect water sources by not camping or washing near them, naturalize campsites and trails, use latrines, and bury waste. The Rainbow Family also has shown a concern for sanitation at the Gatherings. Nevertheless, the annual Gatherings have a considerable impact on the national forest sites selected by the Rainbow Family and in some instances on public health and safety as well. Controlling or preventing adverse impacts on forest resources and addressing concerns of public health and safety are two purposes of this rule.

Typically, the Rainbow Family chooses an undeveloped site with open fields or meadows. Access to the site is limited. Backcountry eating, sleeping, and cooking facilities are set up for as many as 20,000 people. Parking must be available for their vehicles, which range from cars to double decker buses.

At the 1987 Gathering in North Carolina, for example, impacts included soil compaction and loss of vegetation in the paths to various camps and in the surrounding fields. At the end of the Gathering, there were four acres of fields and about eight miles of paths 12 to 25 feet wide with compacted soil and complete loss of vegetation. Only the latrines near the fields where activities took place were covered; latrines in outlying camps were left open with human waste exposed. The Forest Service had to complete rehabilitation of the site because the Rainbow Family had failed to rehabilitate it adequately. Garbage and trash were not always removed promptly from collection points and piled up. Although the garbage and trash were separated, they were mixed together in receptacles provided by the county. At the end of the Gathering, the Forest Service had to remove a dump truck load and a pickup truck load of garbage that had been left along the sides of the main road through the site.

A serious public health threat arose at the 1987 Gathering. At the site of this Gathering, many Rainbow Family members did not boil water from springs that were high in fecal coliform bacteria. During the week of July 1–4, many people had diarrhea and fever. As people at the Gathering became sick, they used the latrines less and less. Uncovered human wastes were scattered where people traveled and camped. Many people went barefoot and their stepping in uncovered human wastes helped transmit the disease. Hospitals in two states notified the Centers for Disease Control (CDC, now called the Centers for Disease Control and Prevention) in Atlanta that cases of confirmed shigellosis had been detected among people who had attended the Gathering. Shigellosis is a highly contagious form of dysentery, caused by shigellae bacteria. The disease is transmitted by direct or indirect fecal-oral contact from one person to another or by contaminated food or water. Individuals primarily responsible are those who fail to clean adequately their fecally contaminated hands. Transmission by water, milk, or flies may occur as a result of direct fecal contamination. One need ingest only a small number of organisms to contract the disease, and symptoms normally appear within seven days.

Two CDC doctors visited the site of the Gathering the week after July 4 and interviewed a large percentage of the Rainbow Family members remaining at the site. The doctors estimated that 65 percent of those people had shingellosis. At the doctors' suggestion, the Forest Service closed the site to other members of the public from July 15 to 29 for health reasons. By the middle of August, 25 states reported outbreaks of shigellosis traced to people who had attended the Gathering. In early October, cases of the disease were still being reported in 25 states.

Forest Service reports of Rainbow Family Gatherings document adverse impacts associated with the Gatherings. Two of these reports, on the 1991 and 1992 annual Gatherings, were submitted by a respondent along with comments on this rulemaking.

The report on the 1991 Gathering in Vermont documents that site clean-up and rehabilitation were inadequate after the 1990 Gathering in Minnesota. Gatherers left cigarette butts and plastic twist ties on the ground, dumped glass

bottles and metal spoons in compost pits, abandoned a 200-gallon water tank, and left latrines uncovered.

The report on the 1991 Gathering documents that while conducting site clean-up and rehabilitation inspections after the 1991 Gathering, agency officials found a large amount of human waste scattered throughout the woods, even though a sufficient number of well-constructed latrines were distributed throughout the Gathering site.

In addition, the 1991 report notes resource damage that resulted from the impact of large numbers of people using the area. Soil compaction occurred wherever human use was concentrated, that is, at the main meadow, kitchens, camps, and heavily used trails. Vegetation and duff layers in these areas were worn away. New trails made during the Gathering showed varying amounts of erosion. Soil was dug up and sloughed downhill, leaving tree roots exposed. Gatherers made trails down to brooks, often on steep slopes. Eroding soils from these trails threatened the stability and integrity of stream banks and water quality. In several places trails crossed historic rock walls. Heavy pedestrian traffic over the walls caused them to crumble and flatten. An archaeological site located on the trail from the front gate to the main meadow of the Gathering was damaged.

At the 1992 Gathering in Colorado, an insufficient number of latrines were dug at two areas with large concentrations of people (approximately 4200 total). Latrines that were dug at these areas were not placed at flagged locations, and some were too near open water. In general, latrine locations were not adequately marked, particularly at the beginning of the Gathering, which resulted in some surface deposition. Many latrines were not properly covered. No sanitation lime was available until one county health department worker donated 150 pounds to the Rainbow Family.

During the clean-up effort, however, all evidence of surface deposition was removed and all but a few latrines in remote locations were filled in correctly. Clean-up was reasonably orderly, but not timely. While all physical evidence of the Gathering was removed or rearranged to present a natural appearance, the quality of scarification and seeding of exposed soil was variable.

Twenty-seven acres of National Forest System lands in Colorado used for the 1992 Gathering were affected. Soil compaction and loss of vegetation occurred in areas of concentrated use. There were also several traffic and parking problems at the 1992 Gathering. Most of the access routes were steep, winding, single-lane gravel roads. The increased traffic and unfamiliarity of gatherers with these types of road conditions created a safety hazard.

CALM (Center for Alternative Living Medicine) is the group in the Rainbow Family entrusted with the medical care of Family members. At annual Gatherings, CALM sets up health units to treat gatherers' ailments and injuries. CALM represented that they could furnish more than basic first aid at the 1992 Gathering. Visits to CALM units by health department officials and local hospital staff revealed that CALM was equipped to provide only first aid. Many of the bandages at the units were old surplus military issue. Other supplies were limited. No protocol was established to deal with emergency situations. Because CALM was not equipped to deal with emergencies or injuries requiring more than basic first aid, 46 people attending the Gathering had to be treated at a local hospital.

The Department believes that it would be more effective and efficient for the Rainbow Family to address these types of medical and sanitation issues prior to the annual Gathering through the special use authorization process and through enhanced coordination with state and local authorities than on a spontaneous or *post hoc* basis.

Comment. Need for Law Enforcement at Rainbow Family Gatherings. Approximately 25 respondents commented that law enforcement at Rainbow Family Gatherings is unnecessary. These respondents stated that there are no threatening incidents at Rainbow Family Gatherings; that Rainbow Family members police themselves; that Rainbow Family members always comply with Forest Service regulations; that all serious problems and violent individuals are brought to the attention of local law enforcement; that Rainbow Family Gatherings have posed fewer security problems than other gatherings of equivalent size; that there are a smaller number of incidents each year; that no drug use was observed at the 1993 Gathering in Alabama; and that unlike uses of public streets or public property in a city, which have impacts on traffic, parking, and neighborhoods and require law enforcement services, group uses of National Forest System lands have no impacts on public facilities and do not require law enforcement services.

In contrast, one respondent acknowledged that Rainbow Family Gatherings attract some people who are not responsible. Several respondents noted that there has been public nudity at the Gatherings. Citing use of marijuana and psychedelics, one respondent noted that the actions of many Rainbow Family members are illegal under present drug laws. Two others noted the use of drugs by some members of the Rainbow Family. One respondent also noted the use of alcohol at Rainbow Family Gatherings.

Response. The Department disagrees that law enforcement at Rainbow Family Gatherings is unnecessary. Most Rainbow Family members who gather on national forests are peaceful and law-abiding. As several respondents noted, however, the annual Gatherings attract some who are not.

Consumption of alcoholic beverages is not condoned by the Rainbow Family and is discouraged within the main Gathering. A separate camp, known as ''A'' Camp, is usually set up along the access route to the main Gathering for those who drink alcoholic beverages. ''A'' camp has been a problem at several Rainbow Family Gatherings because of its location. ''A'' Camp gatherers have panhandled, extorted money, and confiscated liquor from people entering the Gathering. Gatherers at ''A'' Camp also have harassed law enforcement officers and Forest Service personnel.

Forest Service and local law enforcement officers issue a sizeable number of citations for various violations of federal and local law at Rainbow Family Gatherings. For instance, at the 1987 Gathering, there were 311 violations, including citations for driving violations, resource violations, public nudity, impeding traffic, public nuisance, and interfering with an officer. After the Gathering, marijuana plants sprouted where the soil had been dug up by members of the Rainbow Family to plant flowers. Within three weeks after the Gathering, the Forest Service found seventeen marijuana plants approximately one to two feet tall growing from seeds scattered from the handling of marijuana. Possession of marijuana is a violation of federal law. *See* 21 U.S.C. 844.

At the 1991 Gathering, the Forest Service issued 69 notices for ten different violations, including camping in a restricted area, public nudity, parking in violation of instructions, operating a vehicle recklessly, failing to stop for an officer, operating off road carelessly, occupying a day use area, parking in other than designated areas, operating a vehicle off road, and giving false information. Two Rainbow Family members were arrested on drug charges, one for possession and the other for sale of LSD.

The Forest Service's non-environmental concerns were met with resistance at the 1992 Gathering. For example, 20 to 30 Rainbow Family members staged a civil disobedience protest of a Forest Service order closing an area to camping and parking because of safety risks (the area was located on a timber haul route) and commitments made to other users (livestock was scheduled to use the area). Gatherers gradually removed vehicles from the area, but the agency had to tow five from the site.

During the 1992 Gathering, there were 43 arrests of Rainbow Family members on nine different charges, including use of a controlled substance, child abuse, traffic violations, theft, disorderly conduct and harassment, disorderly conduct and possession of a concealed weapon, motor vehicle theft, a wildlife violation, and existence of outstanding warrants.

By comparison, there were 82 arrests of non-Rainbow Family members during the period of the Gathering in the county where the Gathering was held, and 81 during that same period in the previous year. Thus, there was more than a 50 percent increase in the number of arrests in the county during that period, due solely to the presence of the Rainbow Family.

Comment: Government's Intent With Respect to the Rainbow Family. Approximately 50 respondents commented that Rainbow Family Gatherings contribute to world peace and love. Many of these respondents asked the agency not to break up the Gatherings.

Seventy-two respondents stated that the proposed rule is a direct attack on the Rainbow Family or is written with the Rainbow Family in mind. Specifically, these respondents believed that the Rainbow Family is the group most affected by the proposed rule; that no other group is mentioned in showing a need for the regulations; that in *United States* v. *Israel* and *United States* v. *Rainbow Family*, the agency tried to stop Rainbow Family Gatherings; that the agency imposes less stringent standards for site clean-up on more mainstream groups; that the proposed rule is a vehicle for spying on Rainbow Family members; that Forest Service and state and local law enforcement officers have selectively enforced laws to harass and intimidate people attending Rainbow Family Gatherings; that law enforcement officers have looked for activity that could be construed as illegal; that the Forest Service has been unreasonable and hostile at Rainbow Family Gatherings; that the number of law enforcement officers at Rainbow Family Gatherings is excessive and a waste of money; that law enforcement officers have established checkpoints at the entrance to Rainbow Family Gatherings to search cars and to verify car registration, car insurance, and driver's licenses; that at the 1993 Gathering in Alabama, a few people without car registration or insurance were held in chains and beaten; that state police at the 1993 Gathering conducted regular armed patrols and random searches; and that some Rainbow Family members have been taken into custody and forced to pay a fine for their release.

In contrast, one respondent stated that the proposed rule is clearly aimed at more than just one type of gathering. Another respondent noted that to comply with cases on point, the regulation has been modified to treat all group uses the same, regardless of whether they involve the expression of views. One respondent commented that the Forest Service was hospitable and kept order and did a remarkable job handling the crowd at the 1993 Gathering. Another respondent stated that the Forest Service did an excellent job helping the Rainbow Family have a safe and healthy gathering in 1993 and added that the Forest Service was friendly and helpful.

Response. The intent of this rule is not to break up or prohibit any group uses, including Rainbow Family Gatherings. Rather, the intent of this rule is to control or prevent harm to forest resources, address concerns of public health and safety, and allocate space. In *United States* v. *Israel* and *United States* v. *Rainbow Family*, the Forest Service was not attempting to prohibit the Rainbow Family Gathering, but rather to enforce existing group use regulations where the Rainbow Family had failed to obtain a special use authorization.

The Forest Service hosts many types of noncommercial group uses on National Forest System lands, such as company picnics, weddings, group hikes and horseback rides, demonstrations, and group gatherings. This final rule does not single out any particular group or type of event. As two respondents noted, this rule applies to all noncommercial group uses, both those involving and those not involving the expression of views. The Department intends to apply this rule consistently and fairly as required by law to all noncommercial group uses.

The Forest Service makes every effort to be friendly and hospitable and to help every group have a safe and healthy visit to the national forests. The agency's law enforcement approach at large group gatherings reinforces this effort. As shown by the reports on the 1991 and 1992 Rainbow Family Gatherings, agency law enforcement officers endeavor to act as good hosts to prevent potential problems; to provide for public safety; to maintain close coordination with other involved agencies, such as the local highway patrol, sheriff's office, and health department; and to ensure in a courteous, professional manner compliance with federal, state, and local law and agency regulations.

To meet these objectives, enhanced law enforcement is needed for group uses. Perimeter patrols by local and federal law enforcement agencies during the 1991 Rainbow Family Gathering, for example, focused on protecting local residents and their property, facilitating traffic flows, maintaining safety on all state and local roads, and responding to visitors' needs or calls for help.

The Forest Service has endeavored to enforce its regulations not only fully but fairly. Some Rainbow Family members who have committed violations at the annual Gatherings have been taken into custody and/or have had to pay a fine. For example, after coordinating with a local United States Magistrate and Assistant United States Attorney, Forest Service law enforcement officers adopted a procedure at the early stages of the 1992 Rainbow Family Gathering to allow prosecution of violators who were temporarily residing in the area. This procedure required violators either to pay a fine upon issuance of a violation notice or to be taken into custody and brought before a magistrate. By paying the fine, the violator did not forego the right to appear in court and contest the violation.

Shortly after receiving complaints about the procedure from Rainbow Family members, the United States Attorney's office recommended that the procedure be altered. The new procedure required that a violation notice for an optional appearance be issued if the violator could present sufficient identification (driver's license, vehicle registration, and proof of insurance in the driver's name). If adequate identification could not be presented, the violator would have to pay the fine upon issuance of the violation notice or be detained. This change in procedure illustrates the agency's effort to balance its law enforcement obligations against its concern for due process.

The Department acknowledges that the level of law enforcement activities may not always have been appropriate for group uses. For example, while it may be appropriate to post Forest

Service officials at the entrance to a Rainbow Family Gathering to deter illegal activity and to provide helpful information on the national forests and resource protection, it is not necessary or appropriate to search cars entering the Gathering or to verify the driver's car registration, insurance, and license. This practice was curtailed at a gathering in Mississippi in July 1993 as soon as it came to the attention of responsible Forest Service officials. Promulgation of this rule will help the Department ensure a consistent, nationwide approach to law enforcement for group uses.

Comment: Government's Intent Generally. Approximately 40 respondents believed that the intent of the proposed rule is to allow the Forest Service to deny the use of public lands to groups the agency finds undesirable. These respondents stated that the history of the rule shows that the agency's intent is to restrict speech and that by regulating all noncommercial activities under the same standards, the agency is in effect still attempting to restrict First Amendment rights. These respondents felt that if the agency really supported the rights of free speech and assembly, it would be apparent from the proposed rule and there would be no need to state it in the preamble.

Other respondents stated that the proposed rule masks an agenda that has nothing to do with protecting resources and addressing public health and safety; that the Forest Service has invoked public health concerns rigidly and arbitrarily to discourage gatherings and has used these concerns as a pretext for taking other enforcement action, such as dealing with the use of illegal drugs; and that given the proposed rule is written like a legal brief, with a provision for immediate judicial review, and the agency's past attempts to regulate noncommercial group use, it is reasonable to view this regulation as an attempt to restrict assemblies via court order.

Other respondents stated that the agency should specify what will be done to ensure that enforcement of the rule will not result in acts of terrorism against those who like to gather in the national forests; that the proposed rule targets those who go to the forests to worship; that the proposed rule is a direct attack on naturists; that the agency doesn't need a regulation to ensure equal treatment for all groups because equal treatment is already guaranteed by the Constitution; that the proposed rule can be selectively enforced and is therefore discriminatory in nature; that the proposed rule is discriminatory in nature, particularly in view of the severe restrictions on Native Americans' access to tribal lands and the intimidation of Native Americans by law enforcement; and that those responsible for the inception and formulation of the proposed rule are enemies of the people of this country.

Response. The intent of this rule is not to deny the use of National Forest System lands to any group, nor is the intent of this rule to restrict speech. Rather, the intent of this rule is to implement reasonable time, place, and manner restrictions on group uses of National Forest System lands.

In addition to the need to mitigate adverse impacts on forest resources and to address concerns of public health and safety, there is a need to allocate space in the face of increasing legal constraints on the use of National Forest System lands, including the need to protect endangered, threatened, or other plant and animal species. The competition for available sites in the national forests among animals, plants, and humans has increased as more demands and restrictions have been placed on use of the national forests. Requiring a special use authorization allows the agency to act as a kind of ''reservation desk'' for proposed uses and activities, including noncommercial group uses.

The Department believes that its support for the rights of free speech and assembly is not only stated in the preamble, but is apparent from the language and structure of the rule. The rule does not single out any group. On the contrary, the final rule establishes one category called ''noncommercial group uses''; restricts the content of an application for noncommercial group uses to information concerning time, place, and manner; applies the same evaluation criteria to all applications for noncommercial group uses regardless of whether they involve the expression of views; establishes specific, content-neutral evaluation criteria for noncommercial group uses; provides that applications for noncommercial group uses will be granted or denied within a short, specific timeframe; provides that if an application is denied and an alternative time, place, or manner will allow the applicant to meet all the evaluation criteria, the authorized officer will offer that alternative; provides that the authorized officer will explain in writing the reason for denial of applications for noncommercial group uses; and provides that such a denial is immediately subject to judicial review. These provisions have been included to meet the constitutional requirements of a valid time, place, and manner restriction identified in case law, including *United States* v. *Israel* and *United States* v. *Rainbow Family.*

This rule is needed to ensure equal treatment for all groups. Various members of the public and state and local governments have criticized the Forest Service for applying a double standard in not requiring all large groups to obtain a special use authorization. This rule ensures that all noncommercial groups are treated equally under the law.

It is the Department's intent that this rule will be applied consistently to all noncommercial groups as required by law. Moreover, it is essential, both as a matter of fairness and as a matter of constitutional law, that this rule be applied uniformly. The Forest Service intends to provide training to its personnel to ensure that the rule is implemented consistently.

Comment: Least Restrictive Means To Further the Government's Interests. Approximately 95 respondents indicated that the Forest Service has not employed the least restrictive means to achieve its interests. These respondents stated that the proposed rule is unnecessary because, as the court in the *Rainbow Family* case held, there are other laws and regulations that address the agency's interests in promulgating the proposed rule; that the agency should deal with violations of other regulations as they occur; that there is no need for a permit requirement because encouraging groups to contact the agency prior to their proposed activities is sufficient to address the agency's concerns; that the agency does not need to require a permit because requiring notice of a proposed activity is sufficient; that mid-sized groups of 50 to 100 people should only have to notify the Forest Service of their activity, rather than obtain a permit; that there is no need for an application and permitting system and that the agency should allow a group to gather if they meet all other parts of the proposed rule; and that the proposed rule should not apply at developed campgrounds or areas set aside for group uses.

Additionally, these respondents stated that given that impacts vary depending upon the type of activity, the Forest Service should issue specific and objective standards for those activities that are problematic, and that the agency could also intensify education programs for specific groups that cause problems; that a special use authorization should not be required for church, club, or family gatherings; that a simple assessment, roping off of high-risk areas, and site-specific camping requirements have sufficed for

gatherings of over 20,000; and that with respect to the Rainbow Family, the Forest Service has been able through informal cooperation to achieve its objectives concerning resource protection, promotion of public health and safety, and space allocation.

Response. Less restrictive alternatives are not part of the test for the validity of a time, place, and manner regulation like this final rule. Rather, the test is limited to whether the regulation is content-neutral, whether it is narrowly tailored to further a significant governmental interest, and whether it leaves open ample alternative channels for communication. *Clark* v. *CCNV,* 468 U.S. at 293.

In *Clark* v. *CCNV,* where the Court upheld a National Park Service regulation that prohibited camping in certain parks in Washington, D.C., the Supreme Court rejected the Court of Appeals' view that the challenged regulation was unnecessary, and hence invalid, because there were less speech-restrictive alternatives that could have satisfied the governmental interest in preserving national park lands. The Supreme Court held that the less-restrictive alternatives proposed by the Court of Appeals represented no more than a disagreement with the National Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. 468 U.S. at 299.

Thus, it is immaterial if there are less restrictive alternatives to the special use authorization requirement for noncommercial group uses, as long as the final rule meets the test for constitutionality enunciated in *Clark* v. *CCNV.* Under *Clark* v. *CCNV,* the federal land management agencies, rather than the courts, have the authority to manage federal lands and the competence to judge how much protection of those lands is wise and how that level of conservation is to be attained. 468 U.S. at 299.

Even though less restrictive alternatives are not part of the test for constitutionality for time, place, and manner regulations, the Department believes that the special use authorization requirement is the least restrictive means to accomplish the government's interests. Other laws and regulations, such as the Endangered Species Act and rules providing for the issuance of closure orders, address resource protection and public health and safety in general. Other laws and regulations do not, however, provide the framework necessary for applying those standards for resource protection and public health and safety to noncommercial group uses. Other laws and regulations do not allow the Forest Service to control or prevent adverse impacts on forest resources from noncommercial group uses, to address concerns of public health and safety associated with noncommercial group uses, or to allocate space for noncommercial group uses and other uses and activities.

In *United States* v. *Rainbow Family,* the court denied the government's motion for a preliminary injunction to enforce the group use regulation on the grounds that the regulation was unconstitutional and not validly implemented. The court stated in dicta that the government had an adequate remedy at law which would also preclude granting the motion, in that there were other laws and regulations to address the government's concerns in seeking the injunction. 695 F. Supp. at 314. The court never ruled on the existence of an adequate remedy at law for purposes of obtaining a preliminary injunction. Even if the court had ruled on this issue, it would have been immaterial to the assessment of the constitutional validity of this final rule.

Requiring notice of a proposed activity is also insufficient to address the concerns underlying the final rule because the agency still lacks the ability to regulate the activity. Without the application and permitting system, the authorized officer cannot determine whether the evaluation criteria in the final rule are satisfied. This final rule will not apply at developed recreation sites where use is allocated under a formal reservation system and where the agency has the authority to manage and to charge a user fee to the public under the Land and Water Conservation Fund Act (16 U.S.C. 4601–6a).

The Department has determined that it has sufficient interests in regulating noncommercial group uses. Regulating only those activities or groups that have caused problems in the past would be difficult to defend. The courts in *United States* v. *Israel* and *United States* v. *Rainbow Family* held that in regulating noncommercial group uses the agency cannot single out expressive conduct and treat it differently from other activities, and that the regulation must have clear and objective standards. Regulating only certain groups or activities based on a judgment of which ones have caused problems sufficient to warrant regulation could be viewed as singling out expressive conduct on the basis of a subjective standard. The same concern would apply if the Department exempted certain types of noncommercial group uses, like church, club, or family gatherings, from the special use authorization requirement.

Finally, as shown by the reports on the 1991 and 1992 Rainbow Family Gatherings, the Forest Service has not always been able to achieve its objectives concerning resource protection and space allocation through informal cooperation with the Rainbow Family. In particular, agency personnel have been frustrated in dealings with Rainbow Family members because informal agreements made with one individual or subgroup have not been respected by other group members. It has thus been difficult for the agency to obtain commitments from the Rainbow Family on issues pertaining to the Gatherings. On a number of issues, the agency has had to recommence discussions at each encounter with Rainbow Family members. The special use authorization process will enhance the agency's ability to achieve its objectives by allowing the agency to obtain commitments from the Rainbow Family that apply to the group as a whole.

Comment: Ample Alternative Channels for Communication. Approximately 27 respondents felt that the proposed regulation does not leave open ample alternative channels of communication. These respondents stated that there is no adequate substitute for peaceable assembly as a form of communication; without a permit, a proposed activity could not occur on National Forest System lands; and that the Rainbow Family is not an organized group and has no other place to go.

Response. The Department disagrees with these comments. The final rule leaves open ample alternative channels of communication. The final rule does not restrict, and is not intended to restrict, freedom of thought or expression. Nor does the final rule prohibit any expressive activities. Rather, the final rule requires a special use authorization for noncommercial group uses on the national forests. Moreover, § 251.54(h)(2) of the final rule provides that if an application is denied and an alternative time, place, or manner will allow the applicant to meet all the evaluation criteria, the authorized officer shall offer that alternative.

Comment: Enforceability. Approximately 28 respondents commented on the enforceability of the proposed rule. Specifically, six respondents stated that enforcement of the rule would be provocative and confrontational because the rule would be ignored and the agency would have to make mass arrests, disperse large crowds, or obtain a restraining order to enforce it. Thirty respondents stated

that the cost to administer or enforce the rule either would exceed income, would be a waste of taxpayer dollars, or would overburden the Forest Service and the court system.

Response. The Forest Service currently works to the extent possible with organizers of group uses before, during, and after the activities take place to try to prevent problems. Adoption of this final rule will not change the agency's efforts to work cooperatively with groups who wish to use National Forest System lands, nor does the agency foresee any problem with implementation of the final rule. If a group fails to obtain a special use authorization that is required by the rule, the agency can take other action short of making mass arrests or obtaining a restraining order. For example, in most federal judicial districts, the agency may impose a fine for failure to obtain a special use authorization required for use and occupancy of National Forest System lands.

No income to the U.S. Treasury is generated under the final rule. There are always costs to the taxpayer when large groups use the national forests. As the reports on the 1991 an 1992 Rainbow Family Gathering indicate, the agency incurs substantial costs in connection with group uses in order to protect the resource, address concerns of public health and safety, and allocate space. For example, some of the costs cover water quality testing, road maintenance, personnel, scarification, and law enforcement. Requiring a special use authorization should decrease rather than increase these costs by enhancing the agency's ability to prevent or minimize resource damage.

Comment: Efficacy of the Rulemaking. Approximately 23 respondents commented that promulgating this regulation is a waste of time and money because it will be struck down by the federal courts, like the two prior attempts before it.

Response. The final rule ensures that the authorization procedures for noncommercial group uses comply with First Amendment requirements while providing a reasonable administrative framework for addressing the significant governmental interests identified in the rule. The Department has structured this rule very differently from the 1984 rule that was struck down in *United States* v. *Israel* and *United States* v. *Rainbow Family.* Those courts held that the 1984 rule on its face singled out expressive conduct and required that it be treated differently from other activity; lacked clear and objective standards for evaluating applications for expressive activities; and lacked procedural safeguards required by constitutional law. The court in *United States* v. *Rainbow Family* invalidated the 1988 version because the agency had failed to show good cause under the APA for adopting an interim rule without prior notice and comment.

In contrast, this final rule establishes a single regulatory category that includes expressive and non-expressive activities; applies the same specific, content-neutral evaluation criteria to all applications in that category; and contains all the procedural safeguards required by case law. Rather than publish an interim rule that goes into effect upon publication but before comments are received and analyzed, the agency published a proposed rule for notice and comment, and the Department is publishing a final rule incorporating the analysis of timely received comments. The final rule does not go into effect until 30 days after it is published. In promulgating this rule, the Department has meticulously complied with all requirements of the APA.

Comment: Consequences of Noncompliance. Nine respondents stated that the penalty for violating the rule is excessive. One of these respondents commented that the proposed rule could make too many things a crime and could provide for excessive penalties for the pettiest infractions. One respondent commented that the agency gave insufficient notice of the penalty.

Response. The penalty for violating any prohibition in 36 CFR part 261, including use and occupancy of National Forest System lands without a special use authorization when an authorization is required, is a fine of up to $5,000 or imprisonment for up to six months, or both (*see* 16 U.S.C. 551; 18 U.S.C. 3559, 3571). This penalty is authorized by statute and is not subject to amendment by regulation. Consequently, the penalty was not discussed in the proposed rule.

In the context of this rule, the penalty would apply only if a noncommercial group failed to obtain a special use authorization for a group use of National Forest System lands. In such a case, noncommercial groups would be subject to the same penalty imposed on other forest users for violation of the prohibitions found at 36 CFR part 261.

Summary of Comments by Section of the Proposed Rule

The vast majority of respondents opposed the rule. Many did not state the reason for their opposition. Most opposed the rule in the belief that the rule would infringe upon their First Amendment rights to gather and to disseminate information.

The following is a section-by-section summary of timely received comments and the Department's responses to those comments in the final rule.

Amendments to Part 251

Section 251.51—Definitions

The definitions in the rule are important because they determine applicability of the rule. The following terms were defined in the proposed rule: *Commercial use or activity, Distribution of printed material, Group event, Noncommercial use or activity,* and *Printed material.* Approximately 47 respondents commented on the definitions in the proposed rule. Eleven respondents commented on the definition of *Commercial use or activity.* Thirty-one respondents commented on the definition of *Group event.* Other definitions addressed were *Distribution of printed material* and *Printed material.* One respondent commented that the definitions are generally illegal.

Comment: ''Commercial use or activity.'' Respondents commented that the definition for commercial use or activity is too vague and broad and could include activities that are considered to be noncommercial. For example, respondents felt that the following could be considered a commercial activity under this definition:

—A scout troop sharing food;
—A school troop pooling meal and travel expenses;
—An activity involving the exchange of clean-up chores;
—An exchange of pocket knives;
—Bartering;
—Children trading beads or baseball cards; or
—A hug, smile, or handshake.

Respondents felt that bonding could be required if the costs of the activity were supported in part by donations; that the term ''commercial'' should apply to business activities that generate a profit, rather than to the exchange of gifts or barter; and that a better definition of ''commercial use or activity'' would include the phrase ''having profit as the primary aim.''

Response. The Department agrees that the definition for commercial use or activity in the proposed rule was ambiguous and could be construed to include some activities that are noncommercial. However, the Department believes that uses or activities that do not have profit as the primary aim may still be considered commercial and that the phrase ''having

profit as the primary aim'' is too vague and too difficult to apply to all the uses and activities on National Forest System lands.

Instead, the Department has clarified the definition for commercial use or activity in the final rule to include only those uses or activities (1) where an entry or participation fee is charged, or (2) where the primary purpose is the sale of a good or service.

Under this definition, uses or activities involving the exchange of a product or service, such as trading pocket knives or clean-up chores, will not be considered commercial. Uses or activities where the sale of a good or service is merely secondary, such as a gathering where the primary purpose is to worship and exchange views, but where some arts and crafts may be sold incidentally to the gathering, will not be considered commercial.

Comment: ''Group event.'' One respondent commented that the definition for group event would now include special events, recreation events, and all other noncommercial groups, and that this equal treatment of all groups is an outrageous misuse of power which allows for complete disregard for the intent of the group.

Two respondents commented that the threshold of 25 or more in the definition for group event is arbitrary and irrelevant, and that other than with extremely large groups, it is not the size of a group but the actions of a group and the site selected that determine the amount of impact. One of these respondents stated that an orderly church group of 200 can do less damage than a group of 50 demonstrators; the other commented that one person who is careless with a match can do more damage than 50 people swimming in a stream.

One respondent commented that the public has not had an opportunity to read, analyze, and comment on the agency's review of potential impacts that led to the definition of a group as 25 or more people. Two respondents commented that the agency should set different thresholds for a group according to the duration of the proposed activity and its impact on the land, and that the 25-person threshold is arbitrary and may be too large or small depending on special local conditions.

Another respondent voiced strong support for a 25-person cutoff, while eleven other respondents stated that 25 people is too low a threshold for a group event. One suggested 50 or 50 to 100 people. One suggested 50 people, which the respondent stated is the number used by the Bureau of Land Management. Another respondent who suggested 50 people felt that the 25-person threshold would create an undue burden by including many school camping groups and groups gathering only to secure academic credentials, and that the agency does not need to regulate these groups because group leaders with college and graduate-level degrees will always choose sites for their groups where the seven evaluation criteria will be met. One respondent suggested 95 people. One respondent stated that with the 25-person threshold, every family reunion and church picnic would require a permit. Another respondent suggested 250 people in order to allow most ''average'' group activities, such as family reunions and church or company picnics, to use National Forest System lands without an undue paperwork burden.

One respondent stated that the number of people for a group event should be as large as possible and that there are areas of National Forest System lands that can accommodate far more than 25 people. This respondent suggested that like the National Park Service, the Forest Service should designate such areas by regulation and establish a higher number for these areas, so that large groups can gather on short or no notice. In support, this respondent cited the National Park Service's regulations for the National Capital Region at 36 CFR 7.96(g)(2)(ii).

Four respondents were unclear about how the rule would be applied if more than 25 people unexpectedly end up using the same site. One of these respondents stated that it would also be unclear how the rule would be applied if several score people were camping in a large area, but far apart.

Two respondents stated that there is no way to tell how many people will appear at a group event, and that 23 people could be anticipated, but two more could show up, for example, for Rainbow Family site scouting parties. Two respondents stated that the phrase ''and/or attracts'' should be deleted. Specifically, one of these respondents stated that it is reasonable to hold a group responsible for predicting the size of its own turnout, but not for predicting how many unrelated and uninvited outsiders may be attracted to an event. This respondent noted that it is appropriate to require a group that anticipates attracting 25 or more uninvited people to notify the agency in advance.

Three respondents commented that spontaneous gatherings would be eliminated. Two of these respondents commented that large families and church groups that spontaneously camp or conduct other activities on the national forests would not have time to get a permit.

Response. The Department has substituted the term ''group use'' for ''group event'' in the definitions section and elsewhere in the final rule because use of the term ''group event'' in this rule could be confused with use of the term ''recreation event'' in the Forest Service Manual. In section 2721.49 of the Forest Service Manual, ''recreation event'' refers to commercial group uses where an entry or participation fee is charged, such as certain motorcycle races or fishing contests. This final rule applies only to noncommercial, not commercial, group uses.

The definition for group use includes all noncommercial group uses, regardless of whether they involve the expression of views, because the courts have held that it is unconstitutional for the regulation to single out expressive activity and treat it differently from other activity.

The Department agrees that the duration of the activity and the site selected have some effect on the amount of resource impacts and that one individual could cause a lot of damage, for example, by starting a forest fire. However, in the Forest Service's experience, the size of a group has a significant effect on the potential for resource damage: Typically, large groups have more impact on a given area than individuals. A numerical threshold is a purely objective, non-discretionary way to determine applicability of the regulation. In contrast, an assessment based on the type of activity could be subjective and discretionary and therefore unconstitutional.

The Department has carefully reviewed the comments concerning the appropriate numerical threshold for a group use and has carefully reviewed the Forest Service's experience with all types of noncommercial group uses on National Forest System lands, particularly with respect to resource impacts associated with these uses. The Department's review of impacts associated with noncommercial group uses is not based on a study, but on the Forest Service's experience in the field. Parts of this review were discussed in the response to comments on the Department's significant interests in promulgating this rule.

Based on its review of the comments on the numerical cutoff for a group and of the adverse impacts associated with group uses, the Department has determined that a 25-person threshold is too low and that 75 people would be a

more appropriate threshold for applicability of the rule.

The Department recognizes that any numerical threshold is arbitrary in that a group of 74 people could have as much impact on forest resources as a group of 75, and that 25 people could have more impact than 100, depending on the type of activity and the characteristics of the site. Nevertheless, the Department believes that a numerical threshold is the fairest and most objective standard for applicability of the rule and that groups with 75 or more people tend to have a greater impact on National Forest System lands than smaller groups.

The National Park Service designates sites that are available for public assemblies in the National Capital Region and other park areas. These regulations can be found at 36 CFR 2.51, 7.96(g)(2)(ii). The Department does not believe it is practicable or necessary to require designation of sites that are available for noncommercial group uses of National Forest System lands. In general, the National Park Service and the Forest Service administer different amounts and types of land and different varieties of uses and activities on the land and therefore cannot take exactly the same approach to land management.

In the contiguous 48 states the National Park Service manages approximately 25.5 million acres of land with many fairly developed sites and an extensive reservation system. To a significant degree, public use of National Park Service land is concentrated. In contrast, in the contiguous 48 states the Forest Service manages approximately 169 million acres of land with primarily expansive, undeveloped resources. Management units in the National Forest System are generally not subject to the same level of regulation as National Park Service management units, and the Forest Service oversees a broader variety of uses and activities than the National Park Service. Generally, whereas the National Park Service has a preservation mission, the Forest Service has a multiple-use mission.

Finally, the Department does not need to designate specific sites because this final rule allows noncommercial groups to gather on very short notice without designation of specific sites. Section 251.54(f)(5) of the final rule provides for submission of applications up to 72 hours before a proposed activity and provides for a very short, specific timeframe for granting or denying applications.

This rule is intended to apply to noncommercial uses that involve groups of 75 or more people. The rule is not intended to apply to 75 or more individuals who do not arrive as part of a particular group or in connection with an organized activity, such as 75 or more people who reserve campsites individually rather than as a group at a popular developed recreation area on a holiday weekend. To clarify this intent, the Department is adding the words ''a group of'' to the definition for group use.

The rule is intended to apply to groups of 75 or more people that have requested use of a certain area for a noncommercial activity. The rule will apply to a group of 75 or more people that request to camp in the same area, even if they intend to camp far apart from each other.

The Department believes that it is reasonable for groups to estimate the expected number of participants and spectators at their activities. For example, groups could base their estimate on past experience and/or how many have expressed interest or have committed to participate in an activity. The Department agrees, however, that the phrase ''and/or attracts'' should be deleted from the definition for group use because it is not reasonable for groups to predict how many unrelated and uninvited outsiders may be attracted to an activity. Accordingly, the Department has deleted the phrase ''and/or attracts,'' but has added the phrase ''either as participants or spectators,'' to make it clear that an activity involving a group of 75 or more people, regardless of whether they are participants or spectators, requires a special use authorization.

The Department believes that in order to meet its objectives of ensuring resource protection, addressing public health and safety concerns, and allocating space in the face of greater legal constraints on the use of the land, it is both fair and necessary to require noncommercial groups of 75 or more people to obtain a special use authorization prior to their activity. Under the final rule, noncommercial group uses can be very close to spontaneous because applications for a special use authorization may be submitted up to 72 hours prior to the activity.

Comment. ''Distribution of printed material.'' One respondent stated that including the solicitation of views or signatures in the definition for distribution of printed material violates the First Amendment. Another respondent stated that this definition is broadly defined to include soliciting information in conjunction with the distribution of printed material. Another stated that the definition for distribution of printed material is too broad and that any distribution of printed material would be regulated, not just distribution associated with a group use.

Response. The definition for ''distribution of printed material'' has not been included in the amendments to part 251 in the final rule, as the Department has decided not to require a special use authorization for noncommercial distribution of printed material in the final rule.

Comment. ''Printed material.'' Two respondents commented that including photographs in the definition for printed material is unjustified because the rule could be construed to cover one person showing a photograph to another. One respondent stated that the definition for printed material is too broad and that any distribution of printed material would be regulated, not just distribution associated with a group use.

Response. As previously noted, the Department has removed the special use authorization requirement for noncommercial distribution of printed material from the final rule. Therefore, the definition for ''printed material'' has been removed from the amendments to part 251 in the final rule.

The Department believes that the changes noted in response to comments received make the definitions clear and help ensure that the final rule is constitutional, both as written and as applied.

Section 251.54—Special Use Applications. This section of the existing rule prescribes procedures and requirements for processing applications for special use authorizations.

Comment. Section 251.54(a) of the existing rule encourages all proponents to contact an authorized officer as early as possible so that potential constraints may be identified, the proposal can be considered in forest land and resource management plans (forest plans) if necessary, and processing of an application can be tentatively scheduled. The proposed rule offered a technical amendment to § 251.54(a) to make clear that the proponent will be given guidance and information about the items listed in §§ 251.54(a)(1) through (a)(8) only to the extent applicable to the proposed use and occupancy.

Three respondents commented on this provision. One respondent commented that the word ''encourage'' in § 251.54(a) is too vague. Another respondent commented that § 251.54(a) is too vague and allows the Forest Service to delay processing of an application by asking for more information. Another

respondent noted that ''providing for consideration of proposals in forest plans if necessary'' allows the agency either to move existing uses or activities that conflict with a proposal or to deny a permit for the proposal.

Response. These comments address a provision in the existing rule that was not proposed for amendment and which is therefore beyond the scope of this rulemaking. However, the Department wishes to assure those who commented that the intent of § 251.54(a) is to encourage proponents to talk to the Forest Service about proposed uses and activities as early as possible and even before an application is submitted so as to facilitate, not delay, the processing of applications.

The rules in subpart B of part 251 apply to all special uses, both commercial and noncommercial. The amendment proposed to § 251.54(a) was in the last sentence and was necessary to ensure that applicants for noncommercial group uses receive relevant information. For example, as noted in the preamble of the proposed rule, fees and bonding requirements listed in § 251.54(a)(4) do not apply to applications for noncommercial group uses.

Comment. Section 251.54(e) of the existing rule specifies the information that must be contained in an application for a special use authorization. The proposed rule amended § 251.54(e)(1) to specify applicant identification requirements applicable to all special uses. Specifically, § 251.54(e)(1) of the proposed rule required an applicant for any type of special use authorization to provide his or her name and mailing address, and, if the applicant is not an individual, the name and address of the applicant's agent who is authorized to receive notice of actions pertaining to the application.

Two respondents noted that it makes sense to require applicants to provide their names and mailing addresses so that the Forest Service will be able to contact applicants and send them their permits. One of these respondents also stated that there would be no need for this provision if a permit were not required. The other commented that providing a name in a cooperative spirit and signing a permit are two different matters.

One respondent stated that the requirement for an applicant's address discriminates against the homeless.

Approximately 25 respondents commented that the Rainbow Family has no leader who can act as agent for the group. These respondents stated that Rainbow Family Gatherings are often spontaneous and that the group lacks the requisite hierarchy; that this provision infringes on freedom of speech by requiring the Rainbow Family to retreat from one of its fundamental principles—*i.e.*, lack of hierarchy—in order to gather in practice of that principle; and that this provision violates the Rainbow Family's tribal sovereignty and spiritual integrity and is equivalent to asking the Catholic Church to submit an application to have a Mass.

Response. The proposed rule amended § 251.54(e)(1) for clarity by reorganizing its contents. No amendment in substance was made. These comments address a provision in existing § 251.54(e)(1) that was not proposed for amendment and which is therefore beyond the scope of this rulemaking.

For administrative purposes, it is necessary to require an applicant for any kind of special use authorization to provide his or her name and mailing address, and, if the applicant is not an individual, the name and address of the applicant's agent. Without that information, the Department has no way of contacting the applicant concerning the content or disposition of the application. This provision does not discriminate against anyone because it applies to any applicant for any type of special use authorization.

As discussed in response to comments on § 251.50(c), this regulation also does not impose an undue burden on free exercise of religion. Religious groups, including the Catholic Church, have applied for and obtained permits in order to hold services on public lands. *See e.g.*, *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (National Park Service permit authorizing outdoor Mass conducted by Pope John Paul II on National Mall).

The Department believes it is both fair and appropriate to apply this provision to all applicants, including the Raimbow Family. Even if the Rainbow Family has no leader, members of the group can still designate a representative who can receive notice of actions pertaining to an application for a special use authorization. For example, several respondents commented that the Rainbow Family engages in decisionmaking by consensus and that councils meet to make decisions that affect the group. Thus, one of these councils could select a representative for the purpose of § 251.54(e)(1).

The court in *United States* v. *Rainbow Family* held that the Rainbow Family is an unincorporated association that can sue and be sued. 695 F. Supp. at 298. The court also held that service of process upon the Rainbow Family was properly effected in that case by service upon several individuals who acted as agents or representatives of the Rainbow Family. *Id.* Moreover, in 1987, representatives of the Rainbow Family signed a consent judgment in a suit brought by the Health Director of the State of North Carolina against the Rainbow Family for failure to obtain a permit under the State's mass gathering statute. It is therefore reasonable to believe that the Rainbow Family could designate a person or persons to receive notice of actions pertaining to an application for a special use authorization.

Comment. Under the heading ''Minimum information,'' § 251.54(e)(2)(i) of the proposed rule required applicants for noncommercial group uses to provide a description of the proposed activity, a description of the National Forest System lands and facilities the applicant would like to use, the estimated number of participants and spectators, and date and time of the proposed activity, and the name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the applicant.

Four respondents commented on § 251.54(e)(2)(i). One respondent stated that this requirement is generally illegal. Another respondent stated that the agency should only require a group's name, address, and a description and the date of the proposed activity. A third respondent commented that it is reasonable for the agency to require information about proposed activities on National Forest System lands, including their location, the number of participants, and the date and time of the proposed activity. However, this respondent stated that requiring applicants to submit minimum information subjects them to arbitrary standards of accuracy and demands for further information—especially where the activity is diverse and organic, exact participation is unknown, and set-up and clean-up times are imprecise—and that an authorized officer could delay or deny an application because the information provided is deemed incomplete or inaccurate. Two other respondents stated that the agency could deny a permit if an application was not filled out correctly or completely.

Response. The Department believes that requiring minimal information about proposed noncommercial group uses is both reasonable and necessary for administrative purposes and is in no way illegal. Failure to require this information before these activities occur

would defeat the Department's purposes of resource protection, promotion of public health and safety, and allocation of space within the National Forest System. Without this information, for example, the Forest Service would not know the kinds of mitigative and preventive measures to take in authorizing noncommercial group uses. As a result, these uses could pose a substantial risk of damage to National Forest System lands and resources.

The Department's intent is to limit the information required to those items contained in §§ 251.54(e)(2)(i)(A)–(E), which address only the time, place, and manner of the proposed activity. To clarify that intent, the heading for § 251.54(e)(2) has been changed from ''Minimum information'' to ''Required information.'' In addition, a sentence has been added to § 251.54(e)(2)(i) to make explicit that the additional requirements enumerated in §§ 251.54(e)(3) through (e)(6) of the final rule do not apply to applications for noncommercial group uses.

While the Department intends that information be provided for each of the five categories as accurately and completely as possible, Forest Service officers will not hold applicants to standards of accuracy or completeness that are impracticable to attain. For example, § 251.54(e)(2)(i)(C) requires an estimate, not an exact number, of participants and spectators. Under § 251.54(e)(2)(i)(B), the Department is not requiring a legal description of the land proposed for the activity, but rather a description that is accurate and complete enough to allow the authorized officer to determine where the activity will occur.

Finally, the Forest Service cannot delay an application because the information provided is incomplete or inaccurate. Section 251.54(f)(5) of the final rule provides that an application for noncommercial group uses must be granted or denied within 48 hours of receipt.

For the reasons stated, the final rule retains the requirement in § 251.54(e)(2)(i) without change from the proposed rule.

Comment. Section 251.54(e)(2)(i)(A) of the proposed rule required applicants to provide a description of the proposed activity.

Three respondents commented on this provision. One respondent felt that it is reasonable for the Forest Service to want an idea of what people are going to do on public lands, but that if authorized officers already know, then this issue is addressed. This respondent stated that this information should be provided when authorized officers ask for it, but that requiring it to be provided in advance places an undue burden on the public.

Two respondents commented that the requirement for a description of the proposed activity is very ambiguous and that it is not clear how much detail is required. One of these respondents stated that the agency could increase the chances of revocation of a permit by requiring strict compliance with a condition that would be very difficult to meet and that the actions of one person could put everyone at a legal risk.

Response. It is both reasonable and necessary to require proponents to provide in advance a description of the proposed activity. Failure to provide prior notice of proposed activities would defeat the Department's purposes of resource protection, promotion of public health and safety, and allocation of space within the National Forest System. Without this information, for example, the Forest Service would not know the kinds of mitigative and preventive measures to take in authorizing noncommercial group uses. As a result, these uses could pose a substantial risk of damage to National Forest System lands and resources.

The Department believes that § 251.54(e)(2)(i)(A) is unambiguous. Under this provision the Department is requiring a description of the proposed activity that is accurate and complete enough to allow the authorized officer to determine the nature of the proposed activity, for example, whether it is a wedding reception or a group ride. Moreover, a lack of detail in describing the proposed activity is not a basis for revocation under § 251.60(a)(1) of the final rule.

Revocation will not be more likely for special use authorizations issued for noncommercial group uses than for other types of uses. The Forest Service endeavors and will continue to endeavor to ensure compliance with all the terms and conditions of all special use authorizations. Requiring a description of the proposed activity has no bearing on the legal risk assumed by individual group members or the group as a whole in connection with the proposed activity. Under this rule, individual group members will be personally responsible for their own actions, while the group will be responsible for the actions of its members as a whole that relate to compliance with the special use authorization.

Having considered the comments received, the Department has retained without change § 251.54(e)(2)(i)(A) in the final rule.

Comment. Section 251.54(e)(2)(i)(B) of the proposed rule required applicants to provide a description of the National Forest System lands and any facilities the applicant would like to use.

Four respondents commented on this provision. One respondent commented that it is reasonable for the Forest Service to request a description of the National Forest System lands a proponent would like to use, but that requiring this information prior to the proposed activity places an undue burden on the public. This respondent stated that if the land selected by a proponent is not available at the time requested, the agency should address the problem at the time of the activity, not before.

One respondent stated that this provision would require a church group to tell the agency where it wants to pray, which would violate religious freedom. Another respondent commented that the agency could authorize a smaller area than requested and that if 25 or more people spilled over the permit boundary, use of that area would not be authorized by the permit. One respondent stated that a group would have to commit to a site early on, given the amount of time needed to process an application.

Response. The Department has amended § 251.54(e)(2)(i)(B) in the final rule to require an applicant to provide the location as well as a description of the National Forest System lands and facilities the applicant would like to use. It is both reasonable and necessary to require proponents to provide this information in advance. Failure to provide prior notice of the location and a description of the proposed activity would defeat the Department's purposes of resource protection, promotion of public health and safety, and allocation of space within the National Forest System. Without this information, for example, the Forest Service would not know the kinds of mitigative and preventive measures to take in authorizing noncommercial group uses. As a result, these uses could pose a substantial risk of damage to National Forest System lands and resources.

In addition, the National Environmental Policy Act (NEPA) mandates that federal agencies prepare an environmental analysis on proposals for major federal actions significantly affecting the quality of the human environment (42 U.S.C. 4332(2)(C)). As one of the examples of a major federal action, NEPA's implementing regulations include actions approved by federal permit (40 CFR 1508.18(b)(4)). In order to comply with NEPA, the Forest Service needs to know which National

Forest System lands may be impacted by a proposed activity.

Requiring religious groups to provide a description of the National Forest System lands and facilities they would like to use does not impose an undue burden on free exercise of religion. Religious groups have applied for and have obtained permits to hold services at specific sites on public lands. *See, e.g., O'Hair* v. *Andrus,* 613 F.2d 931 (D.C. Cir. 1979) (National Park Service permit authorizing outdoor Catholic Mass on National Mall).

Authorization of noncommercial group uses will not be less likely than authorization of other uses. On the contrary, the Department intends to authorize noncommercial group uses to the full extent allowed under this rule. The Department also intends to apply this rule consistently and fairly as required by law to all noncommercial group uses. While the agency retains the discretion to determine the size of an area needed to support an activity, drawing an authorization boundary smaller than required would not be environmentally defensible as that approach would increase rather than reduce risks to forest resources.

The amount of time needed to process an application will not require a group to commit to a site early. Under § 251.54(f)(5) of the final rule, applications will be granted or denied within 48 hours of receipt. However, a group may still find it necessary to commit to a site early due to factors that are beyond the control of the Forest Service, such as the popularity of the site.

Comment. Section 251.54(e)(2)(i)(C) of the proposed rule required the applicant to provide the estimated number of participants and spectators.

Three respondents commented on this provision. One respondent commented that it is reasonable for the Forest Service to request an estimate of the number of participants and spectators, but that requiring that estimate prior to an activity places an undue burden on the public. Another respondent stated that this provision could be used to limit attendance at an activity on the pretext of mitigating environmental impact. One respondent commented that regulating the number of participants and spectators is not a valid time, place, and manner restriction.

Response. The Department believes that it is both reasonable and necessary to require proponents to provide in advance an estimate of the number of participants and spectators. Failure to require prior notice of the anticipated attendance would defeat the Department's purposes of resource protection, promotion of public health and safety, and allocation of space within the national Forest System. Without this information, for example, the Forest Service would not know the kinds of mitigative and preventive measures to take in authorizing noncommercial group uses. As a result, these uses could pose a substantial risk of damage to National Forest System lands and resources.

This provision is a necessary component of a valid time, place, and manner restriction. For example, the applicable forest plan might limit the number of people that can be accommodated at a proposed site. The Forest Service would need an estimate of the number of participants and spectators to determine whether that number fell within the limit established by the forest plan. In addition, the agency would need to know the anticipated attendance in order to determine the number of toilets or latrines needed or the sufficiency of potable drinking water at the proposed site. Finally, while numbers of people can have varying degrees of environmental impact on a site, the agency cannot under this rule limit the number of people attending an activity. The agency can only accommodate that number.

Having considered the comments received, the Department has retained without change § 251.54(e)(2)(i)(C) in the final rule.

Comment. Section 251.54(e)(2)(i)(D) of the proposed rule required applicants to provide the date and time of the proposed activity.

Two respondents commented on this provision. One respondent stated that it is reasonable for the Forest Service to request the date and time of a proposed activity, but that requiring that information before an activity places an undue burden on the public. Another respondent commented that the agency could authorize a shorter time than requested, so that anyone at the site before or after that time would be in violation of the permit.

Response. The proposed rule merely required the date and time of the proposed activity. Thus, the proposed rule required applicants to specify when but not how long a proposed activity would occur. Accordingly, the Department has amended § 251.54(e)(2)(i)(D) in the final rule to require applicants to provide the starting and ending date and time of a proposed activity.

The Department believes that it is both reasonable and necessary to require applicants to indicate in advance both when and how long a proposed activity will occur. Failure to require prior notice of this information would defeat the Department's purposes of resource protection, promotion of public health and safety, and allocation of space within the National Forest System. Without this information, for example, the Forest Service would not know the kinds of mitigative and preventive measures to take in authorizing noncommercial group uses. As a result, these uses could pose a substantial risk of danger to National Forest System lands and resources.

Authorization of noncommercial group uses will not be less likely than authorization of other uses. On the contrary, the Department intends to authorize noncommercial group uses to the full extent allowed under this rule. The Department also intends to apply this rule consistently and fairly as required by law to all noncommercial group uses.

It would be inconsistent with this intent to authorize a shorter time than requested for the purpose of finding anyone at the site before or after that time in violation of the authorization. However, there could be a compelling need to adjust the requested time period. For example, the agency might suggest an alternate date or site for a school-sponsored camping event if the requested date and site would place students in jeopardy on the opening day of deer hunting season.

Comment. Section 251.54(e)(2)(i)(E) of the proposed rule required applicants to provide the name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the applicant.

Four respondents recommended dropping the age limitation in this provision. These respondents believed that the age limitation prevents persons under the age of 21 from exercising their First Amendment rights, and that the agency should lower the age limit to 18 or drop it altogether; that those under the age of 21 would not be able to gather unless the ideas they espouse have been adopted by someone 21 years of age or older; that the provision discriminates against citizens under the age of 21, who will not be able to gather in groups of 25 or more; that this provision establishes a restriction on First Amendment activity that does not apply to other activities, since younger people can still go camping in small groups without a permit, which could present equal or greater risks to the resource; and that although each Rainbow Family member could get his or her own permit, then no one under the age of 21 could attend the Gathering.

Approximately 19 respondents indicated that it is not appropriate to make one individual responsible for an entire group. Specifically, these respondents stated that individual group members will no longer be responsible for themselves; that individuals should accept responsibility only for themselves; that it is reasonable for a group to give a person's name in the spirit of cooperation, but that it is not reasonable to require one person to assume responsibility for others; that a group should take responsibility for itself, and that if one person signs a permit, the group's solidarity will be broken; that this requirement is unreasonable if a group is not a legal entity and acts by consensus rather than by hierarchy; that if no representative from the group will sign because the group has no leader and because decisions are made by consensus, the Forest Service could find anyone 21 years of age or older or a representative from a different group to sign the permit, thus circumventing the process of decisionmaking by consensus; that individuals in the group will lose their autonomy; that those individuals who are responsible for any damage could make restitution with the aid of the whole group; that this requirement is particularly inappropriate where a group hesitates on philosophical grounds to appoint agents or representatives to speak on its behalf, and that the agency has said that it is unreasonable and impracticable to deal separately with each member of a large group, but that there is no reason for such a group to alter its philosophical grounds unless the agency shows that it has had to deal separately with each group member; that certain religious practices do not recognize a leader who takes responsibility for the group; that making one individual responsible for a permit makes the activity seem like a commercial venture.

Two respondents commented that this provision is unenforceable against the Rainbow Family because they have no leader. One of these respondents stated that no member of the Rainbow Family can speak for, sign for, or be held responsible for another.

Response. The Department believes that the age limitation in § 251.54(e)(2)(i)(E) of the final rule is a reasonable time, place, and manner restriction. The restriction is necessary to ensure that those who are designated to sign and who do sign a special use authorization on behalf of a group are of the age of legal majority. The signature gives the authorization legal effect. If the person or persons who sign the authorization are not of the age of legal majority, the authorization is not legally enforceable. Since the age of legal majority is not the same in every state but in no state exceeds the age of 21, the final rule requires that the person or persons who are designated to sign and who do sign a special use authorization be at least 21 years of age.

The Department does not believe that this age limitation imposes an undue burden on the exercise of First Amendment rights by those under the age of 21. The final rule does not prohibit groups of 75 or more people under the age of 21 from gathering in the national forests, nor does the final rule require that these groups include a person 21 years of age or older. Rather, the final rule requires that a person or persons 21 years of age or older be designated to sign a special use authorization and that that designated person sign an authorization on behalf of the group.

It is not appropriate or necessary for each member of a group to sign a special use authorization. It is also not appropriate or necessary for one member or a few members of a group to assume personal responsibility for the actions of other group members. Individual group members are personally responsible for their own actions. A person who signs a special use authorization for a noncommercial group use acts as an agent for the group, but does not assume personal responsibility for the group's actions.

However, it is appropriate and necessary to ensure that a group will be responsible for the actions of its members as a whole that relate to the use and occupancy of National Forest System lands by requiring a person or persons to sign a special use authorization as an agent or representative of the group. Requiring that a person or persons sign the special use authorization on behalf of the group will not weaken the group's solidarity; on the contrary, this requirement can serve to enhance the group's solidarity by ensuring that the group will take responsibility for its actions. By signing a special use authorization on behalf of the group, the agent or representative gives the authorization legal effect and subjects the group to the authorization's terms and conditions.

In addition, the Forest Service needs to have someone to contact for purposes of special use administration. The authorized officer may have questions about the application or may need to notify the applicant in the event of an emergency. If the application does not identify a contact person, the Forest Service cannot make the appropriate notifications.

As shown by the reports on the 1991 and 1992 Rainbow Family Gatherings, if a group does not designate a representative or representatives, the Forest Service has to deal separately with various individual members and subgroups. Informal agreements made with one individual member or subgroup are not always respected by other group members, which makes it difficult for the agency to obtain commitments from the group as a whole. The special use authorization process will allow the agency to obtain commitments from the Rainbow Family that apply to the group as a whole.

Non-members of a group cannot sign a special use authorization on behalf of a group unless they are designated by the group to act as its agents or representatives and are authorized to make the group responsible for the actions of its members as a whole. Requiring a group to designate a person or persons who will sign a special use authorization on behalf of the group does not make a group use a commercial venture under this rule. Under the final rule, a group use is a commercial use or activity if an entry or participation fee is charged or if the primary purpose of the activity 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. All groups, both commercial and noncommercial, should be responsible for the actions of their members as a whole that relate to the use and occupancy of National Forest System lands.

The Department believes that it is both fair and appropriate to apply this provision to all applicants, including groups like the Rainbow Family that make decisions by consensus. The group can, for example, designate a representative or representatives who can sign a special use authorization on behalf of the group. Groups that make decisions by consensus could select a representative through that decisionmaking process.

As one respondent noted, the court in *United States* v. *Rainbow Family* held that the Rainbow Family is an unincorporated association that can sue and be sued. 695 F. Supp. at 298. The court also held that service upon the Rainbow Family was properly effected in that case by service upon several individuals who acted as agents or representatives of the Rainbow Family. *Id.* Moreoover, in 1987, representatives of the Rainbow Family signed a consent judgment in a suit brought by the Health Director of the State of North Carolina against the Rainbow Family for failure to obtain a permit under the State's mass gathering statute. It is therefore

reasonable to believe that the Rainbow Family could designate a person or persons to sign a special use authorization on behalf of the group as provided in § 251.54(e)(2)(i)(E).

Having considered the comments received, the Department has retained without change § 251.54(e)(2)(i)(E) in the final rule.

Comment. Section 251.54(e)(2)(ii)(D) of the existing rule enumerates certain information that might have to be provided by a private corporation applying for a special use authorization. The proposed rule redesignated this provision but did not offer any substantive change.

One respondent commented that the minimum amount of information required from a private corporation applying for a special use authorization is much greater than what is required from any other category of applicant and that the only information needed from private corporations is evidence of incorporation and good standing.

Response. This provision was not subject to substantive amendment under the proposed rule, is not being amended by the final rule, and has no bearing on the subject matter of this rule. Therefore, this provision is beyond the scope of this rulemaking. However, the Department believes that it may be appropriate to require private corporations applying for a special use authorization to provide more than evidence of incorporation and good standing.

Comment. A provision in § 251.54(e)(1) of the existing rule requiring the Forest Service to give due deference to the findings of another agency, such as a public utility commission, the Federal Energy Regulatory Commission, or the Interstate Commerce Commission, in lieu of another detailed finding, was proposed to be moved to a new § 251.54(f)(4) of the proposed rule, since this provision relates to the processing of applications rather than to their content. This was a technical rather than a substantive amendment.

Two respondents commented on this provision. One respondent stated that if the Forest Service defers to the findings of another agency, an application for a special use authorization could be subjected to the agenda of any part of government. The other respondent commented that this provision applies a large body of administrative law to the review of applications for a special use authorization, subject to the discretion of the authorized officer, and places the burden of documenting the findings of other agencies on the applicant.

Response. This provision was not subject to substantive amendment under the proposed rule, is not being amended by the final rule, and has no bearing on the subject matter of this rule. Therefore, this provision is beyond the scope of this rulemaking. Nevertheless, the Department believes that this provision makes the application process more efficient by allowing the Forest Service to defer to relevant findings of other agencies, rather than making another detailed finding, in evaluating applications for commercial special use authorizations.

Comment. Section 251.54(f)(5) of the proposed rule provided that the agency would grant or deny an application for noncommercial group uses without unreasonable delay. On the one hand, First Amendment due process considerations require a specific timeframe for granting or denying an application for noncommercial group uses. On the other hand, a decision to issue a special use authorization triggers extensive statutory and regulatory requirements such as those imposed by the ESA and NEPA. Section 251.54(f)(5) of the proposed rule reflected the agency's effort to balance the competing concerns of complying with these First Amendment due process considerations and the statutory and regulatory requirements triggered by a decision to issue a special use authorization.

Approximately 65 respondents commented that this proposed provision is too vague and would allow for too much discretion because it fails to provide a definite timeframe for granting or denying an application. Four respondents cited *United States* v. *Rainbow Family* in support of their position. One respondent cited footnote 5 in *United States* v.*Abney,* 534 F.2d 984 (D.C. Cir. 1976), for the proposition that applications for First Amendment activities must be handled on an expedited basis to avoid de facto censorship of certain points of view.

Several respondents recommended an expeditious procedure for reviewing applications. Four respondents stated that the National Park Service has a specific timeframe for evaluating permit applications for First Amendment activities. One respondent cited 36 CFR 7.96(g)(3), which provides that National Park Service permit applications for demonstrations in the National Capital Region are deemed granted if not acted upon within 24 hours of receipt.

Two respondents commented that the need to comply with statutory and regulatory requirements could not justify the agency's position and that the Forest Service should set a short timeframe and deny an application within that timeframe if the agency needed more time to complete an environmental impact statement.

One respondent suggested that permits should be issued immediately where the forest plan identifies the proposed activity as appropriate for the requested area and where the proposed activity meets applicable standards and guidelines. Another respondent commented that if the group threshold remains at 25, the decision should be made almost immediately where the requested stay is three days and two nights or less, where the activity is to be held in an area designed for a large group, such as a developed campground, and where the forest plan recognizes the activity as appropriate for the desired area. The same respondent added that if the group threshold was raised to 50, the decision should be made within 15 days.

One respondent suggested that the agency grant or deny applications within three working days. Another respondent recommended a timeframe of six weeks for evaluating applications. One respondent suggested that an application should be granted or denied 30 to 60 days after completion of the necessary NEPA analysis, which could range from categorically excluding the proposed activity from documentation in an environmental impact statement or an environmental assessment to preparation of an environmental impact statement, depending on the intensity, scope, duration, and location of the activity.

Others stated that the agency could take as long as it liked to review applications, which could wreck a group's plan; that because the agency could take a long time to evaluate applications, proponents would have to apply far in advance; that this provision could allow denial by slow response; that applicants would have to go to court to expedite the process; that the lack of a specific timeframe undercuts the due process protection of immediate judicial review since access to the courts would be denied until a decision was made; that it is unclear why it is infeasible to specify a timeframe; that there is no evidence that NEPA, the ESA, and the NHPA apply to applications for noncommercial group uses or noncommercial distribution of printed material and that even if these statutes did apply, the Forest Service could survey the land and as part of the planning process either identify sensitive areas that need protective or designate areas suited for the activities in question; that the proposed rule does not define ''unreasonable''; that this provision injects too much uncertainty

into the application process and that while the need to comply with NEPA, ESA, and other statutes might in rare instances justify an indefinite timeframe for extremely large groups, such a need does not justify an indefinite timeframe for groups of 25 to 500 engaging in activities such as educational field trips, company picnics, and family reunions.

Response. Upon consideration of the comments received, the Department agrees that a short, specific timeframe for processing applications is needed to meet First Amendment requirements. *See, e.g., Shuttlesworth,* 394 U.S. at 162–64 (Harlan, J., concurring) (applications for First Amendment activities must be handled on an expedited basis to avoid *de facto* censorship of certain points of view); *A Quaker Action Group,* 516 F.2d at 735 (a permit system must have a fixed deadline for administrative action on a permit application for First Amendment activities; suggests that 24 hours be the maximum time for processing an application, and that applications be deemed granted if not acted upon within that time limit); *Rainbow Family,* 695 F. Supp, at 311 (1984 Forrest Service regulations are invalid for failure to specify a deadline for submitting an application and for granting or denying an authorization for First Amendment activities); *see also Rainbow Family,* 695 F. Supp. at 325 (although NEPA is unquestionably constitutional, even an otherwise valid statute cannot be applied in a manner designed to suppress First Amendment activity) (citing *CCNV,* 468 U.S. at 293; *Police Dep't of Chicago* v. *Mosley,* 408 U.S. 92 (1972)).

However, as the court noted in the *Rainbow Family* case, 695 F. Supp. at 323–24, the agency must comply with certain statutory and regulatory requirements under NEPA before issuing a special use authorization. NEPA mandates that federal agencies undertake an environmental analysis on proposals for major Federal actions significantly affecting the quality of the human environment (42 U.S.C. 4332(2)(C)). The Council on Environmental Quality (CEQ) has developed regulations implementing NEPA (40 U.S.C. part 1500).

In general, under the CEQ regulations, an agency must conduct an environmental analysis to determine whether a proposed action may constitute a major federal action significantly affecting the quality of the human environment (40 CFR 1501.4, 1508.9, 1508.13). If a proposed action may significantly affect the quality of the human environment, an environmental impact statement (EIS) must be prepared (40 CFR 1501.4, 1502.4). As one of the example of a major federal action, the CEQ regulations list approval of specific projects, such as actions approved by permit (40 CFR 1508.18(b)(4)).

Thus, as a general matter, the issuance of Forest Service special use authorizations constitutes a federal action for NEPA purposes which may require documentation in a categorical exclusion (CE), environmental analysis (EA), or an EIS. Proposed actions implementing forest plans for which an EA or an EIS is prepared are subject to the Forest Service's appeal regulations for project decisions (36 CFR 215.3(a) (58 FR 58911), which add substantially to the processing time (36 CFR part 215 (58 FR 58904)).

However, the CEQ regulations encourage agencies to reduce paperwork and delay by categorically excluding certain types of proposed actions from documentation in an EA or an EIS which do not individually or cumulatively have a significant effect on the human environment (40 CFR 1500.4(p), 1500.5(k), 1507.3, 1508.4)). The Forest Service NEPA procedures categorically exclude certain types of proposed actions from documentation in an EA or an EIS, including proposed actions that fall within a category listed in § 31.1b of Forest Service Handbook 1909.15 (57 FR 43180), if no extraordinary circumstances are related to or affected by the proposed action.

One of the categories listed in § 31.1b is:

> 8. Approval . . . of minor, short-term (one year or less) special uses of National Forest System lands. Examples include but are not limited to:
>
> a. Approving, on an annual basis, the intermittent use and occupancy by a State-licensed outfitter or guide.
>
> b. Approving the use of National Forest System land for apiaries.
>
> c. Approving the gathering of forest products for personal use.

As explained in section 30.3(2) of the Handbook, extraordinary circumstances include, but are not limited to, the presence of:

> a. Steep slopes or highly erosive soils.
>
> b. Threatened and endangered species or their critical habitat.
>
> c. Flood plains, wetlands, or municipal watersheds.
>
> d. Congressionally designated areas, such as wilderness, wilderness study areas, or National Recreation Areas.
>
> e. Inventoried roadless areas.
>
> f. Research Natural Areas.
>
> g. Native American religious or cultural sites, archaeological sites, or historic properties or areas.

The Department does not intend to preclude reliance on a categorical exclusion because of the mere presence of or a *de minimis* impact on one or more extraordinary circumstances. Rather, the Department intends to preclude reliance on a categorical exclusion if the proposed action materially impacts the characteristics or functions of one or more extraordinary circumstances.

The Department believes it essential to reconcile the First Amendment requirement for a short, specific timeframe with the need to comply with NEPA procedures. Thus, in response to the comments received, the Department gives notice that the Forest Service will categorically exclude authorization of noncommerical group uses from documentation in an EA or EIS under § 31.1b(8) of Forest Service Handbook 1909.15, provided there are no extraordinary circumstances related to or affected by the proposed activity.

The Department believes that authorization of noncommercial group uses qualifies for categorical exclusion under § 31.1b(8) because noncommercial group uses are short-term, typically for only a few days or weeks, and because they are minor in that they entail readily mitigable environmental disturbance.

This determination is further supported by the reports on the 1991 and 1992 Rainbow Family Gatherings and by the *Rainbow Family* case. In the context of an extensive analysis of NEPA requirements, the court in the *Rainbow Family* case concluded that it is questionable whether the annual Rainbow Family Gatherings would have any significant impact on the environment for NEPA purposes. The court stated that environmental impacts associated with these activities, such as the temporary contamination of streams, are likely to be short-term. 695 F. Supp. at 324.

The Department's determination is also supported by the approach taken by the National Park Service: The National Park Service categorically excludes from documentation in an EA or an EIS ''the issuance of permits for demonstrations, gatherings, ceremonies, concerts, arts and crafts shows, etc., entailing only short-term or readily mitigable environmental disturbance'' provided extraordinary circumstances are not adversely impacted by these activities (Department of the Interior NEPA Procedures, 516 DM 6, Appendix 7, sec. 7.4(D)(5); 516 DM 2, Appendix 2, sec. 2.1 through 2.10). By categorically excluding these types of activities from documentation in an EA or an EIS if they do not adversely affect any extraordinary circumstances, the National Park Service is able to process

applications for these activities within the 24-hour timeframe imposed by 36 CFR 7.96(g)(3).

In addition to having determined that noncommercial group uses conform to the categorical exclusion in § 31.1b(8) of Forest Service Handbook 1909.15, the Department has incorporated the extraordinary circumstances exception to categorical exclusions into the evaluation process as an additional criterion at § 251.54(h)(1)(iii) of the final rule. If an authorized officer determines that all the evaluation criteria are met, including the criterion concerning the extraordinary circumstances exception, the application will be granted. With this assurance that the most sensitive environmental lands and resources will be protected, an extensive NEPA analysis is not required.

Categorically excluding noncommercial group uses from documentation in an EA or an EIS under § 31.1b(8) of Forest Service Handbook 1909.15 allows the Forest Service to expedite the processing of applications for these activities in compliance with both NEPA and the First Amendment. Moreover, proposed actions that are categorically excluded from documentation in an EA or an EIS under § 31.1b are exempt from the potentially lengthy notice and comment procedures in the Forest Service's appeal regulations for project decisions (36 CFR 215.4(b) (58 FR 58911)).

Finally, like the National Park Service regulation at 36 CFR 7.96(g)(3), § 251.54(f)(5) of the final rule specifies a short timeframe both for submitting and processing applications for noncommercial group uses. Section 251.54(f)(5) provides that applications for noncommercial group uses may be submitted up to 72 hours before the activity and that applications for noncommercial group uses are deemed granted and that an authorization will be issued for those uses unless the applications are denied within 48 hours of receipt.

The 48-hour and 24-hour timeframes for submission and processing of applications under the National Park Service's regulation apply only to activities in the National Capital Region, which is a fairly concentrated and developed park area. This final rule applies to the entire National Forest System. The Department believes that the additional 24 hours both for submitting and processing applications under this rule are warranted given the sizable amounts of undeveloped land and the wide variety of uses and activities that are subject to this regulation.

As provided in 36 CFR 7.96(g)(3), where an application for a special use authorization has been granted or has been deemed granted under § 251.54(f)(5) and an authorization has been issued, an authorized officer may revoke the authorization under the limited circumstances provided in § 251.60(a)(1) of the final rule.

Under § 251.54(f)(5), as under 36 CFR 7.96(g)(4), applications for noncommercial group uses will be processed in order of receipt, and the use of a particular area will be allocated in order of receipt of a fully executed application, subject to any relevant limitations set forth in § 251.54.

Comment. Section 251.54(h) of the proposed rule specified the procedures and criteria for evaluating applications for noncommercial group uses. Section 251.54(h)(1) of the proposed rule established a presumption in favor of granting an application for a special use authorization for all noncommercial group uses. Under § 251.54(h)(1) of the proposed rule, an authorized officer had to grant an application for a special use authorization for any noncommercial group use upon a determination that seven specific, content-neutral evaluation criteria were met.

Approximately 70 respondents argued that the proposed rule gives the Forest Service too much discretionary power. These respondents stated that an application for a special use authorization could be granted or denied at will; that the proposed rule results in too much governmental control; that the proposed rule does not meet the stringent standards of *Forsyth County* v. *Nationalist Movement, 505 U.S. 123* (1992), because the evaluation criteria are not ''narrowly drawn, reasonable and definite'' and vest ''unbridled discretion in a government official''; that the Forest Service could deny a permit to any group, and that simply restricting conditions under which permits can be denied does not erase a violation of constitutional rights; that the regulation is intentionally vague and was drafted to fail, thereby inviting harsher legal remedies; that a permit could be approved or denied based on an authorized officer's personal interpretation of the public interest; that an authorized officer cannot decide on a whim how many people should gather or what may be discussed at the gathering; that the proposed rule allows an authorized officer to grant or deny an application on the basis of what might happen; that an application could be denied on the basis of prejudice and that if one gives others an opportunity to abuse one's rights, they will; that the agency's intent may not be carried out by subsequent administrators; that the agency may make it difficult to find out where to obtain a permit; and that the agency may add reasons for denying a permit and may start requiring permits for individuals.

Response. The Department disagrees with these comments. Under the proposed and final rules, applications for noncommercial group uses cannot be granted or denied at will, on the basis of prejudice, on the basis of what might happen, or on the basis of a personal interpretation of the public interest. Rather, these applications must be granted or denied on the basis of the specific, content-neutral evaluation criteria at § 251.54(h)(1) that vest little or no discretion in the authorized officer. These criteria merely regulate time, place, and manner with respect to a proposed activity.

The Department drafted the criteria this way to ensure that the rule complies with constitutional requirements. The Department intends that the evaluation criteria be applied consistently and fairly as required by law to all noncommercial groups. After this rule goes into effect, the Department may not change it in any material way without publishing another proposed rule for notice and comment (5 U.S.C. 553).

Application forms for special use authorizations subject to this rule may be obtained from the Forest Service office responsible for management of the affected land. That office will evaluate applications received and decide whether to issue a special use authorization on the basis of those applications.

This rule meets the stringent standards of *Forsyth*. In that case, the Supreme Court held that a permit fee requirement was not narrowly drawn to provide reasonable and definite standards for fee determinations and that the ordinance at issue was content-based rather than content-neutral because the determination of the amount of the fee turned on a review of the content of the message conveyed. 112 S. Ct. at 2403–04. In contrast, the evaluation criteria in this final rule are narrowly tailored to minimize resource damage, to ensure compliance with federal, state, and local law, and to address specific concerns of public health and safety. None of these considerations has any connection with the content of any message that may be conveyed by a proposed activity.

Accordingly, the Department has retained without change the introductory text in § 251.54(h)(1) in the final rule.

Comment. Seventeen additional respondents commented on the evaluation criteria in general. These respondents stated that the criteria are an undue burden; that the criteria impose unreasonable restrictions on freedom of assembly by restricting where, when, and how citizens gather, and what types of activities can occur at a gathering; that denial of a permit for constitutionally protected activities goes beyond a regulation of time, place, and manner; that these criteria are unnecessary, unlawful, redundant, and waste money; that the criteria are unnecessary since most applicants would meet them anyway; that none of the criteria addresses conduct that may have adverse impacts on forest resources; that the issues addressed in the criteria are never a problem at Rainbow Family Gatherings; that with the exception of the criterion on halting, delaying, or preventing other uses and activities, the issues addressed in the seven criteria are either dealt with in other law or are common sense health and safety measures; that applicants have to show cause before a permit is issued; that the proposed rule would shift the burden of proof from the government to its citizens in requiring them to show, through the application process, that they deserve a permit; and that the burden should be on the agency to establish a basis for denial of a permit.

Response. The Department disagrees with these comments. The final rule is a constitutional restriction of time, place, and manner because the standards in the rule, including the evaluation criteria, are content-neutral, are narrowly tailored to further significant governmental interests, and leave open ample alternative channels for communication of information.

As noted earlier in this preamble, the Forest Service has encountered a variety of problems in connection with noncommercial group use of National Forest System lands. These problems have arisen in the context of many different types of noncommercial group uses, including Rainbow Family Gatherings. Some of these problems have included the spread of disease, pollution from inadequate site clean-up, and resource damage in critical salmon habitat. In view of these problems, the Department has established three significant interests in promulgating this rule: Protection of forest resources and facilities; promotion of public health and safety; and allocation of space within the National Forest System.

The Department believes that the eight evaluation criteria in this rule are narrowly tailored to address these issues. The first criterion addresses compliance with laws in general and compliance with laws in particular that relate to protection of forest resources, such as the ESA. The second criterion addresses consistency with standards and guidelines for environmental protection in the applicable forest plan. The third criterion deals with allocation of space for administrative use by the Forest Service and for other authorized uses and activities on National Forest System lands. The fourth and fifth criteria address specific concerns of public health and safety. The sixth criterion makes the rule consistent with existing Forest Service policy on military and paramilitary training or exercises on National Forest System lands. The seventh criterion, which requires a representative of the group to sign a special use authorization, allows the Forest Service to administer special use authorizations and enables noncommercial groups to take responsibility for the actions of their members as a whole that relate to the use and occupancy of National Forest System lands. The eighth additional criterion in the final rule on extraordinary circumstances allows the Forest Service to ensure that the most sensitive environmental lands and resources will be protected while expediting the processing of applications as required by the First Amendment.

Whether other laws address the issues dealt with in the evaluation criteria in this rule is immaterial because less restrictive alternatives are not part of the test for constitutionality of time, place, and manner regulations. Even though less restrictive alternatives are not part of the test for constitutionality, the Department believes that the special use authorization requirement is the least restrictive means to achieve the government's interests. Other laws and regulations do not provide the framework necessary for applying standards for resource protection and public health and safety to noncommercial group uses. Special use authorizations are needed to allow the Forest Service to limit or prevent adverse impacts on forest resources from noncommercial group uses, to address concerns of public health and safety associated with noncommercial group uses, and to allocate space for noncommercial group uses and other uses and activities.

Applicants for noncommercial group uses do not have to show cause before a special use authorization is issued. Applicants for noncommercial group uses merely have to provide the information enumerated in §§ 251.54(e)(2)(i) (A)–(E), which the Forest Service needs in order to apply the evaluation criteria in the rule. Section 251.54(h)(1) establishes a presumption in favor of issuance of a special use authorization. The burden is on the authorized officer to establish a factual and legal basis for denial of a special use authorization.

A summary of comments received on each evaluation criterion and the Department's response to them follows.

Comment. Section 251.54(h)(1)(i) of the proposed rule required an authorized officer to determine that a proposed activity was not prohibited by the rules at 36 CFR part 261, subpart A, or by an order issued pursuant to 36 CFR part 261, subpart B, or by federal, state, or local law.

Twenty-one respondents commented on this provision. Six respondents stated that the provision is too vague and broad. These respondents commented that the provision could always provide a basis for denial of a permit; that a permit could be denied if anyone in a group might violate the law or if a state law, such as an anti-mass gathering law, prohibited the activity; that the perceived risk that a law might be broken or a habitat disturbed would suffice for denial of a permit, and that the test is speculative, biased, and arbitrary; and that the evaluation criteria apply a double standard, in that a substantial risk is required to trigger health and safety concerns, but that any risk of a take of an endangered species could result in denial of a permit, that the rule should provide that there must be a substantial probability of causing a take during the proposed activity, that ''substantial probability'' should be defined as 50 percent or greater, and that a permit should not be denied because the proposed activity violates state law, such as a state endangered species act, which could be broader than federal law.

Three respondents believed that it is a general prohibition that has no bearing on time, place, or manner. One of these respondents commented that specific regulations exist for ensuring compliance with the Wilderness Act and the ESA. Another commented that the agency should regulate sensitive areas, not numbers.

Two respondents stated that the legality of proposed activities is addressed by other laws, such as the ESA, that requiring people to apply for permits so that these laws can be upheld is unjustified, and that if someone intended to take an endangered species, these regulations would not stop them.

Another respondent stated that this provision places an undue burden on

the public in that applicants have to apply in advance and worry about whether a permit will be granted or not, that people should decide where they want to go, and that if they choose a place that they should not use, it is the agency's responsibility to inform them of the problem.

Six respondents commented that there is no need to protect the public by closing a site due to bad weather and that individuals or groups can decide for themselves whether to use a particular site at a particular time. One of these respondents wrote that people would not request a site hit by a major flood or a hurricane. One respondent stated that the provision is unjustified because there has never been a problem with extreme fire danger or inclement weather in the history of Rainbow Family Gatherings.

One respondent stated that the rule should be clarified to show that the referenced prohibitions do not include content-based restrictions in state or local laws. Another respondent commented that the Wilderness Act and the ESA are valid restrictions of time, place, and manner.

Response. The Department agrees that this provision should indicate that the referenced prohibitions do not include content-based restrictions in federal, state, or local law. The reference to § 251.54(h)(1)(i) in the preamble to the proposed rule contained this qualification, but it was inadvertently omitted from the proposed rule. Therefore, as intended, the phrase ''unrelated to the content of expressive activity'' has been added to § 251.54(h)(1)(i) of the final rule.

The Department believes that the criterion at § 251.54(h)(1)(i) is narrowly tailored and specific and that it constitutes a valid restriction on time, place, and manner. The Forest Service must comply with applicable federal law and regulations in managing the National Forest System. For example, the Wilderness Act requires the Forest Service to protect and manage wilderness areas so as to preserve their natural condition and to ensure that the imprint of human activity remains substantially unnoticeable (16 U.S.C. 1131(c)). The ESA requires federal agencies to consult with the Fish and Wildlife Service or National Marine Fisheries Service to ensure that any agency action is not likely to jeopardize the continued existence of any threatened or endangered species (16 U.S.C. 1536). In addition, the ESA prohibits a taking of an endangered species and, by discretion of the listing agency, a taking of a threatened species (16 U.S.C. 1538).

For example, if a noncommercial group of 75 or more requested to camp in grizzly bear habitat during early spring, when the grizzly bear, a species listed as threatened and protected under the ESA, comes out of hibernation, an authorized officer could deny the application and offer another site or time pursuant to § 251.54(h)(2). As one respondent noted, statutes like the ESA and the Wilderness Act are valid time, place, and manner restrictions, and this regulation is needed to provide a framework for applying that type of restriction to noncommercial group use of National Forest System lands. The special use authorization process will give the Forest Service notice of potential problems posed by these restrictions, as well as the ability to prevent or mitigate them.

Section 251.54(h)(1)(i) is severely limited. Under this criterion, a special use authorization can be denied only if authorization of the proposed activity is prohibited by Forest Service regulations at 36 CFR part 261, Forest Service orders issued under 36 CFR part 261, or by laws that are unrelated to the content of expressive activity. The standard in this provision is not speculative, biased, or arbitrary. A special use authorization cannot be denied if authorization of the proposed activity might be prohibited by the law; a special use authorization can be denied only if authorization of the proposed activity is prohibited by the law as it is applied to the specific facts of a given application. To clarify this intent, the Department has added ''authorization of'' before ''the proposed activity'' in § 251.54(h)(1)(i) of the final rule.

This regulation is intended to preempt all state and local laws and regulations that conflict with this regulation or that impede its full implementation. As long as state and local laws and regulations are content-neutral and do not conflict with this final rule or impede its implementation, the Department intends to comply fully with them in authorizing noncommercial group uses under this rule.

This criterion also will allow the Forest Service to enforce its prohibitions and orders consistently and fairly as required by law. For example, an authorized officer may deny an application and offer another site if the requested site is closed or restricted due to the outbreak of disease under an order issued under 36 CFR part 261. A site also might be closed due to extreme fire danger or inaccessibility because of flooding or heavy snowfall or to protect critical threatened or endangered species habitat.

Comment. Section 251.54(h)(1)(ii) of the proposed rule required an authorized officer to determine that a proposed activity was consistent or could be made consistent with the applicable forest plan required pursuant to 36 CFR part 219.

Nine respondents commented on this provision. One respondent stated that this provision should be dropped because there is no connection between the applicable forest plan and activities covered by the proposed rule and because forest plans are too inflexible to accommodate short-term uses. Another stated that the provision is vague and has no bearing on time, place, and manner and that when a proposed activity is not compatible with the applicable forest plan, the agency should change the plan. One respondent stated that the Forest Service should not adhere to the applicable forest plan when a group wishes to gather on a logging road or unreclaimed clear-cut to protest the agency's logging practices. One respondent commented that the proposed rule did not mention that the agency is having problems upholding standards and guidelines in forest plans. One respondent stated that this provision would restrict what type of activities could occur at gatherings. Another commented that a group could be denied use of an area because of past abuse by other groups.

One respondent noted that forest plans do not expressly limit or prohibit group uses but merely set overall guidelines for applying specific environmental and performance standards, with which group uses must conform. This respondent stated that it is the agency's duty to inform applicants of all relevant forest plan provisions and to ensure consistency of proposed activities with standards and guidelines in forest plans.

One respondent stated that this provision does not contain specific and objective standards for ensuring consistency with forest plans. Another respondent commented that this provision as written could indirectly allow restrictions on use based on the content of expressive activity. This respondent suggested that the agency clarify the provision to require consistency of the proposed activity with the management restrictions for the proposed area under the applicable forest plan.

Response. The Department agrees that forest plans do not prohibit authorization of noncommercial group uses. Rather, forest plans set standards and guidelines with which all uses of National Forest System lands, including authorization of noncommercial group

uses, must conform. Thus, requiring that authorization of noncommercial group uses be consistent or can be made consistent with the standards and guidelines in forest plans for the national forests is a valid time, place, and manner restriction.

The National Forest Management Act (NFMA) requires that ''permits * * * and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans'' (16 U.S.C. 1604(i)). This provision is content-neutral. A proposed activity is consistent with a forest plan if it adheres to a plan's standards and guidelines that are forest-wide or that are included in management prescriptions for the specific management areas where the activity will occur. Standards and guidelines in forest plans describe any activities that are not permitted to occur in a specified area or prescribe how activities must be implemented for environmental protection or other purposes.

Forest plans are developed in accordance with the rules at 36 CFR part 219 and adopted following extensive public participation and comment. It is not practicable to write a forest plan that can accommodate every conceivable use at every conceivable site at every conceivable time of the year. The standards and guidelines in forest plans apply to all instruments for the use and occupancy of National Forest System lands, from timber sale contracts to grazing permits, regardless of whether the activity involves the expression of views. In reviewing an application for a noncommercial group use, an authorized officer will determine whether authorization of the proposed activity at the time and place requested is consistent or can be made consistent with the applicable forest plan based on the information provided under §§ 251.54(e)(2)(i) (A) through (e)(2)(i)(E).

NFMA requires that permits and other instruments for use and occupancy of National Forest System lands be consistent with the applicable Forest plan (16 U.S.C. 1604(i)). The Department has added ''authorization of'' before ''the proposed activity'' in § 251.54(h)(1)(ii) of the final rule to reflect the requirement in NFMA that authorization of the proposed activity, rather than the authorized activity itself, be consistent with the applicable forest plan.

Comment. Section 251.54(h)(1)(iii) of the proposed rule required an authorized officer to determine that a proposed activity would not delay, halt, or prevent administrative use of an area by the Forest Service or other scheduled or existing uses or activities on National Forest System lands, including but not limited to uses and activities authorized pursuant to parts 222, 223, 228, and 251 of this chapter.

Approximately 35 respondents commented on this provision. Eight respondents commented that this provision is vague generally and gives an authorized officer too much discretion. Specifically, these respondents stated that denying a permit because it conflicts with another use or because it cannot reasonably be accommodated at the time and place requested allows for two much discretion on the part of the authorized officer; that the provision should be dropped because it is no better than a similar criterion that was struck down by the court in the *Rainbow Family* case; that under *United States* v. *Rainbow Family*, 695 F. Supp. at 312 n.6, this provision vests too much discretion in the authorized officer to propose an alternate time or place; that the agency could ensure that administrative uses are always scheduled at the same time as any proposed activity or deem existing or scheduled uses to be incompatible with the proposed activity, even if they are not; that this provision would allow the Forest Service to deny a permit if the agency thinks that a proposed activity, such as a group protest or distribution of literature at or near a recreation, logging, or mining site, might interfere with any other uses or activities; that it is unclear how a determination could be made without regard to the content of expressive activity; that under a worst-case scenario, this provision could induce an authorized officer to deny access to a site; and that the examples given in the preamble of the proposed rule of how this criterion would be applied are insufficient to remove the vagueness in its wording.

One respondent stated that statutes and other regulations exist to deal with conflicts among users, such as 18 U.S.C. 1863, which allows the agency to restrict access to areas of the national forests, 36 CFR part 261, which allows the agency to issue orders restricting certain types of conduct, and 36 CFR 251.54(i)(1), which allows the agency to avoid conflicts among commercial uses and activities.

Six respondents commented that often minor changes can be made to scheduled and existing uses to avoid conflicts with proposed activities. Two respondents commented that minor, temporary arrangements are easily made and have been made many times by prior informal agreement to address the question of allocation of space. One of these respondents stated that forest plans are built on the concept of balancing interests in an ongoing multiple-use scenario, but that the regulations blurs the fundamental difference between permanent or consumptive uses and transitory group uses, which by their nature do not compete with other uses and activities for use of National Forest System lands.

Six respondents commented that the exercise of constitutionally protected rights should have priority over all other uses. One of these respondents felt that the interests of thousands of people should take precedence over the grazing of cattle. Four others stated that gatherings have proceeded after negotiation and development of operating plans, but that if these plans fail, a court order might be appropriate.

Twelve respondents stated that other uses are given priority over the exercise of constitutionally protected rights. One of these respondents stated that a permit for a gathering could be denied if a timber sale or grazing were scheduled for the same time and place. Another noted that cattle were moved to accommodate the 1984 Rainbow Family Gathering.

One respondent commented that this provision is unnecessary because there are no conflicts among Rainbow Family members. Another stated that no group, including the Rainbow Family, would camp in areas where logging activities are in progress. One respondent commented that the rationale of avoiding traffic congestion is inadequate because there are no traffic jams in the national forests.

Three respondents stated that those who gather should be respectful of others.

Response. The Department believes that this criterion is narrowly tailored and specific and that it constitutes a valid restriction on time, place, and manner. In contrast, the rule struck down in *United States* v. *Rainbow Family* provided that an application for a First Amendment activity could be denied if the activity conflicted with a previously approved use or if it would be of such nature or duration that it could not reasonably be accommodated at the place and time requested (49 FR 25449).

To address the court's concern, the Department has abandoned the unconstitutionally vague criterion that allowed an authorized officer to deny an application for a noncommercial group use on the grounds that it cannot reasonably be accommodated in the time and place requested or that the proposed use might interfere or be

incompatible with scheduled or existing uses.

In contrast to the earlier rule, under § 251.54(h)(1)(iv) of the final rule, an application may be denied only if the proposed activity would delay, halt, or prevent administrative use of an area by the Forest Service or other scheduled or existing uses or activities on National Forest System lands. This narrow, specific, content-neutral criterion is intended to allow the Forest Service to allocate space in a manner that is both fair and consistent with the agency's multiple-use mission. The intent is not to prevent demonstrations; the intent is to ensure that demonstrations can coexist with other authorized uses and activities on National Forest System lands, including endangered, threatened, or other plant and animal species.

Moreover, under this rule the Forest Service cannot manipulate administrative use of an area to ensure that this use coincides with a proposed activity to which some might object. Administrative use of an area by the Forest Service is based on actual need.

In the proposed rule, the agency provided specific examples of how a proposed activity could delay, halt, or prevent scheduled or existing uses and activities for purposes of this criterion. Specifically, under § 251.54(h)(1)(iv) of the final rule, an authorized officer might require a large group to alter arrival and departure times or to use an alternative access route to avoid congestion. On the opening day of fishing season, an authorized officer might suggest a site removed from popular fishing areas for the same reason. This criterion also allows the Forest Service to ensure that a group is not authorized to use a site that is already being used as pastureland under a grazing permit or that is currently being logged under a timber sale contract.

The Forest Service has had difficulty in allocating space among noncommercial group uses and other uses and activities on National Forest System lands. While the Forest Service has generally resolved these types of conflicts successfully, the agency has had to expend considerable time and resources in the effort. The Department believes that these types of problems can be solved more efficiently, more effectively, and more fairly through the issuance of special use authorizations for all special uses, including noncommercial group uses.

One example of this type of allocation problem occurred at the 1992 Rainbow Family Gathering. One of the main access roads to the site of the 1992 gathering was scheduled to be used as a timber hauling route during the gathering. Because of the amount of traffic associated with the gathering, the Forest Service believed that the safety hazard was too high to allow logging trucks to use the access road. Consequently, the agency required the timber purchaser to use an alternate haul route, which resulted in higher costs to the timber purchaser and potentially higher costs to the government. As shown by the reports on the 1991 and 1992 Rainbow Family Gatherings, parking and traffic congestion are additional transportation issues associated with large group gatherings at sites with limited access.

At the 1992 Rainbow Family Gathering, the Forest Service specified that parking would not be allowed at a particular site because of safety risks (the site was located on a timber haul route) and prior agency commitments made to other users (livestock was scheduled to use the site). Ample alternative parking closer to the gathering was available. Nevertheless, the Rainbow Family directed gatherers to the site. By the time the Forest Service issued an order closing the site to parking and camping, 91 vehicles were parked at the site. Forest Service officials explained the agency's reasons for issuing the closure order at a council meeting of approximately 50 members of the Rainbow Family. Although more than half the vehicles were removed by the next day, 20 to 30 Rainbow Family members staged a civil disobedience protest of the closure order. Gatherers continued to remove vehicles from the area gradually, but the agency had to tow five vehicles from the site. The Department believes that this type of problem could be prevented or more quickly resolved through the special use authorization process.

In addition to this parking problem, in July 1993, a group called ''We The People'' selected for a gathering a site that had been authorized since 1955 for use by the Mississippi National Guard for military training purposes. Within the permitted area of 45,000 acres were significant amounts of unexploded ordnance. ''We The People'' chose to camp near an area where the National Guard was performing tank maneuvers. The group selected the site in order to protest use of the national forests for military training and exercises. The management challenge faced by the Forest Service was how to allow the group to conduct its protest without sustaining serious injury and without preventing the National Guard from exercising its privileges under its special use authorization. After several days of negotiations and coordination among all concerned parties, the gathering and protest occurred without conflict with the National Guard or injuries to either group.

These examples illustrate the kind of conflicts that can occur among uses and the need for a special use authorization process for noncommercial group uses to resolve those conflicts more quickly and effectively. Making minor changes or entering into informal agreements is an inadequate or inefficient way to resolve issues pertaining to allocation of space for all uses and activities on National Forest System lands. Other laws and regulations, particularly regulations such as 36 CFR 251.54(i)(1), which do not apply to noncommercial activities, do not give the Forest Service notice of the issues addressed in § 251.54(h)(1)(iv) of the final rule and thus do not allow the agency to allocate space fairly among competing uses and activities. A special use authorization process gives the agency a managerial tool to address these problems more expeditiously, more effectively, and more equitably.

Section 251.54(h)(1)(iv) of the final rule does not give the authorized officer too much discretion to propose an alternate time and place. The criterion in the 1984 rule struck down by the court in the *Rainbow Family* case was unconstitutionally vague and overbroad in that it allowed an authorized officer to deny an application if it could not reasonably be accommodated at the time and place requested. In footnote 6 of the opinion, the court's point was that providing for an alternative site or time if an application was denied under this criterion could not cure its constitutional infirmity. 695 F. Supp. at 312 n.6. The court quoted *Schneider* v. *State*, 308 U.S. 147 (1939), for the proposition that ''[o]ne is not to have the exercise of his liberty of expression in *appropriate places* abridged on the plea that it may be exercised in some other place.'' *Id.* at 163 (emphasis added). If the provision in question is, like § 251.54(h)(1)(iv) of the final rule, a valid time, place, and manner restriction and the site requested does not meet that restriction, providing that an alternative site or time will be offered enhances rather than diminishes the constitutionality of the rule. Providing for alternative sites and times ensures that ample alternative channels will be available for communication of information, as required by *Clark* v. *CCNV*.

The Forest Service is charged with managing the resources of the National Forest System for multiple uses. MUSY authorizes the Forest Service to manage

commercial and noncommercial uses of National Forest System lands (16 U.S.C. 528–531). The Department believes that all special uses, commercial and noncommercial, both involving and not involving the expression of views, should be treated consistently and fairly.

The Department does not intend to give priority to any use or activity in processing applications under this rule. Applications for special use authorizations will be processed in order of receipt under § 251.54(f)(5) of the final rule, and the use of a particular area will be allocated in order of receipt of fully executed applications, subject to any relevant limitations in § 251.54.

Comment. Section 251.54(h)(1)(iv) of the proposed rule required an authorized officer to determine that a proposed activity would not pose a substantial danger to public health. Considerations of public health were limited to the following with respect to the proposed site:

(a) The sufficiency of sanitation facilities;

(b) The adequacy of waste-disposal facilities;

(c) The availability of sufficient potable drinking water, in view of the expected number of users and the duration of use;

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

(e) The risk of contamination of the water supply; and

(f) The sufficiency of a plan for safe handling of food.

Approximately 45 respondents commented on this provision. Seven respondents commented that the public health concerns addressed in this provision are beyond the responsibility or competence of the Forest Service (although one noted that contamination of the water supply is a legitimate agency concern). Another respondent stated that this provision is unnecessary because the local health department handles public health issues.

Eight respondents commented that this provision is too paternalistic, that individuals should be responsible for their own health, and that the agency should leave it up to individuals to decide what kind of health risks they want to take when they use National Forest System lands. One of these respondents commented that forest visitors know what they need to survive and that if a site cannot provide it, they will go elsewhere. Another one of these respondents stated that this provision could be used to deny the application of a group that has different sanitary requirements from what would be considered acceptable in mainstream American society.

One respondent noted that while the public health concerns addressed in this provision are typically under the jurisdiction of local health departments, they are also, depending on the circumstances, under the jurisdiction of local Forest Service personnel. This respondent stated that this provision is directly applicable to the protective mandate of the agency and contains important and legitimate standards of performance.

Another respondent stated that the water supply should not be contaminated by noncommercial group uses and that waste disposal facilities should be adequate for these activities.

One respondent felt that activities that pose a substantial danger to public health are a concern of government, that the risk of disease is an important matter, that contamination of the water supply should be a major focus of government agencies, and that food should be handled in a safe way, but that a permit process is not required to address these concerns. Three respondents commented that other laws, regulations, and standards exist to deal with public health problems, such as 36 CFR 251.54(h)(2) of the current rules, which allows the agency to deny a special use authorization if the proposed activity would present a clear and present danger to public health, 16 U.S.C. 551a, which allows the agency to cooperate with state and local law enforcement authorities, and forest plans and public health codes, which address the risk of disease.

One respondent stated that this criterion is unnecessary because the Forest Service adequately notifies forest visitors of the potability of water in the national forests. Two respondents stated that only minimal assurances are necessary for safe sanitation facilities, availability of safe drinking water, and safe food handling procedures, such as assurances to bury human waste away from the water supply, to truck in water from a nearby town, and to wash hands before eating or preparing meals. One of these respondents stated that satisfaction of these requirements would be so easy that they should be omitted as burdensome and unnecessary. One respondent stated that proper food handling is a matter of common sense.

Sixteen respondents stated that this provision is too vague and leaves too much discretion to the authorized officer. These respondents commented that this provision is no better than a similar provision struck down by the court in the *Rainbow Family* case; that objective standards are not specified, leaving too much room for interpretation, and that it is unclear how a determination could be made without regard to content; that ''substantial danger,'' ''sufficiency of sanitation,'' ''adequacy of waste disposal,'' ''availability of sufficient potable drinking water,'' ''risk of disease,'' ''risk of contamination,'' and ''sufficiency of a plan for safe handling'' are too vague and that the agency should use concrete numerical requirements for facilities based on the size of the group, the length of stay, and the characteristics of the site; that this provision is so broad as to provide a basis for denial of any permit; that this provision could unreasonably require portable toilets for waste disposal, which are more expensive than covered slit-trench latrines and which some groups might not be able to afford; that the risk of disease could be construed unjustifiably to prohibit a large group from using a meadow littered with cow dung from grazing; that a plan for safe handling of food could require unnecessary detail or prohibit individual food preparation; that a group should not need a plan for making peanut butter sandwiches or popcorn; that no church picnic would be authorized if the requirement for a plan for safe handling of food were applied indiscriminately, and that in reality, this provision would be selectively enforced to prevent counterculture groups from distributing food to the needy; and that it is impossible to ensure compliance with these standards prior to a noncommercial group use.

One respondent stated that this provision would require all groups to have an attorney, licensed food handler, trained medical staff, and environmental specialist. One respondent suggested that the agency specify who will review plans for the safe handling of food, who will assess the risk of disease, and who will disseminate assessments of these public health concerns, as well as how the agency's recommendations on these issues will be enforced. This respondent also suggested that the agency specify the ratio of people per latrine required under this provision.

Two respondents suggested that the agency key this provision to specific standards by requiring adherence of the proposed activity with applicable state and local health regulations.

Response. The Department agrees that the public health considerations addressed in § 251.54(h)(1)(v) of the final rule are important and that it is appropriate to address these concerns in this rulemaking. The Forest Service has

a general mandate to address concerns of public health in regulating use and occupancy of National Forest System lands (16 U.S.C. 551; 36 CFR 251.55(d)(3), 251.56(a)(1)(iv), 251.56(a)(2)(iv), 251.56(a)(2)(vii)).

Moreover, as the court held in the *Rainbow Family* case, it is a reasonable time, place, and manner restriction to require that noncommercial group use of the national forests not threaten the public health or welfare. 695 F. Supp. at 329 (citing *Grayned* v. *City of Rockford,* 408 U.S. 104, 113–16 (1972); *Kovacs* v. *Cooper,* 336 U.S. 77, 83, 86–87 (1949); *De Jonge* v. *Oregon,* 299 U.S. 364–65 (1937); *Schenck* v. *United States,* 249 U.S. 47, 52 (1919)). In *United States* v. *Rainbow Family,* the court required compliance with discrete health and sanitation provisions that addressed the same public health concerns enumerated in § 251.54(h)(1)(v) of the final rule. 695 F. Supp. at 330–52.

As shown by the reports on the 1991 and 1992 Rainbow Family Gatherings, the Forest Service works with local health department officials to address concerns of public health that arise in connection with large group gatherings on National Forest System lands. The Department believes that a special use authorization process is needed to handle public health issues associated with large group use of the national forests. Other regulations, particularly 36 CFR 251.54(h)(2) of the current rules, which the court in the *Rainbow Family* case struck down for vagueness, do not provide the framework necessary for applying public health standards to noncommercial group uses.

The shigellosis outbreak at the 1987 Rainbow Family Gathering is one example of the type of problem that could be prevented or more effectively controlled through a special use authorization process. Although the Forest Service posted water sources and bulletin boards at the site with notices to boil water for at least 30 minutes, many people drank the water without boiling it. The Department believes that by allowing the Forest Service to address this type of public health issue before a noncommercial group use takes place, the application and permitting process will enhance the agency's ability to communicate concerns about this type of issue to groups and thus prevent serious health risks.

The 1984 group uses rule allowed an authorized officer to deny an application for a noncommercial group use if it presented a clear and present danger to public health (49 FR 25449). The court in the *Rainbow Family* case struck down this language because it was too vague and allowed for too much discretion on the part of the authorized officer. 695 F. Supp. at 311.

Section 251.54(h)(1)(v) of the final rule corrects this deficiency by restricting the authorized officer's review to concrete, content-neutral considerations of public health associated with the site proposed by the applicant. The Department intends to apply this provision uniformly and fairly as required by law, based on an objective assessment of each application.

The Department agrees that the considerations of public health in this provision should be keyed to specific standards by requiring adherence of the proposed activity with applicable state and local public health laws and regulations. Consequently, the Department has revised this criterion to provide that an authorized officer must determine that the proposed activity does not violate state and local public health laws and regulations as applied to the proposed site. Issues addressed by state and local public health laws and regulations as applied to the proposed site included but are not limited to the specific considerations of public health in § 251.54(h)(1)(v) of the final rule.

Section 251.54(h)(1)(v) of the final rule does not require that applicants retain experts on public health issues or make a determination with respect to the public health considerations listed in that provision. Applicants merely have to submit an application that provides the basic information required in §§ 251.54(e)(2)(i)(A) through (e)(2)(i)(E). An authorized officer will then evaluate whether the proposed activity violates state and local public health laws and regulations as applied to the site identified in the application. To clarify intent, the Department has removed § 251.54(h)(1)(iv)(F) of the proposed rule, which listed the sufficiency of a plan for safe handling of food as one consideration of public health, because it is not clear that an authorized officer could apply state and local law on this subject solely on the basis of the information provided in an application.

The Department has substituted ''sufficiency'' for ''adequacy'' in § 251.54(h)(1)(v)(B) of the final rule to make that provision consistent with the terms used in §§ 251.54(h)(1)(v) (A) and (C). In § 251.54(h)(1)(v)(C) of the final rule, the Department has deleted the phrase ''in view of the expected number of users and duration of use.'' The Department believes that this phrase is redundant because of use of the word ''sufficient'' in § 251.54(h)(1)(v)(C).

Comment. Section 251.54(h)(1)(v) of the proposed rule required an authorized officer to determine that the proposed activity would not pose a substantial danger to public safety. Considerations of public safety did not include concerns about possible reaction to the users' identity or beliefs from non-members of the group that is seeking authorization and were limited to the following:

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

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

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

(d) The adequacy of ingress and egress in case of an emergency.

Approximately 33 respondents commented on this provision. One respondent commented that the agency lacks the ability to make an informed decision on this criterion. Another respondent stated that although the agency may have knowledge of problems pertaining to public safety that applicants do not possess, that knowledge should not be the basis for denying a permit to use the national forests. This respondent added that it is not common sense to plan an activity that is intended to cause physical injury to others or to oneself and that a horse race or water skiing planned for a site selected for a gathering could pose a problem, but that this type of conflict does not occur. One respondent noted that it is appropriate to consider the potential for injury to other forest users from a proposed activity.

Three respondents believe that this provision is too paternalistic. One of these respondents commented that it could be used to deny a permit to a group that has different safety requirements from what would be considered acceptable in mainstream American society, particularly with respect to the potential for injury to forest users from characteristics or conditions of the site. Another one of these respondents commented that some groups want inaccessible, secluded areas. Another stated that people should be able to make their own decisions about safety issues.

Three respondents stated that this provision is unnecessary because the national forests are a known environment. Specifically, these respondents stated that ensuring adequacy of ingress and egress is

unnecessary since individuals participating in group uses are generally aware of the rugged conditions in the national forests and the challenges they present; and that forest users heed safety concerns in selecting sites and planning activities and that forest users have the requisite wilderness experience to know about potential dangers in the national forests.

Seven other respondents believe that this provision is unnecessary. Six of these respondents stated that there have not been any safety problems associated with group uses; that large groups would have a better sense than individuals of safety hazards in the national forests; that the Rainbow Family handles safety issues themselves; that the Rainbow Family Gatherings are safer each year; and that it is unclear why adequacy of ingress and egress is more of an issue with 25 or more people than it is with fewer than 25 people.

One of these six acknowledged that while the agency incurs costs associated with accidents occurring on National Forest System lands, these costs are within the scope of the agency's normal operations, and the threat of an accident on National Forest System lands imposes no legal or financial liability on the Forest Service. Therefore, this respondent concluded that the agency has no need to issue permits based on that threat. This respondent also commented that issuance of a permit would carry an implicit guarantee of health and safety, thereby imposing liability on the agency for any accidents that occur during a group activity and forcing the agency to carry liability insurance at considerable public cost.

Approximately 19 respondents feel that this provision is too vague, broad, and subjective and would give the authorized officer too much discretion in determining the nature of the substantial danger associated with the proposed site. These respondents stated that determinations of the substantial danger to public safety would be completely arbitrary because the criteria are undefined and because there is no indication of the type of site that would be unsafe; that this provision is so broad as to provide a basis for denial of any permit; that this provision fails to take into account the basic attributes of National Forest System lands, which are primarily undeveloped and natural; that virtually every location in the National Forest System could be construed as posing some risk to public safety; that it is unclear how a determination could be made under this provision without regard to content; that the use of the word ''potential'' gives the authorized officer too much discretion; that the broad use of the word ''potential'' allows the agency to use petty discrepancies in activities as a pretext to establish a substantial danger to public safety; that the provision is silent on the degree of potential danger that would warrant denial of a permit; that it is unclear how the potential for physical injury to other users is measured and what that injury might be; that ''potential for physical injury'' and ''adequacy of ingress and egress in case of an emergency'' are too vague and allow for too much discretion; that the provision on adequacy of ingress and egress could be used to bar users from remote sites; that consideration of the potential for injury from the physical characteristics of the proposed site or natural conditions associated with the proposed site could justify denial of a permit if there are cliffs that one person might fall from or a lake that one person might drown in; that consideration of the potential for injury to users from scheduled or existing activities is too vague and not a problem in the case of mining or logging because no one would want to gather where those activities were occurring and if they did, other regulations would address any safety concerns that might arise; that it is unclear how merely regulating where an activity takes place restricts the agency's discretion in reviewing applications; and that a determination of what makes a site dangerous or unsafe for a gathering should be published with the rule.

Response. The Department believes that it is appropriate to address issues of public safety in this rulemaking. The Forest Service has a general mandate to address concerns of public safety in regulating use and occupancy of National Forest System lands (16 U.S.C. 551; 36 CFR 251.55(d)(3), 251.56(a)(1)(iv), 251.56(a)(2)(iv), 251.56(a)(2)(vii)).

Moreover, as the court in the *Rainbow Family* case held, it is a reasonable time, place, and manner restriction to require that noncommercial group use of the national forests not threaten the public welfare. 695 F. Supp. at 329 (citing *Grayned* v. *City of Rockford*, 408 U.S. 104, 113–16 (1972); *Kovacs* v. *Cooper*, 336 U.S. 77, 83, 86–87 (1949); *De Jonge* v. *Oregon*, 299 U.S. 364–65 (1937); *Schenck* v. *United States*, 249 U.S. 47, 52 (1919)).

The Department believes that this public safety provision is needed because proposed activities may pose a substantial danger to public safety, depending on the nature of the activity, its proximity to other uses and activities, the physical characteristics of the proposed site, and natural conditions associated with the proposed site.

For example, the Forest Service might deny an application and suggest another site if a group wanted an authorization to conduct a riflery contest near a heavily used campsite or picnic area. If a group wanted an authorization to ignite a fireworks display, the agency might deny the application because of the risk of a forest fire. These examples illustrate the types of activities that would constitute a substantial danger to public safety based on the likelihood of physical injury to other forest users from these activities.

The Forest Service might deny an application and suggest another site if a group selected an area near a major highway or an area scheduled to be logged under a timber sale contract. The agency might deny an application and suggest another site if a group chose an area accessed only by the same narrow, winding road with blind curves used by trucks hauling timber from a timber sale or talcum from an active mine. This issue, in fact, arose in connection with the 1992 Rainbow Family Gathering, where one of the sites selected was unsafe because it was located on a timber haul route. These examples illustrate the types of activities that would constitute a substantial danger to public safety based on the likelihood of physical injury to users from the physical characteristics of the proposed site or natural conditions associated with the proposed site.

The Forest Service also might deny an application and suggest an alternate site if a group selected an area being used for tank maneuvers or an area riddled with unexploded ordnance. This concern arose in connection with the gathering held by ''We The People'' on National Forest System land in Mississippi in July 1993. These examples illustrate the types of activities that would constitute a substantial danger to public safety based on the potential for physical injury to users from scheduled or existing uses or activities on National Forest System lands.

The agency might deny an application and suggest another site if roads accessing the site were inadequate to evacuate a large group in case of an emergency, such as a forest fire or a flash flood. This example illustrates the type of activity that would constitute a substantial danger to public safety based on the inadequacy of ingress and egress in case of an emergency.

The Department's intent is not to prevent use of remote areas or to prevent gatherings and demonstrations.

Rather, the Department's intent, as specified in the final rule, is to allow noncommercial groups to coexist with other authorized uses and activities on National Forest System lands without posing a substantial danger to public safety.

The Forest Service's handling of the gathering and protest held by ''We The People'' in July 1993 demonstrates the agency's ability to carry out this intent. After several days of negotiations and coordination among all concerned parties, ''We The People'' was able to conduct its gathering and protest without sustaining injury from the unexploded ordnance in the vicinity or from the tank maneuvers being conducted by the National Guard nearby.

Although the Forest System successfully resolved the conflicts among these users, the agency had to expend considerable time and resources in the effort. The Department believes that these types of problems can be solved more efficiently, more effectively, and more fairly through the issuance of special use authorizations for all special uses, including noncommercial group uses.

The Department believes that an application and permitting process will enhance the Forest Service's ability to allow noncommercial groups and other authorized uses on National Forest System lands to coexist without posing a substantial danger to public safety. Other regulations do not provide the framework necessary for applying the specific considerations of public safety contained in this rule to noncommercial group uses. In particular, other regulations do not ensure that the Forest Service will have notice of noncommercial group uses and therefore do not allow the agency to address these considerations as expeditiously, effectively, and equitably.

The Forest Service does not ensure public health and safety on National Forest System lands, either explicitly or implicitly, through issuance of a special use authorization or otherwise. The agency does, however, address public health and safety issues as part of its statutory and regulatory mandate in administering use and occupancy of National Forest System lands. Since the United States is self-insured, the Forest Service's issuance of special use authorizations does not impose additional insurance costs on the agency.

The Department believes that § 251.54(h)(1)(vi) of the final rule is narrowly tailored and specific and that it constitutes a valid restriction on time, place, and manner. In contrast, the 1984 rule struck down in *United States* v. *Rainbow Family* provided that an application for a First Amendment activity could be denied if the activity presented a clear and present danger to the public health or safety (49 FR 25449). To address the court's concern, the Department has abandoned the unconstitutionally vague criterion that allowed an authorized officer to deny an application for a noncommercial group use on the ground that it presented a clear and present danger to the public health or safety. Thus, under § 251.54(h)(1)(vi) of the final rule, an application may not be denied merely because of the possibility of personal injury at a proposed site or in connection with a proposed activity. An application for a company picnic near a lake cannot be denied, for example, merely because an authorized officer thinks that someone at the picnic might drown in the lake.

In contrast to the earlier rule, under § 251.54(h)(1)(vi) of the final rule an application may be denied only if the proposed activity poses a substantial danger to public safety. Considerations of public safety are limited in the final rule to specific, content-neutral criteria concerning the nature of the proposed activity, its proximity to other use and activities, the physical characteristics of the proposed site, and natural conditions associated with the proposed site. Considerations of public safety in the final rule do not include concerns about possible reaction to the users' identity or beliefs from non-members of the group that is seeking an authorization.

The Department believes that it is not practicable to make a determination in this rule as to how these factors would apply to every conceivable noncommercial group uses and every conceivable site suitable for a noncommercial group use at any conceivable time of the year. Instead, the Department has given specific examples of how each of these factors will be applied to applications for noncommercial group uses. The Department believes that the Forest Service's experience in managing the national forests and its knowledge of National Forest System lands enable the agency to apply these specific, content-neutral criteria based on the information submitted in applications for noncommercial group uses.

Having considered the comments received, the Department has retained without substantive change in the final rule § 251.54(h)(1)(v) from the proposed rule.

Comment. Section 251.54(h)(1)(vi) of the proposed rule required an authorized officer to determine that a proposed activity did not involve military or paramilitary training or exercises by private organizations or individuals unless such training or exercises were federally funded.

Eight respondents commented on this provision. One respondent stated that if this type of military or paramilitary activity is already prohibited, then it does not have to be prohibited again. One respondent commented that this provision is a general prohibition with no bearing on the regulation of time, place, or manner.

Two respondents stated that the federal government should not exempt itself from its own regulations. One of these respondents stated that this provision gives official military activities a preemptive or exclusive right of access to the national forests. Three respondents commented that there should be no military or paramilitary training on national forests. One of these respondents stated that this provision authorizes exercises by police S.W.A.T. units and by the Drug Enforcement Administration and training of counterinsurgents for political terrorism. Another stated that the Forest Service could deny a permit for government troops to train in the national forests.

One respondent commented that this provision is too vague and broad and could be used to bar such paramilitary groups as football teams, the Salvation Army, Rainbow Hug Patrols, or the Boy Scouts of America or to bar such activities as aikido, tai chi, or nonviolence training for civil disobedience.

Response. The Forest Service Manual prohibits non-federally funded military or paramilitary training or exercises by private organizations or individuals because this type of use is often potentially damaging to forest resources and may endanger other users of National Forest System lands. The agency authorizes military or paramilitary training or exercises by governmental entities and federally funded military or paramilitary training or exercises by private organizations or individuals because when conducted under such auspices, this type of use is justified for national security purposes and is not as dangerous to other users of National Forest System lands.

Section 251.54(h)(1)(vii) of the final rule incorporates longstanding agency policy and gives it the force and effect of law. Section 251.54(h)(1)(vii) of the final rule provides the framework

necessary for applying this policy to noncommercial group uses.

The rule does not apply to official U.S. military activities, nor does it grant a preemptive or exclusive right of access for paramilitary uses of the national forests. Under § 251.54(f)(5) of the final rule, applications will be processed in order of receipt, and the use of a particular area will be allocated in order of receipt of fully executed applications, subject to any relevant limitations in § 251.54.

The Department believes that this is a narrowly tailored restriction that has no bearing on the content of expressive activity. ''Military'' means ''of, relating to, or typical of soldiers or the armed forces,'' ''performed or supported by the armed forces,'' or ''of or relating to war.'' *Webster's II New Riverside University Dictionary* 752 (1984). ''Paramilitary'' means ''of, pertaining to, or designating forces organized after a military pattern, esp. as a potential auxiliary military force.'' *Id.* at 852. The Department believes that the terms ''military'' and ''paramilitary'' do not apply to groups such as football teams, the Salvation Army, Rainbow Hug Patrols, or the Boy Scouts of America, or to activities such as aikido, tai chi, or nonviolence training for civil disobedience, nor does the Department intend to apply these terms to these types of groups or activities for purposes of § 251.54(h)(1)(vii) of the final rule. Under current policy, for example, adventure games (sometimes called survival or war games) are not considered military or paramilitary activities and may be authorized [FSM 2724.31].

Having considered the comments received, the Department has retained without substantive change in the final rule § 251.54(h)(1)(vi) from the proposed rule.

Comment. Section 251.54(h)(1)(vii) of the proposed rule required an authorized officer to determine that a person or persons 21 years of age or older had been designated to sign and did sign a special use authorization on behalf of the applicant.

Approximately 25 respondents commented on this provision. Seven respondents stated that no individual could sign a permit on behalf of a noncommercial group because each person in a noncommercial group is responsible solely for his or her own actions. These respondents stated that each person should accept responsibility for his or her use of public land; that only commercial activities are organized by an individual or entity that can take responsibility for liability and mitigation of resource impacts; that most noncommercial groups that use the national forests are not structured or legally empowered and that any person in those groups who signs a special use authorization represents only himself or herself; that it is unfair to hold the person who signs a permit accountable for all others in the group and that in the case of demonstrations, no one would sign, and the requirement would have a chilling effect on speech; and that the agency lacks the authority to require that noncommercial groups be constituted as legal entities or internally structured to allow compliance with the agency's rules, and that a group that operates by consensus is not a legal entity, but is merely an assemblage of individuals who are entirely seft-responsible under the law.

Fourteen respondents commented specifically that the Rainbow Family cannot comply with the signature requirement because no individual member speaks for the group and because each person is responsible for his or her own actions. These respondents stated that the signature requirement violates Rainbow Tribal Council traditions; that the signature requirement forces the Rainbow Family to choose between upholding its philosophy or maintaining its existence in that if the group complies with the requirement, it violates its principles, and if the group ignores the requirement, the agency can break up the gathering; that the Forest Service has never had any problem contacting the Rainbow Family; that the Rainbow Family is peaceful and cooperative and poses no threat to the Forest Service; that the Rainbow Family has met with local authorities in advance, helped prepare operating plans, and left sites in a clean and natural state; that the agency has always had reliable contacts at Rainbow Family Gatherings and that questions have been answered, reasonable requests have been met, and problems solved with the cooperation of the Rainbow Family and that the real intent of this provision is to isolate leaders from the consensus, make them culpable for real or imagined actions of the group, and expose them to penalties under the full weight of the law.

One respondent commented that in view of the history of the rule, the agency intends to use this provision to single out individuals for harassment.

One respondent commented that the responsibilities and privileges of citizenship are assumed at the age of 18 in most states. Another respondent commented that requiring those who sign to be 21 years of age or older could prevent persons under the age of 21 from exercising their First Amendment rights and suggested lowering the age limit to 18 or dropping it altogether.

One respondent stated that this provision is a general prohibition with no bearing on time, place, or manner.

Response. The Department believes that the age limitation in § 251.54(h)(1)(viii) of the final rule is a reasonable time, place, and manner restriction. The restriction is necessary to ensure that those who are designated to sign and who do sign a special use authorization on behalf of a group are of the age of legal majority. The signature gives the authorization legal effect. If the person or persons who sign the authorization are not of the age of legal majority, the authorization is not legally enforceable. Since the age of legal majority is not the same in every state but in no state exceeds the age of 21, the final rule requires that the person or persons who are designated to sign and who do sign a special use authorization be at least 21 years of age.

The Department does not believe that this age limitation imposes an undue burden on the exercise of First Amendment rights by those under the age of 21. The final rule does not prohibit groups of 75 or more people under the age of 21 from gathering in the national forests, nor does the final rule require that these groups include a person 21 years of age or older. Rather, the final rule requires that a person or persons 21 years of age or older be designated to sign a special use authorization and that that designated person or persons sign an authorization on behalf of the group.

It is not appropriate or necessary for one member or a few members of a group to assume personal responsibility for the actions of other group members. Individual group members are personally responsible for their own actions. A person who signs a special use authorization for a noncommercial group use acts as an agent for the group, but does not assume personal responsibility for the group's actions.

However, it is appropriate and necessary to ensure that a group will be responsible for the actions of its members as a whole that relate to the use and occupancy of National Forest System lands by requiring a person or persons to sign a special use authorization as an agent or representative of the group. By signing a special use authorization on behalf of the group, the agent or representative gives the authorization legal effect and subjects the group to the authorization's terms and conditions.

The Forest Service needs to have someone to contact for purposes of

special use administration. The authorized officer may have questions about the application or may need to notify the applicant in the event of an emergency. If the application does not identify a contact person, the agency cannot make the appropriate notifications.

As shown by the reports on the 1991 and 1992 Rainbow Family Gatherings, if a group does not designate a representative or representatives, the Forest Service has to deal separately with various individual members and sub-groups. Informal agreements made with one individual member or sub-group are not always respected by other group members which makes it difficult for the agency to obtain commitments concerning an activity from the group as a whole.

All groups, both commercial and noncommercial, can and should be responsible for the actions of their members as a whole that relate to the use and occupancy of National Forest System lands. The Department believes that it is both fair and appropriate to apply this provision to all applicants, including groups like the Rainbow Family that have no leader and that make decisions by consensus. Even if a group has no leader, the group can still designate a representative or representatives who can sign a special use authorization on behalf of the group. (Groups that make decisions by consensus could select a representative through that decisionmaking process.)

As one respondent noted, the court in *United States* v. *Rainbow Family* held that the Rainbow Family is an unincorporated association that can sue and be sued. 695 F. Supp. at 298. The court also held that service of process upon the Rainbow Family was properly effected in that case by service upon several individuals who acted as agents or representatives of the Rainbow Family. *Id.* Moreover, in 1987, representatives of the Rainbow Family signed a consent judgment in a suit brought by the Health Director of the State of North Carolina against the Rainbow Family for failure to obtain a permit under the State's mass gathering statute. It is therefore reasonable to believe that the Rainbow Family could designate a person or persons to sign and that that person or those persons could sign a special use authorization on behalf of the group as provided in § 251.54(h)(1)(viii) of the final rule.

The Department believes that this provision is a narrowly tailored restriction that has no bearing on the content of expressive activity. The Department intends to apply this requirement consistently and fairly as required by law to all applications for noncommercial group uses.

Having considered the comments received, the Department has retained without substantive change in the final rule § 251.54(h)(1)(vii) from the proposed rule.

Comment. Section 251.54(h)(2) of the proposed rule provided that an authorized officer could deny an application if it did not meet the seven evaluation criteria. Under § 251.54(h)(2) of the proposed rule, and authorized officer had to notify an applicant in writing of the reasons for denial of an application, and denial of an application constituted final agency action that was immediately subject to judicial review.

Eight respondents commented on this provision. One respondent stated that the ability to deny an application for a noncommercial group use gives an authorized officer too much discretion.

One respondent commented that a denial of an application is not appealable. Another respondent stated that access to the courts is denied until administrative remedies are exhausted. Two respondents stated that this provision is inadequate because it fails to provide for administrative review. Two respondents stated that judicial review is too expensive for many to pursue. One of these respondents also cited the holding in *United States* v. *Rainbow Family* that the rule must provide for judicial review of the agency's determination. One respondent commented that the agency should consider providing for alternative dispute resolution instead of judicial review.

Three respondents stated that an authorized officer can deny an application without providing for an alternative time, place, or manner. Specifically, these respondents stated that the agency is not required to provide ''ample alternative channels'' for the applicant's use of public land; that this provision gives the agency authority to prevent an activity from taking place; and that ''reasons for the denial'' should be replaced with ''reasons to modify the time, place, or manner'' of the proposed activity.

One respondent approved of requiring an authorized officer to notify an applicant in writing of the reasons for denial of an application.

Response. Section 251.54(h)(2) of the final rule contains the following procedural safeguards:

(1) an authorized officer must notify an applicant in writing of the reasons for denial of an authorization;

(2) if an application is denied and an alternative time, place, or manner will allow the applicant to meet the evaluation criteria, an authorized officer must offer that alternative;

(3) if an application is denied solely because extraordinary circumstances do not permit the categorical exclusion to apply to the proposed activity and the alternatives suggested are unacceptable, an authorized officer must offer to have the requisite environmental analysis (EA or EIS) conducted for the activity; if an EA or EIS is prepared, the analysis will not be subject to the 48-hour timeframe for reviewing applications for noncommercial group uses that do not require preparation of an EA or EIS; if an EA or EIS is prepared, the decision to grant or deny the application will be subject to the administrative appeal process for planning and project decisions at 36 CFR 215 and will be made within 48 hours after the decision becomes final under that appeal process; and

(4) a decision to deny an authorization for a noncommercial group use is immediately subject to judicial review.

The Forest Service's ability to deny applications for noncommercial group uses is strictly constrained by the narrow, specific, content-neutral evaluation criteria in §§ 251.54(h)(1)(i) through (h)(1)(viii) and by the limitations in § 251.54(h)(2) of the final rule. Under § 251.54(h)(2) of the final rule, if an application is denied and an alternative time, place, or manner will allow the applicant to meet the evaluation criteria, an authorized officer must offer that alternative. Moreover, if an application is denied solely because extraordinary circumstances do not permit the categorical exclusion to apply to the proposed activity and the alternatives suggested are unacceptable to the applicant, an authorized officer must offer to have the requisite environmental analysis completed for the site. Thus, the final rule leaves open ample alternative channels for communication of information.

The Department does not believe that ''reasons for denial'' should be replaced with ''reasons to modify the time, place, or manner'' of the proposed activity because it is conceivable that for some proposed activities, such as igniting a fireworks display in a national forest, an alternative time, place, or manner will not allow the applicant to meet the evaluation criteria in the final rule.

The court in the *Rainbow Family* case held that the regulation must provide for expeditious judicial review of the agency's decision to deny an application. 695 F. Supp. at 311. This rule meets that requirement by providing that denial of an application

under § 251.54(h)(1) constitutes final agency action that is immediately subject to judicial review. Exhaustion of administrative remedies is not required before seeking redress in the courts.

Section 251.56—Terms and Conditions

Section 251.56(e) of the proposed rule provided that no bond was required for activities subject to the rule.

Comment. One respondent stated that those who use the national forests should be required to furnish a copy of their insurance policies. Another respondent stated that a performance bond should be required when necessary to ensure compliance with the terms and conditions of special use authorizations, regardless of whether the holder is exercising a constitutional right.

Several respondents objected generally to requiring insurance and bonding for activities subject to the proposed rule. Ten specifically objected to requiring a bond on the ground that it is unnecessary and discriminates against those who do not have a lot of money. One objected that requiring a bond discriminates against those who do not share the majority viewpoint of the Forest Service. Three respondents stated that bonding should not be required for noncommercial uses. One respondent stated that bonding could still be required for noncommercial uses, given the vagueness of the definition of ''commercial use or activity'' and probably would be required given the history and apparent intent of the regulation.

Response. The special use regulations do not contain any provisions on insurance (*see* 36 CFR part 251, subpart B), and the Department as a matter of policy will not require insurance for activities subject to the final rule. This policy demonstrates the Department's intent to ensure that no undue burdens are imposed on the exercise of First Amendment rights.

Under the final rule, an authorized officer may not require bonding for activities subject to the rule. As discussed in response to comments on § 251.51, the Department has clarified and narrowed the definition of ''commercial use or activity'' so that it cannot be construed to include noncommercial activities. It is not the Department's intent to require bonding for noncommercial group uses. The Department's intent is to ensure that no undue burdens are imposed on the exercise of First Amendment rights.

Having considered the comments received, the Department has retained without change § 251.56(e) in the final rule.

Section 251.57—Rental Fees

Section 251.57(d) of the proposed rule provided that no permit fees would be charged for activities subject to the rule.

Comment. Two respondents stated that all persons or organizations subject to the requirement for a special use authorization should be required to pay reasonable application, processing, and land use fees.

Several respondents objected generally to charging permit fees for activities subject to the proposed rule. Three respondents stated that permit fees should not be charged for noncommercial uses. One respondent stated that authorized officers might start charging ever-increasing permit fees. One respondent stated that permit fees could still be charged for noncommercial uses, given the vagueness of the definition of ''commercial use or activity'' and probably would be charged, given the history and apparent intent of the regulation.

Response. Under the final rule, an authorized officer may not charge a permit fee for activities subject to the rule. As discussed in response to comments on § 251.51, the Department has clarified and narrowed the definition of ''commercial use or activity'' so that it cannot be construed to include noncommercial activities. It is not the Department's intent to charge permit fees for noncommercial group uses. As stated above, the Department's intent is to ensure that no undue burdens are imposed on the exercise of First Amendment rights.

Having considered the comments received, the Department has retained without change § 251.57(d) in the final rule.

Section 251.60—Termination, Revocation, and Suspension

Under the proposed rule, special use authorizations for activities subject to the rule were exempted from 36 CFR 251.60(b), which provides that a special use authorization may be suspended, revoked or terminated at the discretion of an authorized officer for ''reasons in the public interest.'' This proposed exemption made clear the agency's intent to ensure that an authorized officer does not have unbridled discretion with respect to administration of activities subject to the rule.

Under the proposed rule, an authorized officer could still terminate, revoke, or suspend an authorization for these activities for noncompliance with applicable statutes, regulations, or terms and conditions of the authorization; for failure of the holder to exercise the rights and privileges granted; with the consent of the holder; or when, by its terms, a fixed or agreed-upon condition, event, or time occurs.

Comment. Nine respondents commented on this provision. Seven respondents commented that this provision gives the authorized officer too much discretion. These respondents stated that the agency could revoke a permit in the middle of a gathering; that the agency could make revocation of a permit likely by requiring strict compliance with a condition that would be difficult to meet or that would inevitably occur; that actions of one person could put everyone at legal risk; that the agency could arbitrarily change a prior determination, for example, a designation of noncommercial to commercial, in order to revoke a permit; and that it is good that one basis for termination, revocation, and suspension was removed, but that reasons to stop an activity will still be determined by the Forest Service, and that there is no reason to stop a gathering unless people do something wrong, such as dumping tons of garbage or burning trees.

Two respondents objected to allowing an authorized officer to revoke a special use authorization if the holder fails to exercise the privileges granted by the authorization. One of these respondents commented that this basis for revocation is unclear and duplicates the basis for revocation for noncompliance with the terms and conditions of the authorization.

Another respondent objected to allowing an authorized officer to terminate a special use authorization with the consent of the holder on the ground that an individual could relinquish privileges on behalf of the group.

One respondent stated that the same criteria for termination, revocation, and suspension should apply to all permit holders, regardless of whether the holder is exercising constitutional rights.

One respondent commented that the rule should require an authorized officer to go before a judge and produce evidence before a permit is revoked.

Response. The Department disagrees that the same criteria for termination, revocation, and suspension should apply to both commercial and noncommercial special use authorizations. Different standards apply to categories of activities like noncommercial group uses, which may include activities involving noncommercial speech.

The courts have held that this regulation cannot single out

noncommercial expression and treat it differently from other similar types of activities. *Israel,* No. CR–86–027–TUC–RMB (D. Ariz. May 10, 1986); *Rainbow Family,* 695 F. Supp. at 309, 312. The courts have also held that the administrative standards that govern special use authorizations for noncommercial expression must be specific and objective and must not leave too much discretion to the authorized officer. *Shuttlesworth,* 394 U.S. at 150–51, 153; *Rainbow Family,* 695 F. Supp. at 309–12.

Therefore, the Department must ensure that the same criteria for termination, revocation, and suspension of special use authorizations for noncommercial group uses apply to all authorizations in that category, regardless of whether they involve the expression of views. The Department also must ensure that these criteria are specific and objective and do not leave unbridled discretion to the authorized officer.

The Department agrees that allowing an authorized officer to terminate, revoke, or suspend a special use authorization for a noncommercial group use when, by its terms, a fixed or agreed upon condition, event, or time occurs could undercut the Department's intent to ensure that the authorized officer does not have unbridled discretion in administering noncommercial group uses. Consequently, § 251.60(a)(1)(i) in the final rule limits the grounds for revocation or suspension of a special use authorization for a noncommercial group use to (a) the criteria under which the authorization may be denied under § 251.54(h)(1) of the final rule, (b) noncompliance with applicable statutes, regulations, or the terms and conditions of the authorization, (c) failure of the holder to exercise the privileges granted by the authorization, and (d) with the holder's consent.

In keeping with the courts' requirement for expeditious review of decisions affecting authorization of expressive activities, decisions to revoke or suspend a special use authorization for noncommercial group uses are immediately subject to judicial review under § 251.60(a)(1)(ii) of the final rule. Thus, § 251.101, which requires exhaustion of administrative remedies under the agency's administrative appeals process for special uses, does not apply.

Section 251.60(a)(1)(iii) of the final rule clarifies that a special use authorization for a noncommercial group use terminates when it expires by its own terms. No agency action is involved. Consequently, § 251.60(a)(1)(iii) of the final rule makes clear that termination of a special use authorization for a noncommercial group use does not constitute agency action that is subject to administrative or judicial review.

Section 251.60(b) of the final rule exempts special use authorizations for noncommercial group uses from the authority to suspend, revoke, or terminate, at the discretion of an authorized officer, for reasons in the public interest.

Revocation will not be more likely for special use authorizations for noncommercial group uses than for other types of uses. The Forest Service endeavors and will continue to endeavor to help all holders comply with applicable statutes, regulations, and the terms and conditions of their special use authorizations and will endeavor to ensure compliance with the new evaluation criteria in § 251.54(h)(1) of the final rule. Under this rule, individual group members will be personally responsible for their own actions, while the group will be responsible for the actions of its members as a whole that have a bearing on compliance with the special use authorization and applicable law.

Revocation or suspension on the basis of the holder's failure to exercise the privileges granted by the authorization allows an authorized officer to give the site authorized for use by the holder to another applicant if the holder decides not to use the site. The Department believes that this basis for revocation or suspension is clear and distinguishable from revocation or suspension on the basis of the holder's noncompliance with the terms and conditions of the authorization.

In the case of a special use authorization for a noncommercial group use, the person or persons who have been designated to sign and have signed the authorization on behalf of the group under §§ 251.54(e)(2)(i)(E) and 251.54(h)(1)(viii) of the final rule would be expected to have the authority to consent to revocation or suspension of the authorization for purposes of § 251.60(a)(1)(i)(D) of the final rule.

Amendments to Part 261

In addition to the changes to 36 CFR part 251, subpart B, the proposed rule incorporated corollary changes to the rules at 36 CFR part 261, subpart A, which contain general prohibitions in effect for the National Forest System.

The proposed rule changed the authority citation for part 261 to consolidate the references. The proposed rule also changed the definitions and prohibitions in part 261, subpart A, governing occupancy and use to make them consistent with the provisions in part 251, subpart B, that require a special use authorization for commercial, but not noncommercial, distribution of printed material.

Comments on these provisions of the proposed rule and the Department's response to them follow.

Section 261.2—Definitions

The proposed rule added definitions for ''Distribution of printed material'' and ''Printed material.'' Since the Department has limited the prohibitions in §§ 261.10 (g) and (h) and 261.14 to commercial distribution of printed material, the Department has added to § 261.2 the same definition for ''Commercial use or activity'' as has been added to § 251.51 of the final rule.

Section 261.10—Occupancy and Use

Comment. Section 261.10(g) of the proposed rule prohibited distribution of any printed material without a special use authorization.

Five respondents commented on this provision. Three respondents commented hat the reasons cited for this provision are inadequate. One of these respondents stated that posting, affixing, or erecting printed material does not have the same significant impact on forest resources as clear-cutting. Another stated that there have not been any traffic jams from Rainbow Family members distributing leaflets, that the amount of printed material posted on trees would undoubtedly be small, and that these concerns can be addressed in a rule regulating traffic and posting, affixing, or erecting written materials on trees. One respondent stated that affixing printed material in the national forests might cause resource damage, but that this concern is addressed by existing laws, as are the concerns about traffic and danger to the person distributing the material.

Two respondents advised the agency to remove this provision and address resource damage as it occurs.

One respondent advised that this prohibition should apply only to commercial distribution of printed material.

Response. The Department has carefully examined the special use authorization requirement for noncommercial distribution of printed material. Based on the comments received on resource impacts and on the Department's review of resource impacts associated with noncommercial distribution of printed material, the Department has determined that these impacts are not significant enough to warrant regulation at this time.

Therefore, the Department has limited the prohibition in § 261.10(g) of the final rule to commercial distribution of printed material without a special use authorization.

Comment. Section 261.10(h) of the proposed rule prohibited certain conduct when distributing printed material, including delaying, halting, or preventing administrative use of an area by the Forest Service or other scheduled or existing uses or activities on National Forest System lands, misrepresenting the purposes or affiliations of those selling or distributing the material, and misrepresenting the availability of the material without cost or donation.

Eleven respondents commented on this provision. One respondent objected generally to this provision as a violation of First Amendment rights. Another commented that this provision prohibits distribution of printed material and solicitation of donations for printed material.

One respondent stated that distrubtion of printed material could not significantly delay, halt, or prevent administrative use of an area by the Forest Service or other scheduled or existing uses or activities.

Two respondents stated that there is no need for this provision because the agency's concerns about fraud and conflicts with other uses are addressed by other laws.

Five respondents commented that this provision gives the agency too much discretion. One of these respondents commented that the phrase, ''administrative use of an area by the Forest Service or other scheduled or existing uses for activities on National Forest System land,'' is too vague. Another stated that virtually any human presence on National Forest System lands could be determined to impede other uses or to conflict with the forest plan. One respondent commented that an applicant's omission of a purpose or affiliation in applying for a permit could be construed as a misrepresentation that would justify denial of a permit and thereby have a chilling effect on speech. One respondent stated that under this provision, distribution of printed material for no charge while requesting donations could be considered a prohibited misrepresentation, that this provision would prohibit distribution of printed material in exchange for purely voluntary contributions, and that no such rule applies to commercial distribution of printed material.

One respondent stated that no individual at a consensual gathering can assume liability for the proposes or affiliations of other members and that the intent of the prohibition on misrepresentation is to impose liability and to provide a pretext for enforcement action.

One respondent commented that prohibiting misrepresentation when distributing printed material constitutes regulation of the content of speech. Another respondent advised deleting ''misrepresenting the purposes or affiliations of those selling or distributing the material,'' because although commercial speech may be regulated for truthfulness, political speech may not be.

Response. The Department has carefully examined the special use authorization requirement for noncommercial distribution of printed material. Based on the comments received on resource impacts and on the Department's review of resource impacts associated with noncommercial distribution of printed material, the Department has determined that these impacts are not significant enough to warrant regulation at this time. Therefore, the Department has limited the prohibition contained in § 261.10(h) to commercial distribution of printed material. In so doing, the Department has removed the reference to donations in § 261.10(h) of the final rule, as donations generally do not occur in connection with commercial activities.

Section 261.10(h) of the final rule does prohibit and is not intended to prohibit commercial distribution of printed material. Rather, this provision is intended to ensure that commercial distribution of printed material does not delay, halt, or prevent other authorized uses and activities on National Forest System lands. Section 261.10(h) of the final rule is also intended to protect the public from fraud by prohibiting specific types of misrepresentation in the context of commercial distribution of printed material. Thus, this provision of the final rule regulates the time, place, and manner of commercial distribution of printed material, rather than the content of the commercial printed material.

As discussed in response to comments on § 251.54(h)(1)(iii) of the proposed rule, the Forest Service has had difficulty allocating space among uses and activities, both commercial and noncommercial, on National Forest System lands. Section 261.10(h) of the final rule provides the framework necessary for ensuring that authorized uses and activities can coexist in the national forests and for ensuring that certain specific types of misrepresentation do not occur in the context of commercial distribution of printed material.

Section 261.14—Developed Recreation Sites

Comment. The proposed rule removed § 261.14(p) of the current rule, which prohibited distribution of printed material without a special use authorization at developed recreation sites. This prohibition was subsumed in the prohibition of distribution of printed material without a special use authorization contained in § 261.10(g) of the proposed rule, which applied throughout the National Forest System.

Two respondents commented on this provision. One respondent stated that this prohibition should apply only to commercial distribution of printed material. The other stated that it is unclear what the removal of this provision from the rule means that it is acceptable if it means that there is no longer a permit requirement for distribution of printed material at developed recreation sites.

Response. The Department has removed § 261.14(p) of the current rule, which prohibits distribution of printed material without a special use authorization at developed recreation sites, because it is redundant. Section 261.10(g) of the current rule prohibits distribution of printed material without a special use authorization throughout the National Forest System, including at developed recreation sites.

In addition, the prohibition contained in § 261.14(p) of the current rule is too broad. The Department has carefully examined the special use authorization requirement for noncommercial distribution of printed material. Based on the comments received on resource impacts and on the Department's review of resource impacts associated with noncommercial distribution of printed material, the Department has determined that these impacts are not significant enough to warrant regulation at this time. Therefore, in § 261.10(g) of the final rule, the Department has limited the prohibition currently found at § 261.14(p) to commercial distribution of printed material without a special use authorization.

Procedural Comments

A number of comments were received on various procedural aspects of this rulemaking. These comments and the Department's response to them follow.

Comment: Requests for Administrative Hearing. Approximately 79 respondents requested an administrative hearing on the proposed rule. Specifically, one respondent commented that the average person who might be affected by the rulemaking might not otherwise know about it or

feel comfortable commenting. Another respondent cited *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701 (1884), for the proposition that due process requires a judicial proceeding when life, liberty, or property are at stake.

One respondent stated that the agency had failed to give timely notice of the proposed rule to those who had notified the agency of their interest. Another respondent stated that Forest Service correspondence about the status of the proposed rule sent before it was published constitutes an *ad hoc*, unpublished decision issued at the same time as the proposed rule in violation of the APA.

Response. When a rule is promulgated under the notice and comment provisions of the APA at 5 U.S.C. 553(c), an administrative hearing is not required and is seldom provided. By publishing the proposed rule in the **Federal Register**, by accepting comments on the proposed rule for 90 days, and by analyzing and addressing the comments received during that period in the preamble to this final rule, the Department has fully complied with the notice and comment provisions of 5 U.S.C. 553(c).

For informal rulemaking, an agency satisfies the APA's notice requirement by publishing in the **Federal Register**. The Forest Service published the proposed rule in the **Federal Register** on May 6, 1993. In addition, the agency gave direct notice to numerous interested parties and invited their comments. The timeliness of the agency's notice is in fact supported by the actions of the respondent who stated that the agency had failed to give timely notice. That respondent submitted a comment on the proposed rule dated June 24, 1993, which was received on July 7, 1993, nearly a month before the end of the comment period. Correspondence sent by the agency concerning the status of the proposed rule before it was published has no legal bearing on this rulemaking and does not violate the APA.

Comment: Requests for Extension of the Comment Period. Fifteen respondents requested that the comment period be extended. One of these respondents requested an extension to 100 days after publication of the proposed rule, until August 14, to allow the Rainbow Family Council, which meets July 1, through 7, to submit a comment.

Response. The APA does not specify the number of days for a comment period for informal rulemaking (5 U.S.C. 553(c)). The comment period for a proposed rule is often 60 days. The comment period for this rulemaking was 90 days and closed August 4, 1993, nearly a month after the time identified for the meeting of the Rainbow Family Council. The Forest Service received 603 comments on the proposed rule, including 12 petitions with 20,451 signatures. The Department believes that the 90-day comment period was sufficient to give all members of the public an opportunity to comment on the proposed rule.

Comment: Compliance With the Paperwork Reduction Act. Five respondents commented that the proposed rule violates the Paperwork Reduction Act on the grounds that an application for noncommercial group uses would take more than one to four hours to complete; that preparation time of up to four hours for applications governed by the rule indicates that these applications unreasonably restrict recreational use of national forests; that it is unreasonable to spend an hour or more on something that currently does not have to be done; and that the proposed rule would generate paperwork through litigation.

Response. The Department disagrees with these comments, which are irrelevant to compliance with the Paperwork Reduction Act. The Paperwork Reduction Act requires approval by the Office of Management and Budget (OMB) of any collection of information required by an agency that affects ten or more persons (44 U.S.C. 3502(4)(A), 3507(a)). ''Collection of information'' includes obtaining information through the use of application forms (44 U.S.C. 3502(4)(A)). An agency must estimate the time needed to comply with the collection of information requirement (44 U.S.C. 3507(a)).

The Department has fully complied with the Paperwork Reduction Act. The information that an applicant must provide the Forest Service in an application for a noncommercial group use constitutes a collection of information requirement under the Paperwork Reduction Act. The Department has obtained approval from OMB of a standard application form that can be used for all special uses. Because of the very limited information required in applications subject to this rule, however, the Department has developed a special application form for noncommercial group uses. The Department has submitted a request for approval of this form to OMB and will obtain approval of this form from OMB before using it in conjunction with this rule.

Since this rule applies to all noncommercial group uses on National Forest System lands, the Department has estimated the average amount of time an applicant will spend to prepare an application. The amount of time will vary depending on the scope and complexity of the proposed activity.

The Department believes that it has not underestimated the preparation time for an application. Under §§ 251.54(e)(2)(i)(A) through (e)(2)(i)(E) of the final rule, information required from applicants for noncommercial group uses is limited to five very basic elements; (1) A description of the proposed activity; (2) a description of the National Forest System lands and any facilities the applicant would like to use; (3) the estimated number of participants and spectators; (4) the date and time of the proposed activity; and (5) the name of the person or persons who will sign a special use authorization on behalf of the applicant. Moreover, the application requirement is an essential component of the special use authorization process, which in turn furthers several significant governmental interests.

Comment. Compliance with Executive Order 12291. Five respondents commented that the proposed rule violates or triggers additional analysis under Executive Order 12291. Specifically, these respondents stated that the regulation is a major rule; that any rule that violates rights is a major rule; that in these economically difficult times, the regulatory impact could exceed $100 million, and that interested parties might incur more court costs as a result of promulgation of the rule; that the proposed rule would have an effect of more than $100 million on the economy, given that the agency spent almost $400,000 at the 1992 Rainbow Family Gathering, and that if the agency made similar expenditures on noncommercial group uses throughout the year, the agency would be spending more than $20 million a year, and that if five activities occurred continuously, the agency would be spending $100 million a year; that the proposed rule would increase costs for state and local governments; that it is unclear where the agency derives the unilateral authority to make a determination on the issues covered by the Order; that the standard cited in the proposed rule is purely economic and fails to acknowledge other standards required by law, which would easily be met; that the proposed rule violates section 2(a) of the Order, which requires that agency decisions be based on adequate information concerning the need for and consequences of the proposed rule, given that other regulations address the agency's concerns in promulgating the rule; that the benefits to society from the

proposed rule do not outweigh the costs as required by section 2(b) of the Order, given that the rule is unconstitutional and that the agency's concerns in promulgating the rule are addressed by other regulations; and that being set apart from a totalitarian regime and the value of freedom as contemplated in *Terminiello* v. *Chicago*, 337 U.S. 4 (1948), should be considered ''beneficial effects that cannot be quantified in monetary terms'' under section 3(d) of the Order.

One respondent commented that the proposed regulation would have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because the proposed rule would impose additional recordkeeping requirements on them.

Response. Executive Order 12291 was revoked on September 30, 1993, by section 11 of Executive Order 12866. Thus, Executive Order 12291 does not apply to the final rule. Nevertheless, as Executive Order 12291 was in effect when the proposed rule was published, the Department will address comments pertaining to that Order.

Section 1(b) of Executive Order 12291 required agencies to determine whether each regulation they promulgated qualified as a major rule. Under section 1(b), a regulation was deemed a major rule if it was likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Department determined that the proposed regulation was not a major rule because it would have little or no impact on the national economy. The proposed rule required a special use authorization for noncommercial group uses on National Forest System lands. The proposed rule consisted primarily of technical and administrative changes for authorization and use of National Forest System lands.

The fact that interested parties could incur court costs in challenging the rule and that the Forest Service and state and local governments incur costs in hosting noncommercial group uses does not affect the determination that the proposed regulation was not a major rule. The Forest Service and state and local governments have incurred costs in connection with noncommercial group uses without the special use authorization requirement and would continue to incur certain costs, such as personnel costs, after the proposed rule became effective. The Department believes that costs associated with noncommercial group uses would decrease, not increase, after the proposed rule went into effect because the rule would enhance the Forest Service's ability to manage these uses and minimize adverse impacts.

The proposed rule did not violate sections 2(a) and 2(b) of Executive Order 12291. The proposed rule was based on adequate information concerning the need for and consequences of the regulation, and the benefits outweighed any costs of the rulemaking. The Department articulated several significant interests in promulgating the proposed rule and determined that requiring a special use authorization for noncommercial group uses does not impose a substantial burden on the public. Other regulations do not adequately address the Department's concerns associated with managing noncommercial group uses of National Forest System lands. The Department believes that the proposed rule is constitutional. Section 3(d) of Executive Order 12291 applied only to major rules. Section 3(d) did not apply to the proposed regulation because it was not a major rule.

The final rule will not have a significant impact on a substantial number of small entities under the Regulatory Flexibility Act in part because the rule will not impose additional recordkeeping requirements on them.

Comment: Environmental Documentation Required for Rulemaking. Three respondents commented that the proposed rule requires documentation in an environmental assessment or environmental impact statement. These respondents stated that the rule has environmental impacts from anticipated litigation with large groups like the Rainbow Family; that the rule must affect the environment because otherwise the agency would not have issued it; and that the rule might keep people out of the national forests and thereby have a significant effect on the human environment.

Response. Section 31.1b of Forest Service Handbook 1909.15 categorically excludes from documentation in an EA or an EIS ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes or instructions.'' This regulation falls into this category of actions because the rule establishes agency-wide administrative procedures for authorization and use of National Forest System lands and because no extraordinary circumstances exist which would require preparation of an EA or an EIS.

Summary

Having fully considered the comments on the proposed rule received during the comment period, the Department is adopting this final rule with the modifications previously described in response to comments received. This rule is effective 30 days after the date of publication in the **Federal Register**.

Regulatory Impact

This final rule was received under USDA procedures and determined to be a significant rule under Executive Order 12866 on Regulatory Planning and Review because of the strong public interest expressed in the proposed rule. Accordingly, this final rule was subject to OMB review.

Moreover, this final rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). It has been determined that this action will not have a significant economic impact on a substantial number of small entities because it will not impose recordkeeping requirements on them; it will not affect their competitive position in relation to large entities; and it will not affect their cash flow, liquidity, or ability to remain in the market.

This rule has been reviewed for its impact on private property rights under Executive Order 12630 of March 15, 1988, as implemented by the United States Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings. Executive Order 12630 does not apply to this rule because it consists primarily of technical and administrative changes governing application procedures for authorization of occupancy and use of National Forest System lands. Application for a special use authorization does not grant any right, title, or interest in or to lands or resources held by the United States.

This rule has been reviewed under Executive Order 12778, 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 suite in court challenging its provisions.

Paperwork Reduction Act

The information an applicant must provide the Forest Service under §§ 251.54 (e)(2)(i)(A) through (e)(2)(i)(E) to obtain an authorization for a noncommercial group use constitutes an information requirement as defined by the Paperwork Reduction Act and OMB implementing rules at 5 CFR part 1320 and thus requires OMB approval before adoption of the final rule. The Department has developed an application form for noncommercial group uses and is in the process of obtaining approval of this form from OMB. The Department will obtain approval of this form before using it in conjunction with this rule. The Department estimates that each applicant would spend an average of one to four hours preparing an application, depending on the scope and complexity of the proposed activity.

Environmental Impact

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

List of Subjects

36 CFR Part 251

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

36 CFR Part 261

Law enforcement, National forests.

Therefore, for the reasons set forth in the preamble, part 251, subpart B, and part 261, subpart A, of Chapter II of Title 36 of the Code of Federal Regulations are hereby amended as follows:

PART 251—LAND USES [AMENDED]

Subpart B—Special Uses

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

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

2. Amend § 251.50 by revising the section heading, paragraph (a), the introductory text for paragraph (c), and paragraph (c)(3) to read as follows:

§ 251.50 Scope.

(a) All uses of National Forest System lands, improvements, and resources, except those provided for in the regulations governing the disposal of timber (part 223) and minerals (part 228) and the grazing of livestock (part 222), are designated ''special uses.'' Before engaging in a special use, persons or entities must submit an application to an authorized officer and must obtain a special use authorization from the authorized officer unless that requirement is waived by paragraph (c) of this section.

* * * * *

(c) A special use authorization is not required for 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:

(1) * * *

(2) * * *

(3) Noncommercial group uses as defined in § 251.51 of this subpart.

* * * * *

3. Amend § 251.51 by removing the terms and definitions for ''Group event,'' ''Distributing noncommercial printed material,'' and ''Noncommercial printed material,'' and adding the following new terms and definitions in alphabetical order to read as follows:

§ 251.51 Definitions.

* * * * *

Commercial use of activity—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.

Group use—an activity conducted on National Forest System lands that involves a group of 75 or more people, either as participants or spectators.

Noncommercial use or activity—any use or activity that does not involve a commercial use or activity as defined in this section.

* * * * *

4. Amend § 251.54 by revising the introductory text for paragraph (a); removing the introductory text for paragraph (e); revising paragraph (e)(1); redesignating paragraphs (e)(2) through (e)(5) as paragraphs (e)(3) through (e)(6); adding a new paragraph (e)(2); redesignating paragraphs (f)(1) and (f)(2) as (f)(2) and (f)(3) and designating the first sentence of paragraph (f) introductory text, as paragraph (f)(1); adding new paragraphs (f)(4) and (f)(5); and revising paragraph (h) to read as follows:

§ 251.54 Special use applications.

(a) *Preapplication activity.* When occupancy or use of National Forest System lands is desired, a proponent is encouraged to contact the Forest Service office(s) responsible for management of the affected land as early as possible so that potential constraints may be identified, the proposal can be considered in forest land and resource management plans if necessary, and processing of an application can be tentatively scheduled. To the extent applicable to the proposed use and occupancy, the proponent will be given guidance and information about:

* * * * *

(e) *Application content*—(1) *Applicant identification.* Any applicant for a special use authorization shall provide the applicant's name and mailing address, and, if the applicant is not an individual, the name and address of the applicant's agent who is authorized to receive notice of actions pertaining to the application.

(2) *Required Information*—(i) *Noncommercial group uses.* An applicant for noncommercial group uses shall provide the following:

(A) A description of the proposed activity;

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

(C) The estimated number of participants and spectators;

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

(E) The name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the applicant. Paragraphs (e)(3) through (e)(6) of this section shall not apply to applications for noncommercial group uses.

(ii) *All other special uses.* At a minimum, applications for special uses other than noncommercial group uses shall include the information contained in paragraphs (e)(3) through (e)(6) of this section. In addition, if requested by an authorized officer, an applicant in one of the following categories shall furnish the information specified for that category:

(A) A State and local government agency: a copy of the authorization under which the application is made;

(B) A public corporation: the statute or other authority under which it was organized;

(C) A federal government agency: the title of the agency official delegated the authority to file the application;

(D) A private corporation:

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

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

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

(*4*) in the case of an affiliate which is controlled by the entity, the number of shares and the percentage of any class of voting stock of the affiliate that the entity owns either directly or indirectly; or

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

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

* * * * *

(f) *Processing applications.* (1) * * *

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

(5) Applications for noncommercial group uses must be received at least 72 hours in advance of the proposed activity. Applications for noncommercial group uses shall be processed in order of receipt, and the use of a particular area shall be allocated in order of receipt of fully executed applications, subject to any relevant limitations set forth in this section. All applications for noncommercial group uses shall be deemed granted and an authorization shall be issued for those uses unless the applications are denied within 48 hours of receipt. Where an application for a noncommercial group use has been granted or is deemed to have been granted and an authorization has been issued under this paragraph, an authorized officer may revoke that authorization only as provided under § 251.60(a)(1)(i).

* * * * *

(h) *Response to applications for noncommercial group uses.* (1) An authorized officer shall grant an application for a special use authorization for a noncommercial group use upon a determination that:

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

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

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

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

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

(A) The sufficiency of sanitation facilities;

(B) The sufficiency of waste-disposal facilities;

(C) The availability of sufficient potable drinking water;

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

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

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

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

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

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

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

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

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

(2) If an authorized officer denies an application because it does not meet the criteria in paragraphs (h)(1)(i) through (h)(1)(viii) of this section, the authorized officer shall notify the applicant in writing of the reasons for the denial. If an alternative time, place, or manner will allow the applicant to meet the eight evaluation criteria, an authorized officer shall offer that alternative. If an application is denied solely under paragraph (h)(1)(iii) of this section and all alternatives suggested are unacceptable to the applicant, the authorized officer shall offer to have completed the requisite environmental and other analysis for the requested site. A decision to grant or deny the application for which an environmental assessment or an environmental impact statement is prepared shall be subject to the notice and appeal procedures at 36 CFR part 215 and shall be made within 48 hours after the decision becomes final under that appeal process. A denial of an application under paragraphs (h)(1)(i) through (h)(1)(viii) of this section constitutes final agency action and is immediately subject to judicial review.

5. Amend § 251.56 by revising paragraph (e) to read as follows:

§ 251.56 Terms and conditions.

* * * * *

(e) *Bonding.* An authorized officer may require the holder of a special use authorization for other than a noncommercial group use to furnish a bond or other security to secure all or any of the obligations imposed by the terms of the authorization or by any applicable law, regulation or order.

* * * * *

6. Amend § 251.57 by redesignating paragraphs (d) through (h) as (e) through (i) and adding a new paragraph (d) to read as follows:

§ 251.57 Rental fees.

* * * * *

(d) No fee shall be charged when the authorization is for a noncommercial group use as defined in § 251.51 of this subpart.

* * * * *

7. Amend § 251.60 by revising paragraphs (a) and (b) to read as follows:

§ 251.60 Termination, revocation, and suspension.

(a) *Grounds for termination, revocation, and suspension.* (1) *Noncommercial group uses.*

(i) *Revocation or suspension.* An authorized officer may revoke or suspend a special use authorization for a noncommercial group use only under one of the following circumstances:

(A) Under the criteria for which an application for a special use authorization may be denied under § 251.54(h)(1);

(B) for noncompliance with applicable statutes or regulations or the terms and conditions of the authorization;

(C) for failure of the holder to exercise the rights or privileges granted; or

(D) with the consent of the holder.

(ii) *Administrative or judicial review.* Revocation or suspension of a special use authorization under this paragraph constitutes final agency action and is immediately subject to judicial review.

(iii) *Termination.* A special use authorization for a noncommercial group use terminates when it expires by its own terms. Termination of a special use authorization under this paragraph does not involve agency action and is not subject to administrative or judicial review.

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

(i) For noncompliance with applicable statutes, regulations, or the terms and conditions of the authorization;

(ii) for failure of the holder to exercise the rights or privileges granted;

(iii) with the consent of the holder; or

(iv) when, by its terms, a fixed or agreed upon condition, event, or time occurs. Termination, revocation, or suspension of a special use authorization under this paragraph is subject to administrative and judicial review in accordance with 36 CFR part 251, subpart C.

(b) A special use authorization may be suspended, revoked, or terminated at the discretion of the authorized officer for reasons in the public interest, except that this provision shall not apply to a special use authorization for a noncommercial group use.

* * * * *

PART 261—PROHIBITIONS

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

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

Subpart A—General Prohibitions

9. Amend § 261.2 by adding the following new terms and definitions in alphabetical order to read as follows:

§ 261.2 Definitions.

* * * * *

Commercial use or activity—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.

Distribution of printed material—disseminating, posting, affixing, or erecting printed material as defined in this section.

Printed material—any written and/or graphic material including but not limited to pamphlets, brochures, photographs, graphics, signs, and posters.

* * * * *

10. Amend § 261.10 by redesignating paragraphs (h) through (n) as paragraphs (i) through (o), revising paragraph (g), and adding a new paragraph (h) to read as follows:

§ 261.10 Occupancy and use.

* * * * *

(g) Commercial distribution of printed material without a special use authorization.

(h) When commercially distributing printed material, delaying, halting, or preventing administrative use of an area by the Forest Service or other scheduled or existing uses or activities on National Forest System lands; misrepresenting the purposes or affiliations of those selling or distributing the material; or misrepresenting the availability of the material without cost.

* * * * *

§ 261.14 Developed recreation sites.

11. Amend § 261.14 by removing paragraph (p) and redesignating paragraph (q) as paragraph (p).

Dated: August 14, 1995.

Mark Gaede,

Acting Deputy Under Secretary, Natural Resources and Environment.

[FR Doc. 95–21225 Filed 8–29–95; 8:45 am]

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