

In addition, for anyone unable to attend any of the regional hearings, the Department will also accept written comments. You should send your comments to: John Kolotos, U.S. Department of Education, 1990 K Street, NW., room 8018, Washington, DC 20006. All comments must be received by November 29, 2007.

All of the hearing sites are accessible to individuals with disabilities. Individuals needing an auxiliary aid or service to participate in the meeting (e.g., interpreting service, assistive listening device, or materials in alternative format), should notify the contact person for information about hearings listed under **FOR FURTHER INFORMATION CONTACT** in this notice in advance of the scheduled meeting date. Although we will attempt to meet any request we receive, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it. Further information on the regional hearing sites is available on <http://www.ed.gov/policy/highered/reg/hearulemaking/2008/index2008.html>.

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**Program Authority:** 20 U.S.C. 1098a.

Dated: October 17, 2007.

**Diane Auer Jones,**

*Assistant Secretary for Postsecondary Education.*

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## DEPARTMENT OF AGRICULTURE

### Forest Service

#### 36 CFR Part 223

RIN 0596-AB81

#### Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products

**AGENCY:** Forest Service, USDA.

**ACTION:** Proposed rule; request for comment.

**SUMMARY:** The Department is issuing this proposed rule governing the disposal of special forest products from National Forest System lands. Special forest products include, but are not limited to, wildflowers, mushrooms, moss, nuts, seeds, tree sap, and Christmas trees. This proposed rule also formally establishes a pilot program to charge and collect fees for the harvest and sale of forest botanical products on National Forest System lands. This proposed rule is intended to facilitate sustainable harvest of special forest products and forest botanical products. Public comment is invited and will be considered in the development of the final rule.

**DATES:** Comments must be received in writing by December 21, 2007.

**ADDRESSES:** Send written comments to Director, Forest Management Staff, USDA Forest Service, Mail Stop 1105, 1400 Independence Avenue, SW., Washington, DC 20250-1105, or by e-mail to [wospecialproducts@fs.fed.us](mailto:wospecialproducts@fs.fed.us). Comments also may be submitted via the world wide web/Internet at <http://www.regulations.gov>. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying at the Office of the Director, Forest Management Staff Third Floor NW., Yates Building, 201 14th Street, SW., Washington, DC. Persons wishing to inspect the comments are encouraged to call ahead (202) 205-1766 to facilitate entrance into the building.

**FOR FURTHER INFORMATION CONTACT:** Richard Fitzgerald, Forest Service, Forest Management Staff, (202) 205-1753.

#### SUPPLEMENTARY INFORMATION:

#### I. Introduction

This proposed rule adds Subparts G and H to 36 CFR part 223. Subpart G governs the commercial harvest and sale of special forest products and also establishes regulations for limited free use of these products. Subpart H, in

turn, implements a pilot program for the harvest and sale of forest botanical products, as authorized by the Department of the Interior and Related Agencies Appropriations Act of 2000, (Pub. L. 106-113, Div. B, sec. 1000(a)(3), 113 Stat. 135 (enacting into law sec. 339 of Title III of H.R. 3423)), as amended in 2004 by section 335 of Public Law 108-108 ("the pilot program law"). Subpart H also contains regulations governing free, personal use of forest botanical products, as authorized under the pilot program law.

#### II. Background

##### A. Special Forest Products: Commercial Harvest and Sale and Free Use

##### 1. Commercial Harvest and Sale

The Forest Service presently sells special forest products from National Forest System lands under the authorities contained in the Multiple-Use Sustained-Yield Act of 1960, as amended (16 U.S.C. 528-531); the National Forest Management Act of 1976, as amended (16 U.S.C. 472a *et seq.*), the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended (16 U.S.C. 1600-1614); and the timber sale regulations at 36 CFR part 223. Historically, timber-related products, such as firewood, posts, poles, and Christmas trees, have comprised most of the sales. However, the Forest Service also sells smaller amounts of non-timber special forest products, such as boughs, mushrooms, berries, and floral greeneries. On an annual basis, the total revenue from the sale of special forest products sold from National Forest System lands is approximately \$3 million.

Sales of special forest products are relatively small-scale in comparison to timber sales. Purchasers are frequently individuals or small business, and most special forest product sales do not exceed \$10,000 in value. Generally, these smaller sales are not sold through competitive bidding; rather, a prospective purchaser asks to harvest certain forest products, and either enters into a simplified contract with the Forest Service, or buys a permit that allows the purchaser to conduct operations. Consistent with existing regulations, the Forest Service follows competitive bidding procedures for sales of special forest products valued at \$10,000, or more. The Forest Service presently uses the following standard documents for smaller sales: Permit FS-2400-1, Forest Products Removal Permit; Contract Forest Products FS-2400-3P for pre-measured products, and Contract FS-2400-4, Forest Products Contract. These documents contain

standard conditions and allow the parties to add provisions, as may be necessary given the conditions of the sale. For larger sales of special forest products, the Forest Service uses the standard timber sale contract, Contract FS-2400-6. The responsible Forest Officer selects the appropriate document in light of the value of the sale and other circumstances. The Forest Service anticipates that it will continue to use these standard documents after issuance of this proposed rule.

Over the past 10 years, public demand for both timber and non-timber special forest products has increased. Given this growing demand and the related need to ensure resource sustainability, the Forest Service has determined that it is impractical to continue to rely on the timber sale regulations and corresponding sections of the Forest Service Manual (FSM) and Handbook (FSH) to facilitate the sale of special forest products. Thus, the Forest Service has developed regulations specifically applicable to these products. The Forest Service is issuing this proposed rule to establish a new subpart G to 36 CFR part 223 to address fees, bidding, sustainability, and other issues associated with the commercial harvest and sale of special forest products. This framework, along with direction in the Forest Service Handbook 2409.18, Chapter 80 will govern commercial disposal of special forest products.

## 2. Free Use of Special Forest Products

This proposed rule also contains measures allowing for free use of special forest products. Historically, the agency has granted limited free use of these products to individuals and to members of federally-recognized Indian tribes holding reserved treaty gathering rights. The regulations will ensure that responsible Forest Officers administer free use of forest products uniformly across National Forest System lands and will provide greater transparency to the public. The Forest Service relies upon its broad multi-use mandate under the Multiple-Use Sustained-Yield Act of 1960, as amended, as authority for allowing free use of special forest products.

### *B. Forest Botanical Products: Commercial Harvest and Sale and Personal Use*

#### 1. Commercial Harvest and Sale

In recent years, bio-prospecting activities on National Forest System lands have increased. Bio-prospecting generally refers to gathering of natural products that have innate nutritional or

medicinal properties for commercial development and sale. Historically, the Forest Service has addressed bio-prospecting activities under the same authority and regulations that it has applied to special forest products. However, in the pilot program law, Congress directed the Secretary to initiate a pilot program for charging and collecting fees for the harvest and sale of forest botanical products—such as mosses, fungi, bryophytes, roots, bulbs, berries, seeds, and wildflowers—which are often the focus of bio-prospecting activities. Accordingly, the Forest Service is establishing in this proposed rule a new subpart H to 36 CFR part 223 to formally govern the pilot program. For the duration of the program, these regulations will apply to the sale of this subset of special forest products.

The pilot program law provides a mechanism for funding the environmental analyses and administrative tasks necessary for its implementation. Generally, the law requires the agency to charge and collect a fee covering at least a portion of the fair market value of the products and a portion of the costs incurred by the agency in administering the program. The law specifies that retained funds shall be available for expenditure without further appropriation for activities associated with the program, through September 30, 2010.

Subpart H of this proposed rule will terminate on September 30, 2010, unless Congress extends the pilot program, or makes it permanent.

#### 2. Personal Use of Forest Botanical Products

Section (e) of the pilot program law directs the Forest Service to permit limited, free use of forest botanical products. It mandates that the Forest Service establish a “personal use harvest level” for each product and directs that a person’s harvest of a product below that level shall be exempt from otherwise applicable fees. Additionally, the law authorizes the Secretary to waive fees “pursuant to such regulations as the Secretary may prescribe.” For the duration of the pilot program, free use of forest botanical products shall be conducted under this mandate, and under additional waivers, as established by the Secretary.

### **III. Section-by-Section Analysis of the Proposed Rule**

#### *A. Subpart G—Special Forest Products*

*Section 223.215—Applicability.* This section establishes that subpart G of part 223 governs the disposal of special forest products including both

commercial operations and free use. However, for the duration of the pilot program covering forest botanical products, the disposal of this subset of special forest products shall also be subject to the requirements set forth in subpart H, which implements that program. Upon termination of the pilot program, all special forest products, including forest botanical products, shall be disposed of pursuant to subpart G.

*Section 223.216—Definitions.* This section sets out the definition of special forest products as used in this subpart and provides common examples of such products. The definition also lists other products that do not fall under the definition.

*Section 223.217—Authority to dispose of special forest products.* This section sets out the Forest Service’s statutory authorities for the disposal of special forest products on National Forest System lands. For commercial harvest and sale, the agency relies upon three sources of authority: The Multiple-Use Sustained-Yield Act of 1960, as amended (16 U.S.C. 528–531); the National Forest Management Act of 1976, as amended (16 U.S.C. 472a *et seq.*), and the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended (16 U.S.C. 1600–1614). For example, the National Forest Management Act, 16 U.S.C. 472a, authorizes the Secretary to sell “at not less than appraised value, trees, portions of trees, or forest products on National Forest System lands.” In addition, the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 529, authorizes and directs the Secretary of Agriculture to “develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom.”

The Multiple-Use Sustained-Yield Act of 1960, as amended, provides authority for the agency to permit limited free use of special forest products. Under the Act, the Forest Service has expansive authority to manage National Forest System lands “in the combination that will best meet the needs of the American people” (16 U.S.C. 531). The Act identifies “outdoor recreation,” as one of several Congressional objectives that must inform the agency’s management (16 U.S.C. 528). Thus, while the Forest Service must consider the “relative values of the various resources,” its multiple-use management is “not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output” (16 U.S.C. 531). Limited free use of special forest products, as a

recreational activity, is fully consistent with the objectives and obligations established under the Multiple-Use Sustained-Yield Act of 1960.

*Section 223.218—Consistency with plans, environmental standards, and other management requirements.* This section requires the disposal of special forest products on National Forest System lands to be consistent with applicable land management plans. This section also requires contracts, permits, or authorizing instruments to include provisions, as appropriate, addressing among other things: fire protection and suppression; protection of natural resources; regeneration of harvested products; and, minimization of soil erosion.

*Section 223.219—Sustainable harvest of special forest products.* This section generally requires the Forest Service to determine the sustainable harvest level for each naturally occurring special forest product prior to offering that product for sale or free use. (The requirement would not include “man-made” products such as mine props and rails.) The sustainable harvest level for a naturally occurring special forest product is the aggregate quantity of the product that may be disposed of from a National Forest annually in perpetuity on a sustained yield basis. Special forest products shall be disposed of in a manner that does not exceed the sustainable harvest level for the product. In the absence of a determined sustainable harvest level for a product, the Forest Service may nevertheless sell, or offer the product for free use under measures designed to protect its renewable resource values. These measures may include consideration of past harvest levels and regular monitoring of the product, the site, and the harvest operations. This section prohibits the Forest Service from issuing or approving contracts, permits, or instruments for disposal of special forest products that are listed as endangered or threatened, or that have been proposed or listed under The Endangered Species Act. This restriction would not apply when the disposal is authorized by the Fish and Wildlife Service for scientific or other purposes related to sustainability of species. Under these rare situations a permit from the Forest Service is also required. This section also identifies when the Forest Service may issue permits authorizing disposal of special forest products listed on the Convention on International Trade in Endangered Species (CITES), or included on the Regional Forester’s sensitive plant list, or list of species of concern. Finally, this section provides

for monitoring and revision of harvest levels.

*Section 223.220—Quantity determination.* This section describes the acceptable methods for determining the quantity of special forest products. The quantity may be determined by scaling, measuring, weighing, counting, or other reliable means.

*Section 223.221—Establishing minimum rates.* This section provides that the Chief of the Forest Service shall issue agency directives in Forest Service Handbook 2409.18, Chapter 80, containing approved methods for setting minimum rates for sale of special forest products.

*Section 223.222—Appraisal.* This section specifies that the Chief of the Forest Service shall issue agency directives setting forth methods for appraising special forest products to determine their fair market value. The directives shall be contained at Forest Service Handbook 2409.18, Chapter 80. It also provides that special forest products must be sold at minimum rates or appraised value, whichever is higher.

*Section 223.223—Advance payment.* This section establishes the requirement for advance payment or payment guarantee for special forest products. It also directs the Forest Service to refund advance payments found to be in excess of that needed by the United States, subject to obligations established under the Debt Collection Improvement Act.

*Section 223.224—Performance bonds and security fees.* This section authorizes the Forest Service to require a purchaser to post a performance bond or security fee in conjunction with special forest products sale contracts, permits, or other instruments.

*Section 223.225—Contract, permit, and instrument term.* In accordance with section 14(c) of the National Forest Management Act (16 U.S.C. 472a(c)), this section establishes that the term of any contract, permit, or other instrument authorizing the sale of special forest products may not exceed 10 years, unless the Chief of the Forest Service finds that a longer term is consistent with the Multiple-Use Sustained-Yield Act of 1960, as amended (16 U.S.C. 528–531). Any such finding by the Chief shall be made in writing.

*Section 223.226—Adjustment of term of contract, permit, or other instrument for force majeure delay.* This section provides that each contract, permit, or other instrument shall contain a provision allowing the Forest Service to extend the term in the event that circumstances beyond the purchaser’s reasonable control delay performance. Such circumstances may include, but

are not limited to acts of God, acts of public enemy, acts of Government, labor disputes, fires, insurrections, or floods. Before granting an adjustment, the approving officer must find that the purchaser has diligently performed in accordance with the contract, permit or other instrument, or that the substantial public interest justifies the extension.

*Section 223.227—Sale advertisement.* This section generally requires the Forest Service to advertise for at least 30 days any sale of special forest products which has an appraised value of \$10,000, or more. For any sale with an appraised value under \$10,000, the Forest Service may offer the sale without advertisement. Regardless of the value of the sale, the agency may sell special forest products without advertisement, or in its discretion, advertise for less than 30 days if (1) deterioration of the product threatens its value; (2) if the products were previously advertised for competitive bidding but were not sold because of an absence of satisfactory bids; or, (3) if the products remain from expired, cancelled, or abandoned contracts, permits, or other instruments. Under this section, if a potential purchaser approached the Forest Service and proposed to purchase special forest products valued at less than \$10,000, then the Forest Service could proceed with the sale without advertising if there is absence of competitive interest.

*Section 223.228—Contents of advertisement.* This section sets forth the required contents of advertisements for special forest products sales. It requires the agency to provide information about the location and the estimated quantities of special forest products offered for sale, the time and place at which sealed bids will be opened in public, a provision asserting the agency’s right to reject any and all bids, the place where complete information on the offering may be obtained, and notice that a prospectus is available to the public and to interested potential bidders.

*Section 223.229—Contents of prospectus.* This section establishes the minimum contents of a prospectus accompanying the sale of special forest products. A prospectus is required for all products which are to be advertised for sale.

*Section 223.230—Bid restriction on resale of incomplete contracts, permits, or other instruments.* This section prohibits the Forest Service from considering a bid from any person, or affiliate of such person, who failed to complete or defaulted the original contract, permit, or other instrument covering the products offered for sale.

The Forest Service may waive this prohibition when doing so would serve the public interest.

*Section 223.231—Bidding methods.* This section sets forth bidding methods and other requirements for the sale of special forest products from National Forest System lands. The Forest Service must use either sealed bidding, or sealed bidding followed by oral auction. The method used must ensure open and fair competition; that the Government receives not less than fair market value for the resource; and consistency with the National Forest Management Act and other federal laws. The section also requires the Chief of the Forest Service, or authorized designee, to use sealed bids, or a mix of bidding methods to guard against collusive bidding, if there is a reasonable belief that anticompetitive or abnormal bidding practices are occurring.

*Section 223.232—Disclosure of relation to other bidders.* This section authorizes the Forest Service to require any prospective purchaser of special forest products to disclose its relationship to other potential purchasers or operators.

*Section 223.233—Award to highest bidder.* This section requires the Forest Service to award an advertised sale of special forest products to the highest bidder whose bid conforms to the conditions of the sale, as set forth in the prospectus. If the highest bidder cannot meet the requirements under which the special forest products were advertised, then the Forest Service may offer the sale to the next highest conforming bidder at the high bid level, and so on, until the offer is either accepted, or refused by all qualified bidders. In the event of a tie between two or more conforming high bidders, the Forest Service shall make the award based upon the drawing of lots. This section also specifies that if the Forest Service does not accept the highest bid, then the Forest Service may reject all bids and readvertise the sale.

*Section 223.234—Determination of purchaser responsibility.* This section requires the Forest Service to make an affirmative determination of purchaser responsibility before awarding a contract, permit, or other instrument authorizing the sale of special forest products. It sets forth the factors that the Forest Service must consider in making this finding, including: That the purchaser has adequate financial resources to perform the contract or the ability to obtain them; that the purchaser is able to perform the contract within the contract term, taking into consideration all existing commercial and governmental business

commitments; and that the purchaser has a satisfactory record of integrity and business ethics.

*Section 223.235—Unilateral delay, suspension and modification of contracts, permits, or other instruments authorizing the sale of special forest products.* This section establishes the conditions under which the Forest Service may unilaterally delay, suspend or modify a contract, permit, or other instrument governing the sale of special forest products. Pursuant to this section, the Forest has broad delay, suspension, and modification authority, in particular for circumstances related to protection of the environment or compliance with federal laws. The section provides that in the event of a delay, suspension, or modification, the Forest Service shall compensate a purchaser in accordance with the provisions of the relevant contract, permit, or instrument. In the absence of such provisions, the Forest Service may compensate the purchaser in accordance with agency methods and procedures in effect at the time of submission of the claim, but not to exceed 5 percent of the contract value of the unharvested permit products in which case the appropriate Forest Service officer shall give due consideration to the cause, duration, and financial impact of the delay, suspension, or modification. Compensation shall be awarded only if it is justified under applicable provisions or other relevant circumstances. If the provisions of the governing contract, permit, or instrument do not address the mechanics/procedure at claim submission, the rule provides that a purchaser must make a written submission that is fully supported by relevant documents. This requirement will assist Forest Service personnel in evaluating the merits of a claim and ensure that it is handled promptly. Because most harvests of special forest products are relatively small scale operations, the Forest Service believes that delays, suspensions, or modifications will arise infrequently, and that in such cases, the parties will be able to amicably resolve issues pertaining to compensation. The section also empowers Contracting Officers and/or their superiors to make decisions regarding delays, suspensions, or modifications.

*Section 223.236—Unilateral termination.* This section establishes the conditions under which the Forest Service may unilaterally terminate a contract, permit, or other instrument authorizing the sale of special forest products. Pursuant to this section, the agency has broad authority to terminate

an agreement, in particular for circumstances related to protection of the environment, compliance with federal laws, or the purchaser's fitness and integrity. The section provides that in the event of a termination, the Forest Service shall compensate a purchaser in accordance with the provisions of the relevant contract, permit, or instrument, or, in the absence of such provisions, as described in the preceding section on delay, suspension, and modification. Again, compensation shall be awarded only if justified under applicable provisions or other relevant circumstances. However, compensation shall not be available when the Forest Service terminates a contract, permit, or instrument for reasons related to the purchaser's fitness, integrity, or breach of contract. The section also empowers contracting officers and/or their superiors to make decisions regarding terminations.

*Section 223.237—Request by Purchaser for delay, suspension, modification, or termination.* This section allows a purchaser to request delay, suspension, modification, or termination of their contract, permit or other authorizing instrument. It is designed primarily for smaller sales when the request is not covered by an agreement provision and when the circumstances warrant a mutually agreed upon resolution. In this case, the Forest Service may address the request in light of the supporting reasons offered by the purchaser and other relevant circumstances. A purchaser's request should have a plausible foundation, such as substantially changed market conditions, and should be submitted in writing with a detailed explanation of all relevant circumstances supporting the request. The Forest Service may deny a request, in whole or in part, in its discretion. When governing contract, permit, or instrument provisions would apply to the request, the Forest Service shall adhere to those provisions. The responsible Forest Officer, or his or her superior, shall have authority to respond to any request by the purchaser for delay, modification, suspension, or termination.

*Section 223.238—Free use authorization to U.S. Army and Navy.* This section authorizes Regional Foresters, by delegation from the Chief of the Forest Service, to approve the harvest of special forest products by the U.S. Army and Navy for the purposes identified at 16 U.S.C. 492.

*Section 223.239—Free use by individuals.* This section authorizes individuals to harvest special forest products from National Forest System

lands without charge. This section is not intended to affect subsistence uses implemented under the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3101–3126.

An individual person may obtain authorization to harvest a special forest product for personal, non-commercial use in a quantity not to exceed the amount allowed by the appropriate Forest Service officer pursuant to 36 CFR 223.8. Unless the product is located in an area previously designated for free use, a person seeking to harvest a special forest product must obtain a “free use” permit prior to harvesting any such product and must comply with the requirements established by the Regional Forester or subordinate officer. A permit shall indicate the type, amount, and/or value of the products to be harvested and shall contain other related requirements and restrictions.

The permit request may be denied outright to ensure the personal safety of the individual, to prevent interference with Forest Service and/or commercial operations in the forest, to protect the product as a sustainable resource, and to otherwise protect the forest. The issuing officer or any superior officer may revoke a permit at any time.

*Section 223.240—Indian tribes and treaty reserved gathering rights.* This section acknowledges that Indian tribes with reserved treaty gathering rights have retained the right to harvest special forest products in accordance with the terms of such treaty rights. Such harvest by Indian tribes shall not be subject to the application and permit requirements pertaining to personal, non-commercial harvest by individuals. By this proposed rule, the Forest Service does not intend to interfere with Indian tribes’ harvest of special forest products for traditional, ceremonial, and/or cultural purposes when such use is included as a treaty right. Additionally, this section does not prevent individual Indians from requesting free use of special forest products under section 223.239.

*Section 223.241—Disposal of seized special forest products.* This section authorizes the Forest Service to dispose of special forest products that have been illegally obtained from National Forest System lands through commercial sale or by offering such products for free use. The Forest Service may not sell such products to the entity that took them illegally. Additionally, the Forest Service shall not sell or dispose of seized special forest products that are threatened, endangered, or candidates for listing under the Endangered Species Act; that are listed on the Regional Forester’s sensitive plant list or list of species of concern or interest; or

identified by CITES as being prohibited from international sale or trade. Seized special forest products that are threatened, endangered, proposed or candidates for listing under the Endangered Species Act, that are on the Regional Forester’s sensitive plant list or list of species of concern, or interest, or prohibited from international sale or trade may be donated to a recognized scientific institution or university for educational or research purposes. In the absence of commercial interest in a seized product, the Forest Service may offer the product for free use to individuals, to Indian tribes with reserved treaty gathering rights, or to other federally-recognized tribes.

#### *B. Subpart H—Forest Botanical Products*

*Section 223.275—Establishment of a pilot program.* Subpart H to 36 CFR Part 223 governs the pilot program for the sale and harvest of forest botanical products, as required by the Pilot Program Law. This subpart also implements the free, personal use mandate contained in the pilot program law. Reflecting the limited duration of the program, the section indicates that Forest Service may collect fees through fiscal year 2009, which ends September 30, 2009.

*Section 223.276—Applicability.* This section establishes that the pilot program applies to the disposal of forest botanical products from National Forest System lands. However, rather than developing and implementing redundant procedures applicable solely to disposal of forest botanical products for the limited duration of the program, the Forest Service shall use the procedures set forth in subpart G. Thus, the Forest Service’s treatment of forest botanical products will differ from its treatment of special forest products only to the extent that the pilot program requires segregation of fees and that personal use differs from free use practices. Other aspects of the pilot program, for example those pertaining to prices, bidding, and sustainability, shall be accomplished through forest products regulations and associated Forest Service directives.

*Section 223.277—Definitions.* This section defines forest botanical products and provides examples of products that fall within the definition.

*Section 223.278—Collection of fees.* This section governs the Forest Service’s charging and collection of fees for the harvest of forest botanical products from National Forest System lands. It directs that fees charged for forest botanical products shall cover at least a portion of the products’ fair market value and a

portion of the costs associated with administering the program. Thus, when forest botanical products are sold through the procedures established under subpart G, the selling price shall incorporate the collection requirements of section (c)(1) of the Law; a portion of the products’ fair market value and program administrative costs will be built into the price.

Despite the Act’s requirement that the Forest Service establish methods and procedures for the sale of forest botanical products, the Forest Service believes that these products may be sold without advertisement under the circumstances provided under 36 CFR part 223.227, which reflects 16 U.S.C. 472a(d).

*Section 223.279—Personal use harvest levels and waiver of fees.* This section implements the free personal use authority set forth in section (e)(1) of the pilot program law. The regulation provides that the Forest Service shall not collect fees for a person’s harvest of forest botanical products at or below established personal use harvest levels. Regional Foresters shall establish personal use harvest levels by type and quantity, or by value through supplements to the Forest Service Directive System. Personal use harvest levels will be consistent with sustainable harvest levels. A person seeking free use of a forest botanical product subject to personal use harvest levels must submit an application to the appropriate Forest Service officer and obtain a permit, as provided in section 223.239 of subpart G. For the duration of the pilot program, free use of forest botanical products shall be limited to personal use harvest levels.

Additionally, in this section, the Chief of the Forest Service employs waiver authority under the section (e)(2) of the Act to waive otherwise applicable fees for the harvest of forest botanical products by federally recognized Indian tribes. Tribal free use of forest botanical products must be non-commercial, and for cultural, ceremonial and/or traditional purposes. The regulation also provides that a Regional Forester or Forest Supervisor, having proper authorization from the Chief of the Forest Service, may waive application of a fee to allow harvest of forest botanical products for scientific research or for salvage when other management activities will destroy or damage the product. The waiver decision must be in writing.

*Section 223.280—Monitoring and revising of harvest levels.* This section provides that monitoring and revising of harvest levels for forest botanical products, as required under the pilot

program, shall be accomplished pursuant to the regulation at 36 CFR part 223.219.

*Section 223.281—Disposition of collected fees.* This section governs the accounting and expenditure of fees collected under the pilot program and follows the requirements set forth in sections (f) and (h) of the Act.

#### IV. Conclusion

The regulations contained in this proposed rule will allow the Forest Service to manage better its program for the disposal of special forest products, through commercial harvest and sale and free use, and to implement a pilot program for charging and collecting fees for harvest of forest botanical products, pursuant to the pilot program law.

##### *Regulatory Certifications*

##### Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review as amended by 13422. OMB has determined that this is not a significant rule. This proposed rule will not have an annual effect of \$100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This proposed rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this proposed rule is not subject to OMB review under Executive Order 12866.

##### Proper Consideration of Small Entities

This proposed rule has been considered in light of Executive Order 13272 regarding consideration of small entities and the Small Business Regulatory Enforcement Act of 1996 (SBREFA), which amended 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 as defined by the Executive Order. The proposed rule will have no adverse impact on small business, small not-for-profit organizations, or small units of government.

##### Environmental Impact

This proposed rule has no direct or indirect effect on the environment. Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43180;

September 18, 1992) excludes from documentation in an environmental assessment or impact statement rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions that do not significantly affect the quality of the human environment. The Department's assessment is that this proposed rule falls within this category of actions, and that no extraordinary circumstances exist that would require preparation of an environmental assessment or environmental impact statement.

##### No Takings Implications

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12360, and it has been determined that this action will not pose the risk of a taking of private property.

##### Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. When the final rule is adopted, (1) all State and local laws and regulations that conflict with the final rule or that would impede full implementation of this rule will be preempted, (2) no retroactive effect will be given to the final rule; and (3), the Department will not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

##### Unfunded Mandates

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

##### Federalism

The Department has considered this proposed rule under the requirements of Executive Order 13132, Federalism, and concluded that this action will not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Department has determined that no further assessment of federalism implications is necessary at this time.

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

Pursuant to Executive Order 13175, Consultation and Coordination With Indian Tribal Governments, the Forest Service conducted a preliminary assessment of the impact of this proposed rule on Indian Tribal Governments and it determined that the rule does have tribal implications. Therefore, advance consultation with Tribes was required.

Consultation in the form of opportunity to review and comment on these regulations and accompanying Forest Service Handbook direction was provided to all interested Tribes in all Forest Service Regions. Regional Foresters and Forest Supervisors determined which Tribes could be affected by these regulations and initiated consultations with Tribal representatives. A 60-day comment period was established, however many Tribes asked for additional time for consultation, which was granted. Recommendations from the Tribes have been incorporated, as appropriate, into this proposed rule.

During consultation, it became apparent that the Tribes were concerned about their existing statutory authority, or lack thereof, to gather special forest products for cultural, ceremonial, and/or traditional purposes at no charge. The Tribes believed that current law does not meet their needs. In October 1999, the Chief Operations Officer of the Forest Service commissioned a National Tribal Relations Program Task Force to develop recommendations to improve working relationships with the Tribes. The task force report concluded that free use opportunities offered by the Forest Service were inconsistent with access provided by other government agencies. The report recommended development of legislation that more readily enables the Forest Service to provide free use of forest products to Tribes. The Chief of the Forest Service accepted the recommendation and efforts are underway to advance legislation that would empower the Forest Service to provide products free of charge to Tribes for cultural, traditional, and customary purposes. The proposed legislation has been drafted and is currently in legislative clearance. Tribes may also review and comment on this proposed rule.

##### Controlling Paperwork Burdens on the Public

This proposed rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5

CFR part 1320, and therefore, imposes no paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and implementing regulations at 5 CFR part 1320 do not apply.

#### Energy Effects

This proposed rule has been reviewed under Executive Order 13211 of May 18, 2001, and it has been determined that it has no effect on the supply, distribution, or use of energy. This proposed rule is administrative in nature and, therefore, the preparation of a statement of energy effects is not required.

#### List of Subjects 36 CFR Part 223

Administrative practice and procedure, Exports, Forests and forest products, Government contracts, National forests, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Forest Service, U.S. Department of Agriculture, proposes to amend 36 CFR part 223 as follows:

#### PART 223—SALE AND DISPOSAL OF NATIONAL FOREST SYSTEM TIMBER, SPECIAL FOREST PRODUCTS, AND FOREST BOTANICAL PRODUCTS

1. The authority citation for part 223 is amended to read as follows:

**Authority:** 90 Stat. 2958, 16 U.S.C. 472a; 98 Stat. 2213, 16 U.S.C. 618, 104 Stat. 714–726, 16 U.S.C. 620–620j, 113 Stat. 1501a, 16 U.S.C. 528 note; unless otherwise noted.

2. Revise the part heading as shown above.

3. Add subparts G and H to read as follows:

##### Subpart G—Special Forest Products

Sec.

- 223.215 Applicability.
- 223.216 Definitions.
- 223.217 Authority to dispose of special forest products.
- 223.218 Consistency with plans, environmental standards, and other management requirements.
- 223.219 Sustainable harvest of special forest products.
- 223.220 Quantity determination.

##### Appraisal and Pricing

- 223.221 Establishing minimum rates.
- 223.222 Appraisal.

##### Contract and permit Conditions and Provisions

- 223.223 Advance payment.
- 223.224 Performance bonds and security fees.
- 223.225 Contract, permit, and instrument term.
- 223.226 Adjustment of term of contract, permit, or other instrument for force majeure delay.

##### Advertisement and Bids

- 223.227 Sale advertisement.
- 223.228 Contents of advertisement.
- 223.229 Contents of prospectus.
- 223.230 Bid restriction on resale of incomplete contracts, permits, or other instruments.
- 223.231 Bidding methods.
- 223.232 Disclosure of relation to other bidders.

##### Award of Contracts, Permits, or Other Instruments

- 223.233 Award to highest bidder.
- 223.234 Determination of purchaser responsibility.
- 223.235 Unilateral delay, suspension, or modification of contracts, permits, or other instruments authorizing the sale of special forest products.
- 223.236 Unilateral termination.
- 223.237 Request by Purchaser for delay, suspension, modification, or termination.
- 223.238 Free use authorization to U.S. Army and Navy.
- 223.239 Free use by individuals.
- 223.240 Indian tribes and treaty reserved gathering rights.
- 223.241 Disposal of seized special forest products.

##### Subpart H—Forest Botanical Products

- 223.275 Establishment of a pilot program.
- 223.276 Applicability.
- 223.277 Definitions.
- 223.278 Collection of fees.
- 223.279 Personal use harvest levels and waiver of fees.
- 223.280 Monitoring and revising of harvest levels.
- 223.281 Disposition of collected fees.

##### Subpart G—Special Forest Products

###### § 223.215 Applicability.

The regulations contained in this subpart govern the disposal of special forest products from National Forest System lands through commercial harvest and sale and free use. During the duration of the pilot program for the sale of forest botanical products, pursuant to the Department of the Interior and Related Agencies Appropriations Act of 2000, (Pub. L. 106–113, Div. B, sec. 1000(a)(3), 113 Stat. 135 (enacting into law sec. 339 of Title III of H.R. 3423)), as amended in 2004 by Section 335 of Public Law 108–108–, special forest products that are also forest botanical products shall be sold, or offered for free use, subject to the requirements of subpart H of this part. A commercial sale of special forest products shall be governed by a contract, permit, or other authorizing instrument. Free use shall be conducted under a permit, unless this requirement has been waived.

###### § 223.216 Definitions.

As used in this subpart, the following term shall mean:

*Special forest products:* Products collected from National Forest System lands for commercial, personal, tribal, educational, or scientific purposes, including without limitation: bark, berries, boughs, bryophytes, bulbs, burls, Christmas trees, cones, ferns, firewood, forbs, fungi (including mushrooms), grasses, mosses, nuts, pine straw, roots, sedges, seeds, transplants, tree sap, wildflowers, fence material, mine props, posts and poles, shingle and shake bolts, and rails. The term *special forest products* does not include sawtimber, pulpwood, non-sawlog material removed in log form, cull logs, small roundwood, house logs, telephone poles, derrick poles, minerals, animals, animal parts, insects, worms, rocks, water, and soil.

###### § 223.217 Authority to dispose of special forest products.

The Forest Service has authority to dispose of special forest products located on National Forest System lands pursuant to the Multiple-Use Sustained-Yield Act of 1960, as amended (16 U.S.C. 528–531); the National Forest Management Act of 1976, as amended (16 U.S.C. 472a *et seq.*); and, the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended (16 U.S.C. 1600–1614).

###### § 223.218 Consistency with plans, environmental standards, and other management requirements.

The disposal of special forest products from National Forest System lands shall be consistent with applicable land management plans. Each contract, permit, or other instrument shall include, as appropriate, provisions requiring the purchaser or user to:

- (a) Provide fire protection and suppression;
- (b) Protect natural resources;
- (c) Regenerate harvested species after harvesting operations;
- (d) Minimize soil erosion;
- (e) Maintain favorable conditions of water flow and quality;
- (f) Minimize adverse effects on, protect, or enhance other national forest resources, uses, and improvements; and
- (g) Deposit voucher specimens to a curator of a nationally recognized herbarium in North America as identified in the *Index Herbariorum* for all permits authorizing bioprospecting.

###### § 223.219 Sustainable harvest of special forest products.

(a) *Sustainable harvest levels.* Prior to offering special forest product for sale or free use, the responsible officer shall determine the sustainable harvest level for the product. The sustainable harvest

level for a special forest product is the total quantity of the product that can be harvested annually in perpetuity on a sustained yield basis. Responsible officers shall not authorize harvest of special forest products in an amount exceeding known sustainable harvest levels. In determining a sustainable harvest level, the responsible officer may consider harvest levels of the product for the previous three years, if such information is available.

(b) *Harvest of protected species.* No contract, permit, or other authorizing instrument may be issued or approved under this subpart for a species listed by the U.S. Fish and Wildlife Service as endangered or threatened, or that has been proposed for listing under the Endangered Species Act, except as authorized by that Service. Moreover, Regional guidelines will identify the conditions when a contract, permit, or instrument may be issued or approved for any product listed on the Regional Forester's sensitive plant list, species of concern list, or *species of interest list*, or that is protected under the Convention on International Trade in Endangered Species.

(c) *Monitoring of established harvest levels.* At least once every three fiscal years, or as otherwise established by the Regional Forester, the Forest Service shall monitor the effects of harvesting a product on its sustainability. Such monitoring may include on-site examination of the product, including both harvested and non-harvested areas, and a review of past and projected harvest levels to the extent such information is available.

(d) *Revision of harvest levels.* The sustainable harvest level for a special forest product may be increased or decreased, as appropriate, based on monitoring.

#### **§ 223.220 Quantity determination.**

Sale contracts, permits, or other authorizing instruments may provide for determining the quantity of special forest products by scaling, measuring, weighing, counting, or other reliable means.

### **Appraisal and Pricing**

#### **§ 223.221 Establishing minimum rates.**

The Chief of the Forest Service shall establish methods for setting minimum rates for sale of special forest products.

#### **§ 223.222 Appraisal.**

The Chief of the Forest Service shall set forth methods for appraising special forest products to determine their fair market value. Valid methods to determine fair market value include, but are not limited to, transaction evidence

appraisals, analytical appraisals, comparison appraisals, and independent estimates based on average investments. Special forest products must be sold at minimum rates or appraised value, whichever is higher.

### **Contract and Permit Conditions and Provisions**

#### **§ 223.223 Advance payment.**

Contracts, permits, or other authorizing instruments for the harvest and sale of special forest products shall require advance payment, unless the contract, permit, or instrument authorizes the purchaser to furnish a payment guarantee satisfactory to the Forest Service. Advance payments found to be in excess of amounts due the United States shall be refunded to the purchaser or their successor in interest, subject to the requirements of the Debt Collection Improvement Act.

#### **§ 223.224 Performance bonds and security fees.**

A contract, permit, or other authorizing instrument for the sale of special forest products may require the purchaser to furnish a performance bond or other security for satisfactory compliance with its terms.

#### **§ 223.225 Contract, permit, and instrument term.**

The term of any contract, permit, or other authorizing instrument for the sale of special forest products shall not exceed 10 years, unless the Chief of the Forest Service finds that a longer term is consistent with the Multiple-Use Sustained-Yield Act of 1960, as amended (16 U.S.C. 528-531). Any such finding by the Chief shall be made in writing.

#### **§ 223.226 Adjustment of term of contract, permit, or other instrument for force majeure delay.**

A contract, permit, or other instrument authorizing the harvest and sale of special forest products shall allow for the adjustment of its term to provide additional time to the purchaser in the event that circumstances beyond the purchaser's reasonable control delay performance. Such circumstances may include, but are not limited to acts of God, acts of the public enemy, acts of the Government, labor disputes, fires, insurrections, and floods. The approving officer may grant an extension upon finding that the purchaser has diligently performed in accordance with the contract, permit or other instrument, or that the substantial public interest justifies the extension.

### **Advertisement and Bids**

#### **§ 223.227 Sale advertisement.**

(a) The Forest Service shall advertise for a period of 30 days any sale of special forest products for which the appraised value of the sale is equal to, or greater than \$10,000, except as provided in paragraph (c) of this section.

(b) In any instance when the appraised value of the sale is less than \$10,000, the Forest Service may sell the products without advertisement; however, if there is competitive interest in a sale valued at less than \$10,000, the Forest Service shall advertise for not less than 7 days.

(c) Regardless of the requirement set forth in paragraph (a) of this section, above, the Forest Service may sell special forest products without advertisement, or at the Agency's discretion, advertise the sale for a period less than 30 days if

(1) Deterioration of a special forest product threatens its value;

(2) If the products were previously advertised for competitive bidding but were not sold because of an absence of satisfactory bids; or

(3) If the products are remaining from expired, cancelled, or abandoned contracts, permits, or other instruments.

#### **§ 223.228 Contents of advertisement.**

The Forest Service shall include the following information in an advertisement for the sale of special forest products:

(a) The location and estimated quantities of special forest products offered for sale;

(b) The time and place at which sealed bids will be opened in public;

(c) A provision asserting the agency's right to reject any and all bids;

(d) The place where complete information on the offering may be obtained; and

(e) Notice that a prospectus is available to the public and to interested potential bidders.

#### **§ 223.229 Contents of prospectus.**

The prospectus for the sale of special forest products shall include the following:

(a) The minimum acceptable value or unit price and the amount or rate of any additional required deposits;

(b) The amount of the bid guarantee that must accompany each bid;

(c) The amount of the deposit or downpayment to be made by the successful bidder and the time-frame for making such deposit or downpayment;

(d) The location and area of the sale, including acreage;

(e) The estimated volumes, quality, size, or other appropriate measure for the special forest products;

(f) A description of any special harvest and removal requirements for the sale;

(g) The method of bidding that the Forest Service will employ; sealed bid or sealed bid followed by oral auction;

(h) The type of contract, permit, or other instrument to be used for the sale;

(i) The termination date of the contract, permit, or other instrument and the normal operating period;

(j) The amount of performance bond required; and

(k) If circumstances warrant, such additional information about the sale as the Forest Service deems appropriate in order to notify purchasers that an on-site investigation of the products may be prudent.

**§ 223.230 Bid restriction on resale of incomplete contracts, permits, or other instruments.**

In any resale of special forest products remaining from a previous sale, the Forest Service shall not consider a bid submitted by a person who failed to complete or defaulted the original contract, permit, or other instrument authorizing the sale, or from any affiliate of such person except when such consideration serves the public interest.

**§ 223.231 Bidding methods.**

(a) The Contracting Officer or designated Forest Officer shall offer advertised sales of special forest products through sealed bid or sealed bid followed by oral auction. The method selected shall:

(1) Ensure open and fair competition;

(2) Ensure that the Federal Government receives not less than fair market value for the public resource; and

(3) Be consistent with the National Forest Management Act and other applicable federal laws.

(b) As a prerequisite to participation in an oral auction, a bidder shall submit a written sealed bid at least equal to the minimum acceptable bid price(s) specified in the prospectus. The Forest Service shall not accept a bid at oral auction that is less than the bidder's initial sealed bid.

(c) The Chief, or authorized designee shall specify the use of sealed bids or a mix of bidding methods in any area where there is a reasonable belief that collusive and/or abnormal bidding practices may be occurring.

**§ 223.232 Disclosure of relation to other bidders.**

The Forest Service may require any prospective purchaser of special forest products to disclose its relationship with other potential purchasers or operators. Such disclosure may include a certified statement of stockholders or members of the firm; officers of the corporation or members of the board of directors; or holders of bonds, notes, or other evidences of indebtedness.

**Award of Contracts, Permits, or Other Instruments**

**§ 223.233 Award to highest bidder.**

(a) The Forest Service shall award contracts, permits, or other authorizing instruments for advertised sales as follows:

(1) The Forest Service will award a sale of special forest products to the responsible bidder that submits the highest bid that conforms to the conditions of the sale as stated in the prospectus.

(2) If the highest bidder cannot meet the requirements for the sale, as specified in the prospectus or otherwise, then the Forest Service may:

(i) Reject all bids and reoffer the sale, or

(ii) Offer the award to the next highest qualified, at the high bid level, until the award is accepted or refused by all of conforming bidders.

(3) In the event of a tie between two or more responsible high bidders submitting conforming bids, the Forest Service shall award the sale by drawing of lots.

(b) If none of the bids meet the specified conditions of the sale, or in the event of other irregularities in the bidding process, the Forest Service may reject all bids, and, if it so decides, reoffer the sale.

**§ 223.234 Determination of purchaser responsibility.**

(a) A Contracting Officer shall not award a contract, permit, or other instrument authorizing the sale of special forest products to a prospective purchaser unless that officer makes an affirmative determination that the purchaser is responsible. In the absence of information clearly establishing that the prospective purchaser is responsible, the Contracting Officer shall conclude that the purchaser is not responsible.

(b) In order to make an affirmative determination that a prospective purchaser is responsible, the Contracting Officer must find that:

(1) The purchaser has adequate financial resources to perform the

contract, permit, or other instrument, or the ability to obtain such resources;

(2) The purchaser is able to perform the contract, permit, or instrument within the relevant term, taking into consideration all of their existing commercial and governmental business commitments;

(3) The purchaser has a satisfactory record of integrity and business ethics;

(4) The purchaser has or is able to obtain equipment and supplies suitable for harvesting the products and for meeting applicable resource protection requirements;

(5) The purchaser is otherwise qualified and eligible to receive an award of a contract, permit, or instrument under applicable laws and regulations, or

(6) The purchaser has a satisfactory performance record on contracts, permits, or other instruments with the Forest Service. Failure to apply sufficient diligence and perseverance to perform a contract, permit, or other instrument is strong evidence that a purchaser is not responsible. A purchaser that is, or has been deficient in performance shall be deemed not responsible, unless the purchaser demonstrates that the deficiency arose from circumstances beyond their reasonable control.

**§ 223.235 Unilateral delay, suspension, or modification of contracts, permits, or other instruments authorizing the sale of special forest products.**

(a) *Reasons for Delay, Suspension or Modification.* The Forest Service may unilaterally delay, suspend, or modify any contract, permit, or instrument authorizing the sale of special forest products for any one of the following reasons:

(1) To prevent actual or potential harm to the environment, including without limit harm to land, water, air, habitat, plants, animals, cave resources, or cultural resources;

(2) To ensure consistency with land management plans or other management documents;

(3) To conduct environmental analyses, including without limitation, consultation under the Endangered Species Act of 1973, 16 U.S.C. 1531, *et seq.*;

(4) Because of existing or threatened litigation, which might affect or implicate the purchaser's harvest of special forest products; or

(5) For any reasons or other conditions as may be set forth in the contract, permit, or other instrument governing the sale.

(b) *Compensation.* (1) The Forest Service may compensate the purchaser

for unilateral delay, suspension or modification of any contract, permit, or other instrument in accordance with the applicable provisions set forth in such contract, permit, or instrument, if any, or in the absence of such provisions, in accordance with applicable Forest Service methods and procedures in effect at the time of claim submission, giving due consideration to the cause, duration, and financial impact of the delay, suspension or modification.

(2) A purchaser shall comply with provisions for claim submission contained in the governing contract, permit, or instrument, if any, or, in the absence of such provisions, shall submit a claim for compensation in writing and accompanied by supporting documentation that fully substantiates the amount of the claim.

(c) *Authority.* The Contracting Officer administering the sale or responsible superior may issue an instruction delaying, suspending, or modifying the contract, permit, or instrument. Such instructions shall be issued to the purchaser in writing, except when exigent circumstances warrant oral communication, in which case the officer shall promptly followup in writing.

#### **§ 223.236 Unilateral termination.**

(a) *Reasons for Termination.* The Forest Service may unilaterally terminate a contract, permit, or other instrument authorizing the sale of special forest products for any of the following reasons:

(1) For any of the reasons enumerated at § 223.235(a)(1) through (5);

(2) For purchaser's material breach or continued violation of the contract or agreement terms;

(3) In the event purchaser is found to be in violation of any Federal or State civil or criminal statute, law, or regulation, when such violation relates to obtaining, attempting to obtain, selling, trading, or processing special forest products; to obtaining, attempting to obtain, or performing a public contract or subcontract; harm or damage to public lands or protected species; or, to purchaser's business integrity, honesty, or responsibility;

(b) *Compensation.* (1) The Forest Service may compensate the purchaser for unilateral termination of any contract, permit, or other instrument in accordance with the provisions set forth in such contract, permit, or instrument, if any, or, in the absence of such provisions, in accordance with applicable Forest Service methods and procedures in effect at the time of claim submission, giving due consideration to

the cause, duration, and financial impact of the termination.

(2) A purchaser shall comply with provisions for claim submission contained in the governing contract, permit, or instrument, if any, or, in the absence of such provisions, shall submit a claim for compensation in writing and accompanied by supporting documentation that fully substantiates the amount of the claim.

(3) A purchaser shall not be entitled to compensation if the unilateral termination is due in whole or in part to the reasons set forth at § 223.236(a)(2) or (3).

(c) *Authority.* Any unilateral termination of a contract, permit, or instrument for the sale of special forest products shall be made by the Chief, or the Chief's designee. Any such instruction shall be issued to the purchaser in writing, except when exigent circumstances warrant oral communication, in which case a written communication shall follow promptly.

#### **§ 223.237 Request by Purchaser for delay, suspension, modification, or termination.**

(a) *Request.* A purchaser of special forest products may request delay, suspension, modification, or termination of their contract, permit, or other instrument pursuant to the provisions set forth in the contract, permit, or instrument, if any, or for another reasonable cause, including without limit catastrophic damage to the product or substantially changed market conditions. Any such request shall be submitted in writing and shall contain a detailed explanation of all relevant circumstances supporting the request.

(b) *Response.* The Forest Service shall respond to any request for delay, suspension, modification, or termination in accordance with applicable provisions of the contract, permit, or other instrument, and, in the absence of such provisions, may respond in a manner that is fair and reasonable in light of the circumstances of the request. The Forest Service may deny any request, in whole or in part, in accordance with the provisions of the relevant contract, permit, instrument, or at the Agency's discretion in the absence of such provisions.

(c) *Authority.* The Contracting Officer administering the sale or superior officer shall have authority to respond to any request by a purchaser for delay, modification, suspension, or termination.

#### **§ 223.238 Free use authorization to U.S. Army and Navy.**

Subject to delegations of authority by the Chief of the Forest Service, Regional

Foresters may approve the harvest of special forest products by the U.S. Army and Navy for the purposes identified at 16 U.S.C. 492.

#### **§ 223.239 Free use by individuals.**

(a) *Free use.* Under a permit, a person may harvest special forest products from National Forest System lands free of charge for personal, non-commercial use, not in excess of the amount or quantity authorized by a designated Forest Service officer, a Forest Supervisor, or a Regional Forester under 36 CFR 223.8.

(b) *Permit requirement.* A person seeking to harvest a special forest product for personal, non-commercial use, must submit an application to a Forest Service officer and obtain a free use permit prior to harvest, unless these requirements have been waived to allow harvesting of a specific product from a designated free use area. The permit shall indicate the type, amount, and/or value of the product to be harvested, and shall contain other restrictions and requirements. The Forest Service officer may set conditions on the proposed harvest, or deny the harvest, to ensure the personal safety of the individual; to prevent interference with Forest Service and/or commercial operations on the forest; to protect the product as a sustainable resource; or to otherwise protect the forest. The issuing officer or any superior officer may terminate for the convenience of the government, without compensation, a free use permit at any time for a number of reasons including, but not limited to, resource concerns including threatened, endangered or sensitive species; weather factors such as fire season or road access; conflicts with other users; or violations of permit requirements.

(c) *Subsistence in Alaska.* This section is not intended to affect subsistence uses implemented under the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3101–3126.

#### **§ 223.240 Indian tribes and treaty reserved gathering rights.**

Indian tribes with reserved treaty gathering rights or other adjudicated rights may harvest special forest products in accordance with the terms of such treaty rights. Such harvest by Indian tribes shall not be subject to the application and permitting requirements of subpart G; however, the Regional Forester may set conditions on the harvest, as necessary to protect the product as a sustainable resource, or to otherwise protect the forest. The Regional Forester may only deny the harvest for purposes of health and safety and in some instances in order to

conserve the species or resources used. Any decision restricting tribal off-reservation treaty rights needs to be well documented. Consultation with the affected Tribe(s) and local Office of General Counsel on how to exercise such regulatory authority is found in FSM 1563.1 and FSH 1509.13, Chapter 10.

**§ 223.241 Disposal of seized special forest products.**

The Forest Service may dispose of seized special forest products that have been illegally obtained from National Forest System lands. Any commercial sale of such products shall be conducted in accordance with the requirements of this subpart; however, such products shall not be sold to the entity that collected them illegally. The Regional Forester may make seized products available for free use to individuals, Indian Tribes with reserved treaty gathering rights, and other federally recognized tribes. However, the Forest Service shall not dispose of a seized product by sale or free use if that product is threatened, endangered, or a candidate for listing under the Endangered Species Act; identified as prohibited for sale or trade under CITES, or listed on the Regional Forester's sensitive plant list, list of species of concern, or list of species of interest.

**Subpart H—Forest Botanical Products**

**§ 223.275 Establishment of a pilot program.**

This subpart governs the Forest Service's pilot program for the disposal of forest botanical products, as authorized by the Department of the Interior and Related Agencies Appropriations Act of 2000, (Pub. L. 106-113, Div. B, sec. 1000(a)(3), 113 Stat. 135 (enacting into law sec. 339 of Title III of H.R. 3423)), as amended in 2004 by Section 335 of Public Law 108-108. The pilot program shall be in effect through September 30, 2009.

**§ 223.276 Applicability.**

This subpart applies to the disposal of forest botanical products, as defined herein, from National Forest System lands, until September 30, 2009 of the pilot program. The Forest Service shall dispose forest botanical products in accordance with the procedures set forth in 36 CFR part 223 subpart G, subject to the requirements of this subpart.

**§ 223.277 Definitions.**

As used in this subpart, the following term shall mean:

*Forest botanical products*—naturally occurring special forest products, including bark, berries, boughs, bryophytes, bulbs, burls, cones, ferns, fungi (including mushrooms), forbs, grasses, mosses, nuts, pine straw, roots, sedges, seeds, shrubs, transplants, tree sap, and wildflowers. The term excludes animals, animal parts, Christmas trees, fence material, firewood, insects, mine props, minerals, posts and poles, rails, rocks, shingle and shake bolts, water, worms, and soil.

**§ 223.278 Collection of fees.**

The responsible official shall ensure that the price applicable to the harvest and sale of any forest botanical product, as determined in accordance with the procedures set forth in 36 CFR part 223 subpart G, includes at least a portion of the fair market value of the product and a portion of the costs associated with administering the pilot program.

**§ 223.279 Personal use harvest levels and waiver of fees.**

(a) In conjunction with determining sustainable harvest levels for special forest products, including forest botanical products, pursuant to § 223.219 of subpart G, the responsible Forest Service officer shall also determine personal use harvest levels, which shall be consistent with sustainable harvest levels.

(b) A person may harvest a forest botanical product from National Forest system lands, without charge, up to but not exceeding the personal use harvest level established for the product. A person seeking such personal use of a forest botanical product must comply with the procedures set forth in § 223.239 of subpart G.

(c) Under the following circumstances, the Forest Service waives the collection of fees otherwise required pursuant to § 223.278 of this subpart:

(1) For federally recognized Indian tribes seeking to harvest forest botanical products for cultural, ceremonial, and/or traditional purposes. Such purposes must be non-commercial, and any such harvest may be conditioned or denied as provided in § 223.240 of subpart G; and,

(2) On any occasion when a Regional Forester or Forest Supervisor, having proper authorization from the Chief, makes a determination in writing that the harvest facilitates scientific research or is for salvage because other management activities will destroy or damage the product.

**§ 223.280 Monitoring and revising of harvest levels.**

Monitoring and revision of harvest levels for forest botanical products for

purposes of the pilot program shall be conducted as provided at § 223.219 of subpart G.

**§ 223.281 Disposition of collected fees.**

(a) Funds collected under the pilot program for the harvest and sale of forest botanical products shall be deposited into a special account in the Treasury of the United States. These funds shall be available for expenditure at National Forests or National Grasslands where the funds were collected until September 30, 2010.

(b) Funds deposited into the special account specified in paragraph (a) of this section shall be expended at a National Forest or National Grassland in proportion to the fees collected at that unit to pay for costs of: conducting inventories of forest botanical products; determining sustainable harvest levels for each species or type of forest botanical product; monitoring and assessing the impact of harvest levels and methods; conducting restoration activities, including vegetation restoration, necessitated by the collection, harvest, or removal of forest botanical products; or administering the pilot program, including environmental or other analyses.

Dated: September 25, 2007.

**Abigail R. Kimbell,**  
Chief, Forest Service.

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BILLING CODE 3410-11-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 52 and 97**

[EPA-R05-OAR-2007-IN-0140; FRL-8481-5]

**Approval and Promulgation of State Implementation Plans; Indiana: Clean Air Interstate Rule**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing limited approval of a revision to the Indiana State Implementation Plan (SIP) submitted on February 28, 2007, as amended by letter on September 20, 2007. This revision addresses the requirements of EPA's Clean Air Interstate Rule (CAIR), promulgated on May 12, 2005, and subsequently revised on April 28, 2006, and December 13, 2006. EPA is proposing to determine that the Indiana SIP revision strengthens the implementation plan for the State because it makes progress toward