

**DEPARTMENT OF AGRICULTURE****Forest Service****36 CFR Parts 223 and 261**

RIN 0596-AB81

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

AGENCY: Forest Service, USDA.

ACTION: Final Rule.

**SUMMARY:** The Department is issuing this final rule to regulate the sustainable free use, commercial harvest, and sale of special forest products and forest botanical products from National Forest System lands. The rule is needed to promote sustainability in light of the increased public demands for both timber and non-timber special forest products and forest botanical products over the past 10 years. In many cases, these demands are challenging sustainability, particularly in the most heavily used parts of the National Forest System. This rule will help ensure the continued sustainability of special forest products and forest botanical products.

The rule also revises 36 CFR 261.6 to reflect new free use and personal use authorizations for special forest products and forest botanical products and to specify the types of contractual documents currently used by the Forest Service. In addition, the Forest Service made minor textual clarifications to section 261.6.

**DATES:** This rule is effective January 28, 2009.

**ADDRESSES:** The public may inspect comments received at USDA Forest Service—Forest Management, Yates Federal Building, 3rd floor SW wing, 1400 Independence Avenue, SW., Washington, DC. Visitors are encouraged to call ahead to 202-205-1766 to facilitate entry into the building. The public may also inspect comments received via the Internet at <http://www.notes.fs.fed.us:81/wo/wospecialproducts.nsf>.

**FOR FURTHER INFORMATION CONTACT:** Richard Fitzgerald, Forest Service, Forest Management Staff, (202) 205-1753. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The following section outlines the contents of the preamble.

**Introduction****Background**

- Special Forest Products: Commercial Harvest and Sale and Free Use.

*Commercial Harvest and Sale Free Use*

- Forest Botanical Products: Commercial Harvest and Sale and Personal Use.

*Commercial Harvest and Sale Personal Use*

- 36 CFR 261.6—Timber and other forest products.
- Tribal Impact Summary.

**Comments on the Proposed Rule and Changes Made in Response Regulatory Certifications****Introduction**

This final rule regulates the sustainable free use, sale, and commercial harvest of special forest products and forest botanical products from National Forest System lands. Special forest products include, but are not limited to, firewood, post and poles, wildflowers, mushrooms, moss, nuts, seeds, and Christmas trees. Forest botanical products are naturally occurring special forest products including, but not limited to, bark, berries, boughs, cones, grasses, seeds, nuts, mushrooms. Definitions for special forest products and forest botanical products are found in sections 223.216 and 223.277.

The rule is needed to account for increased demand, which threatens the continued sustainability of these products. Given this growing demand and the need to ensure sustainability, the Forest Service determined that regulations dealing solely with special forest products and forest botanicals were required. Under the final rule, the Forest Service will help ensure sustainability by establishing, monitoring, revising, and enforcing sustainable harvest levels for special forest products and forest botanical products. The final rule also governs the appraisal, pricing, advertisement, bidding, and award of special forest product and forest botanical product sales. In addition, the rule provides the types of contracts and permits the Forest Service will use to administer the commercial harvest and free use of special forest products and forest botanical products. This framework, along with direction in Forest Service Handbook 2409.18, chapter 80, will regulate special forest products and forest botanical products.

The final rule adds Subparts G and H to 36 CFR Part 223. Subpart G regulates

the commercial harvest and limited free use of special forest products. Authority for subpart G is found 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.

Subpart H implements a pilot program for the commercial harvest and limited personal use 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 (“pilot program law”). Subject to certain exceptions, the pilot program law requires that the Forest Service sell forest botanical products for an amount that includes at least a portion of a product’s fair market value and a portion of certain costs associated with administering the pilot program (see 16 U.S.C. 528(c)). Subpart H will apply for the duration of the pilot program, which is currently scheduled to terminate on September 30, 2009, unless extended or made permanent by Congress.

The final rule respects treaty and other reserved rights retained by Tribes, and recognizes the importance of traditional and cultural forest products in the daily lives of Indians. Nothing in this rule affects the Forest Service’s trust responsibilities or continued government-to-government relations. In fact, the rule will help the Agency meet its obligations to Tribes. Further, the rule encourages Tribes and the Agency to collaborate with one another to reach agreement on specific issues. In addition, the rule provides Forest Service line officers with a regulatory citation for reference whenever gathering by Tribal members is questioned or becomes a law enforcement issue.

The final rule also revises 36 CFR 261.6(f) to include the new free use and personal use authorizations provided by sections 223.239 and 223.279, to reflect the types of contractual documents currently used by the Forest Service, and to make minor textual clarifications.

**Background**

- Special Forest Products: Commercial Harvest and Sale and Free Use.

### 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 (NFMA), 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. The Forest Service's annual 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. These products are frequently purchased by individuals or small businesses, and most sales do not exceed \$10,000 in value. Generally, sales valued at less than \$10,000 are not sold through competitive bidding; rather, a prospective purchaser asks to harvest certain forest products, and either enters into a contract with the Forest Service, or buys a permit that allows the purchaser to harvest the products. Consistent with existing regulations at 36 CFR 223.80, the Forest Service follows competitive bidding procedures for special forest product sales valued at \$10,000 or more. The Forest Service presently uses the following standard documents for simple sales which are typically less than \$10,000, as identified in Forest Service Handbook (FSH) 2409.18, sec. 53, ex. 01: FS–2400–1, Forest Product Removal Permit and Cash Receipt; FS–2400–3P, Timber Sale Contract for pre-measured products; and FS–2400–4, Forest Products Contract and Cash Receipt. These documents contain standard conditions and allow the parties to add provisions as may be necessary given sale specifics. For complex special forest product sales, the Forest Service uses the standard Timber Sale Contract FS–2400–6. The responsible forest officer selects the appropriate document in light of the value of the sale and other circumstances (see FSH 2409.18 sec. 53 ex. 01 for additional information). The Forest Service will continue to use these standard documents for special forest products and forest botanical products.

Historically, the Forest Service used timber sale regulations and corresponding sections of the Forest Service Manual (FSM) and FSH to sell special forest products. However, these sources are no longer sufficient to oversee the sustainable commercial harvest and sale of these products. Therefore, the Forest Service developed this final rule, which applies specifically to special forest products.

### Free Use

This final rule also regulates the limited free use of special forest products. Historically, the Agency has granted limited free use of special forest products to individuals and honored the rights of Tribes with treaty and other reserved rights related to special forest products. This rule continues those historical practices while helping ensure the continued sustainability of special forest products.

- Forest Botanical Products: Commercial Harvest and Sale and Personal Use.

### Commercial Harvest and Sale

The pilot program law directed the Secretary to initiate a new program for forest botanical products. Accordingly, the Forest Service established subpart H, which will apply for the pilot program's duration.

The pilot program law provides a mechanism for funding the environmental analyses and administrative tasks necessary for its implementation. Generally, the law requires that forest botanical products be sold for an amount that includes at least a portion of a product's fair market value and a portion of certain costs associated with administering the pilot program. The law specifies that retained funds collected through September 30, 2009, shall be available for expenditure without further appropriation for activities associated with the program through September 30, 2010. Subpart H of this final rule will terminate on September 30, 2009, unless the pilot program is extended or made permanent.

### Personal Use

Section 528(e) of the pilot program law (16 U.S.C. 528) directs the Secretary of Agriculture to allow free personal use of a forest botanical product in an amount below that product's personal use harvest level. Under section 223.279 of the rule, the Forest Service will establish personal use harvest levels for each forest botanical product; any personal use below that level will be free. For the duration of the pilot program, personal use of forest botanical

products will be conducted in accordance with section 223.279.

- 36 CFR 261.6—Timber and Other Forest Products.

This rule revises 36 CFR 261.6(f) to reflect the new free use and personal use authorizations contained in subparts G and H. In addition, the rule specifies the types of contractual documents currently used by the Forest Service, explains the Forest Service's interpretation of the term "other forest products," and makes minor textual clarifications. These changes were made in response to a comment submitted by a Forest Service law enforcement officer and are a logical outgrowth of the proposed rule.

First, the Forest Service revised section 261.6(f) to incorporate 36 CFR subparts G and H. Section 261.6(f) contains the Forest Service's prohibition against selling or exchanging forest products obtained via free use authorization. Section 261.6(f) required revision to include the free use and personal use authorizations contained in subparts G and H, which did not previously exist. In addition, section 261.6(f) was revised to clarify that "other forest products" include special forest products and forest botanical products.

The Forest Service promulgated subparts G and H to help ensure the sustainability of special forest products and forest botanical products. To achieve this objective, subparts G and H, allow, among other things, for the limited free and personal use of these products in a sustainable manner. Specifically, section 223.239 allows for free use of special forest products and section 223.279 allows for free personal use of forest botanical products. However, subparts G and H do not contain prohibitions against selling or exchanging forest products obtained from National Forest System lands at no cost.

Those prohibitions are located at 36 CFR 261.6(f), which this rule revises to reflect the new free use and personal use authorizations provided by sections 223.239 and 223.279. Prior to this final rule, section 261.6(f) prohibited "[s]elling or exchanging any timber or other forest product obtained under free use pursuant to §§ 223.5 through 223.11." This final rule revises section 261.6(f) to prohibit "selling or exchanging any timber or other forest product, including special forest products and forest botanical products, obtained under free use or personal use pursuant to §§ 223.5 through 223.11, § 223.239 or § 223.279."

The Forest Service can now use section 261.6(f) to prohibit selling or

exchanging forest products obtained via free or personal use pursuant to subparts G and H. Failing to make these revisions could result in the non-sustainable use of special forest products and forest botanical products, which is contrary to the public interest. In addition, this change is a logical outgrowth of the proposed rule. Therefore, there is no need for notice and comment prior to these changes becoming effective.

Second, the Forest Service combined section 261.6(a) with section 261.6(h). The old section 261.6(a) prohibited cutting or otherwise damaging timber, trees, or other forest products, except as authorized by a special-use authorization, timber sale contract, or Federal law or regulation. The old section 261.6(h) prohibited the removal of timber, trees or other forest products, except as authorized by a special-use authorization, timber sale contract, or Federal law or regulation. The revisions to this rule combine the prohibitions previously contained in paragraphs (a) and (h) into one paragraph (a). The combination of paragraphs (a) and (h) into one paragraph (a) is a non-substantive technical amendment. Therefore, there is no notice and comment prior to these changes becoming effective.

Third, section 261.6(a) and (c)–(f) were revised to include the terms “special forest products” and “botanical forest products.” Special forest products and Forest Botanical products, as defined in subparts G and H, are the same products the Forest Service has always considered to be “other forest products.” However, the Agency revised section 261.6 to make the Agency’s interpretation that “other forest products” include special forest products and botanical forest products explicit. Because the inclusion of the terms “special forest products” and “forest botanical products” is both interpretive and a logical outgrowth of the proposed rule, no opportunity for comment is available prior to these changes becoming effective.

Fourth, the terms “permit,” “free-use authorization,” and “personal-use authorization” have been inserted into paragraphs (a), (b), (c), and (e). These revisions are necessary to reflect the new subparts G and H and the various instruments used to sell or authorize removal of timber and other forest products, some of which were developed after issuance of section 261.6. These revisions, which are a logical outgrowth of the proposed rule, update section 261.6 and make technical changes to reflect the contractual instruments currently used

by the Forest Service. Consequently, no opportunity for comment is available prior to these changes becoming effective.

Finally, the Forest Service has replaced the term “timber sale contract” with “contract” throughout section 261.6. This change is necessary to reflect the various instruments the Forest Service uses to sell timber and other forest products, which include timber sale contracts, stewardship contracts, and procurement contracts. These revisions, which are a logical outgrowth of the proposed rule, merely update section 261.6 and make a technical change to reflect the multiple instruments currently used by the Forest Service. Therefore, no opportunity for comment is available prior to these changes becoming effective.

- Tribal Impact Summary.

The Forest Service conducted a preliminary assessment of the impact of this rule on Tribal governments and determined that the rule does have tribal implications; therefore, advanced government-to-government consultation was required.

The Forest Service began consultation efforts prior to publication of the proposed special forest products and forest botanical products rule on October 22, 2007. In April 2004, the Deputy Chief of the National Forest System sent a letter to forest supervisors asking them to contact federally-recognized Tribes in their area and establish early consultation with regard to a future special forest products regulation. The Forest Service provided early consultation regarding draft regulations and Forest Service handbook changes for the management of special forest and forest botanical products prior to publication in the **Federal Register**. The Agency received a substantial number of responses to the request and considered the comments in formulation of the proposed rule.

The proposed rule was published for a 60-day comment period (72 FR 59496) and extended for an additional 30 days based on specific requests from several Tribes (72 FR 72319). Numerous comments were received during both the regular comment period and the extended comment period. All of those comments were considered during formulation of the final rule, and numerous changes were made as a result of those comments. A summary and an analysis of the Tribes’ concerns and the changes made to the rule are located in a separate part of this preamble.

The Agency, working within the parameters of existing laws, regulations, and policies, made numerous changes to

the rule in response to the concerns expressed by Tribes. However, not all of those concerns can be satisfied through his rule. In addition, several Tribes provided conflicting concerns.

Nevertheless, the rule encourages Tribes and the Agency to work in close collaboration with one another to come to agreement regarding important issues.

- Comments on the Proposed Rule and Changes Made in Response.

A 60-day comment period on the proposed rule was initiated on October 22, 2007 (72 FR 59496). The comment period was then extended for an additional 30 days through January 22, 2007 (72 FR 72319). Respondents submitted 151 comments in response to the proposed rule. However, duplicate submissions, such as those sent by both fax and mail, were considered as one response, resulting in 117 total comments. All documents were reviewed and comments were grouped into applicable categories. Responses and a summary of any changes made in the final rule are provided below.

*General Comments and Responses for Both Subparts G Special Forest Products and Subpart H Forest Botanical Products.*

*Confidential or Proprietary Nature of Special Forest Products/Forest Botanical Products Information.*

*Comment:* Many commenters expressed concern about the confidentiality of information provided to the Forest Service in permit applications and other documents. The fact that permits are public documents concerns these commenters. Many of the commenters indicated that they should not be asked to provide information about their harvesting, and in many cases would not provide that information if asked. Both gathering locations and materials harvested can be considered confidential to Tribes and their members, particularly if the material is to be used for healing and/or in ceremonies. Some of the commenters indicated that gathering locations and materials may be closely held, even within families or local communities. Other commenters fear that site information would be obtained by commercial interests that would then over harvest in those areas, compromising both the sacred nature of the places and populations of the plants being used.

*Response:* Section 8106 of the Food, Conservation and Energy Act of 2008 (Pub. L. 110–234) allows the Forest Service to protect from disclosure information concerning the identity, use, or specific location in the National Forest System of a site or resource used for traditional and cultural purposes by

a federally-recognized Indian Tribe. The Forest Service will comply with all applicable laws concerning disclosure of this type of information, including the Freedom of Information Act, and Section 8106 of the Food, Conservation and Energy Act.

#### Consultation

*Comment:* Several commenters indicated that there was inadequate consultation or no consultation provided with regard to this rule.

*Response:* The Forest Service made significant efforts to consult with federally-recognized Tribes before development of the proposed regulation. Prior to the publication of any draft regulation on special forest products and forest botanical products, the Forest Service began one of its first early consultation efforts as prescribed in FSM 1563. In April 2004, the Forest Service's Deputy Chief, National Forest System, sent a letter to forest supervisors asking them to contact federally-recognized Tribes in their respective areas and establish early consultation with regard to an early draft regulation and FSH revision related to the management of special forest products and forest botanical products. That consultation was one of the first times the Agency consulted with federally-recognized Tribes prior to a major revision or development of a regulatory policy.

Although the Forest Service tried to inform all federally-recognized Tribes about the request for consultation, the Agency cannot independently verify whether every federally-recognized Tribe was informed. However, the Agency was pleased to receive a substantial number of responses to the consultation request and significant consultation took place.

#### Cultural Significance of Special Forest Products/Forest Botanical Products

*Comment:* Several comments were received that focused on the importance of special forest products to American Indian culture and expressed concerns that the proposed regulations will do harm to traditional cultural practices and jeopardize cultural survival. Several commenters stated that gathering special forest products has been a part of their Tribe's or indigenous people's lives and practices for millennia. Other commenters noted that access to special forest products on national forests is critical for many Tribes whose land bases cannot furnish the foods, medicines, and other materials necessary to sustain their lives and cultures. Further, others noted Memoranda of Agreement (MOAs)

between Tribes and the Forest Service that contain language acknowledging the cultural importance of special forest products to the Tribes and their members. A few comments addressed sacred sites and special places, with one commenter suggesting that the cultural significance of some locations may be incompatible with commercial activity of any sort.

*Response:* The Forest Service recognizes the important role that special forest products play in the daily lives of many American Indians and Alaska Natives. As noted in other responses to comments, Memoranda of Understanding (MOUs) and MOAs that are consistent with this rule will continue to exist between the Forest Service and Tribes.

These agreements will help maintain traditional cultural practices, as well as culturally important places. Additionally, the Agency understands the importance of close working relationships between the Tribes and local Forest Service line officers. We encourage Tribal members to take advantage of opportunities to educate line officers and Forest Service personnel with whom they interact on a regular basis.

In response to concerns over harvesting in sensitive or sacred areas, this final rule will help ensure the continued sustainability of special forest products and forest botanical products. In addition, Tribes and other concerned parties should work with local Forest Service officers and utilize existing procedures and authorities to help protect such areas.

#### Application of Fees to Tribes

*Comment:* Several commenters expressed the belief that permit fees should not be imposed on tribal people. Some believe the imposition of fees would violate treaty laws; others believe the imposition of fees could impose an economic hardship on individual American Indians.

*Response:* Under the final rule, there are no fees associated with free-use and personal-use permits. This rule does not affect any existing treaty or other reserved rights.

#### Allocation of Harvest Quantities

*Comment:* Some commenters stated that tribal harvesting should have a higher priority over harvesting by non-tribal individuals. Other commenters stated that the regulations, as written, are unclear as to whether harvest limits for treaty Tribes would be set at the same levels as for the general public. Others asserted that treaty rights cannot be limited in this manner. Three

commenters suggested a hierarchy of priority for harvest of special forest products/forest botanical products in the following order of importance: Traditional harvesting by Tribes and their members; personal use harvesting; and commercial harvesting. One American Indian commenter suggested that Tribes should be accorded first priority in the distribution of seized materials. Another commenter identified the problematic nature of specifying, in advance, quantities to be harvested.

*Response:* The Forest Service manages the National Forests for multiple purposes, interests, and users, including Tribes, the general public, and commercial concerns. The Agency believes that the final rule strikes the appropriate balance between these purposes and uses, including all parties with an interest in special forest products and forest botanical products.

Further, the final rule respects treaty and other reserved rights retained by Tribes, and recognizes the importance of traditional and cultural forest products in the daily lives of Indians. Nothing in this rule affects existing treaty or other reserved rights, the Forest Service's trust responsibilities or continued government-to-government relations. The final rule does not take away local forest's flexibility to work with Tribes; it provides new tools for successfully meeting resource management objectives, including continued sustainability.

#### Existing Memoranda of Understanding or Agreement

*Comment:* Several Tribes who commented on the proposed regulations indicated they have negotiated, or are in the process of negotiating, agreements with the Forest Service, including formal MOUs or MOAs. Several commenters indicated that they enjoy good relationships with the Forest Service and/or national forests in their area, and expressed concern that the regulations, as written, will damage those relationships and effectively extinguish existing agreements. Some said that they believe existing local agreements and regional policies between local Forest Service offices and Tribes would be overridden by this regulation. Nontribal commenters with federal agencies imply that they believe the regulations as written would override an interagency agreement in California that is supportive of American Indian gathering.

*Response:* The Forest Service agrees that the local flexibility provided by MOUs and MOAs with Tribes have been valuable tools and should continue to be

used to address local tribal concerns regarding the harvest of special forest products and forest botanical products. As a result of the comments, language has been added to section 223.242 making it clear that MOUs and MOAs are allowed under the rule. Such MOU/MOAs must be consistent with the rule. Further, any existing MOAs and MOUs that are inconsistent with this final rule must be made consistent within 24 months from the rule's publication date, which provides sufficient time for any needed revisions.

#### Permit Requirements for Tribes and American Indians

*Comment:* Numerous commenters indicated that permits should not be required for American Indians gathering special forest products. In some cases, the commenters seek a waiver that encompasses all American Indians, regardless of federal recognition status. Other commenters requested that specific groups or members of specific groups already covered under existing MOUs remain exempt from permit requirements.

In contrast, several Tribes and one organization representing numerous Tribes supported the issuance of permits as a means of monitoring natural resources. The Tribes in favor of this policy requested that they receive copies of all data collected under a permit program. Another umbrella organization representing Tribes cautioned that instituting a system of permits based on race may alienate individuals who cannot prove their indigenous heritage.

*Response:* Permits are required to gather special forest products and forest botanical products except for those who qualify under Section 223.240 of the final rule that states "Tribes with treaty or other reserved rights related to special forest products retain their ability to harvest special forest products in full accordance with existing rights." The Agency revised some of the wording in section 223.240 to better address treaty rights. The original wording was construed by some commenters to be inaccurate in the way it referred to rights "retained" by Tribes under treaties. The proposed rule stated that Tribes "\* \* \* may harvest special forest products in accordance with the terms of such treaty rights." Some commenters interpreted that language as authorizing the Agency to exercise discretion that would prohibit gathering in a manner that is inconsistent with established treaty rights. The language has been revised to make clear that the Agency recognizes existing treaty and other reserved rights related to special

forest products: Consistent with those rights, the Agency may place conditions on the harvest of special forest products to protect the sustainability of the product or to protect the forest. Sustainability of forest products and protection of the forests are a priority for Tribes and the Forest Service.

Further, permits are not required for anyone harvesting or gathering special forest products for personal non-commercial use in amounts below that product's incidental-use harvest level.

The Agency revised some of the wording in section 223.240 to better address treaty rights. The original wording was construed by some commenters to be inaccurate in the way it referred to rights "retained" by Tribes under treaties. The proposed rule stated that Tribes "\* \* \* may harvest special forest products in accordance with the terms of such treaty rights." Some commenters interpreted that language as authorizing the Agency to exercise discretion that would prohibit gathering in a manner that is inconsistent with established treaty rights. The language has been revised to make clear that the Agency recognizes existing treaty and other reserved rights related to special forest products; consistent with those rights, the Agency may place conditions on the harvest of special forest products to protect the sustainability of the product or to protect the forest. Sustainability of forest products and protection of the forests are a priority for Tribes and the Forest Service.

Tribal free use provisions are found in sections 223.239, 223.240. Section 223.280 allows national forests to waive fees only for federally-recognized Tribes and Tribes with treaty or other reserved rights seeking to harvest forest botanical products for cultural, ceremonial, and/or traditional purposes. Under certain circumstances, the Forest Service may agree to issue a permit to a Tribe with treaty or other reserved rights related to special forest products for the free use of a specified quantity of special forest products and work with the Tribe to manage the process and conserve the resources. These are the types of discussions that can be held during consultation with regional and/or local officials.

There were a number of commenters representing Tribes without treaty rights who were concerned that the permit requirement would be burdensome to them. The Agency has listened closely to Tribes without treaty rights in the past and will continue to do so in a spirit of cooperation. Memorandums of Understanding and Memorandums of Agreement have been developed to address local concerns on the

management of special forest products and forest botanical products. Under Section 223.242, regional foresters may issue supplemental guidance and approve Memorandums of Agreement and Memorandums of Understanding consistent with subparts G and H, to promote local cooperation, issue resolution, and local implementation of these regulations.

The Forest Service understands the concern of the commenter who expressed concern over a permit system based on race. The Forest Service does not discriminate on the basis of race and the Forest Service complies with all laws regarding racial matters.

The Agency encourages Tribes to engage in open dialogue with Forest Service line officers and law enforcement officers in order to agree upon ways to mitigate problems that could develop in this area.

#### Tribes' Sense of Forest Service Disrespect

*Comment:* Some commenters stated that the proposed regulations and/or the process through which they were developed display a lack of respect for Tribes and native peoples. Others spoke very highly of the close working relationship between their Tribe and local Forest Service offices. Several commenters suggested that "respectful consideration" for Tribes and Indians will be necessary to make these regulations work.

*Response:* The proposed regulations were not intended as a sign of disrespect for American Indians, Alaska Natives, or other native peoples. The Agency is responsible for managing natural resources on National Forest System lands in a sustainable way that allows for multiple uses, including, among other things, the continuation of cultural and traditional activities of American Indians and Alaska Natives. Our recent history has shown that competing interests, both commercial and non-commercial, have the ability to endanger certain plant and animal species at any given time. There is reason to believe that these types of pressures will continue and will increase. Therefore, these regulations are necessary to protect the resources and to manage them effectively.

The Forest Service intends for these regulations to help develop stronger relationships with Tribes and to support consultation and coordination with Tribes. These regulations, and FSH and FSM revisions, will provide clearer guidance for Forest Service line officers when responding to requests to harvest special forest products from National Forest System land by Tribes.

The Forest Service agrees with the commenters who suggested that respectful consideration of Tribes and American Indians will be necessary to make this regulation work effectively. The Agency is confident that the historically close working relationship between the local Forest Service offices, Tribes, and American Indians will continue, and that all will work closely together to protect the natural resources and traditional cultural practices in their respective areas.

#### Tribal Sovereignty

*Comment:* American Indian commenters assert tribal sovereignty, including over ancestral lands, and expect that the Forest Service will honor requirements for government-to-government consultations as it seeks to manage and regulate special forest products/forest botanical products. Commenters also emphasized the need for government-to-government relations.

*Response:* The Forest Service agrees that government-to-government relations between the Agency and Tribes will continue as required. The Forest Service also believes the rule will help meet its obligations to Tribes.

#### Legal Status of Tribes

*Comment:* Some commenters explained the many types of status that Tribes and individuals may have: Federally-recognized and nonfederally-recognized Tribes; treaty and non-treaty Tribes; individuals who do not qualify by blood quantum to hold tribal identity cards even when their relatives do; and descendants of people who did not enroll as Tribal members under the Dawes Act (25 U.S.C. 331), but may be as much as 100% American Indian. Many commenters provided background on the historical processes that lead to this variety of statuses and protest the manner in which the regulations appear to place non-treaty Tribes in a position analogous to that of the non-indigenous public with respect to access to special forest products. Several commenters also indicated that they believe the rule takes away the status of official government-to-government relations with nonfederally-recognized Tribes.

*Response:* The Forest Service is bound by the statutory direction provided at 25 U.S.C. 479(a)-1 regarding the status of Tribes. This rule does not create any new authority or take away any existing authority with regard to the status of Tribes. Responsible forest officers may consult with other appropriate parties to determine sustainable harvest levels based on historical information (223.219). For example, responsible forest officers may

solicit information such as but not limited to amounts harvested, season of harvesting, and yearly variances of amounts available from other parties to help determine sustainable harvest levels.

#### Traditional Ecological Knowledge & Stewardship Practices

*Comment:* Some commenters stated that American Indian use and stewardship of special forest products are based on traditions that are thousands of years old. Some noted that the traditional ecological knowledge and stewardship of special forest products by Tribes are acknowledged in scholarly writings, as well as in agreements between Tribes and government agencies, including the Forest Service and the National Park Service. Two commenters suggested that, to the extent that the proposed regulations would eliminate traditional stewardship practices, they would lead to negative ecological impacts. Another stated that this would deprive Tribes of the rights and responsibilities to manage land and resources. Others asserted that the Agency should consult with both American Indian land managers and scientists in management of special forest products on national forests. These commenters believe that Tribes' traditional ecological knowledge and stewardship practices provide coherent models of land, resources, and people's relationships to them that could serve as the basis for sustainable management of special forest products and the habitats on which they depend. Other commenters indicated that some national forests already are actively engaged in managing special forest products with Tribes with positive results.

*Response:* The Agency recognizes and values the forest stewardship practiced by Tribes, and the traditional ecological knowledge possessed by Tribes. Under 223.219 responsible forest officers are required to consult with Tribes, to the extent appropriate, to determine sustainable harvest levels based on historical information. The Agency intends to ensure that this base of knowledge will be reflected in regional and local agreements. As stressed elsewhere, the Forest Service and Tribes may continue to enter into local agreements consistent with this final rule. Regional Foresters may approve MOUs, MOAs, or other Agency policy, in compliance with these regulations, to promote local collaboration, issue resolution, and local implementation of these regulations.

This rule will not eliminate Tribal stewardship projects nor deprive Tribes

of their land management responsibilities. This rule was developed to promote sustainable harvest of special forest products. Accordingly, the Agency welcomes collaboration with holders of traditional knowledge of the land and resources, as well as scientists. As traditional knowledge is often local and place-based, holders of traditional knowledge about special forest products should contact their local Forest Service line officers and staff, and local Forest Service officers and staff should likewise reach out to holders of this knowledge.

Additionally, the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) requires the Agency to engage Tribes and the public in management decisions.

#### Trade and Commercial Use by Tribes

*Comment:* Several treaty Tribes expressed a strong belief that the Forest Service does not have the authority to restrict or otherwise regulate treaty-protected gathering for trade or commercial purposes. These Tribes cited case law they believe supports their position. Several commenters noted that trade and commerce are traditional activities of American Indian people, and questioned their apparent exclusion in section 223.240 from the provisions for "traditional ceremonial, and/or cultural purposes."

An additional consideration surfaced by these comments is the importance of the definition of commercial and non-commercial gathering in relation to American Indian practices. Commenters noted that exchange of special forest products for other forest resources or for purposes such as healing that involves the use of gathered plants is traditional and wonder if such practices would be deemed to be commercial activities under the terms of the proposed regulations. Several comments suggested that the sale of items made from materials gathered by an individual, for example, a traditional basketweaver's sale of products made from special forest products gathered pursuant to a permit under this rule, should not be considered "commercial activity." Other commenters believe that there are some circumstances under which it would be appropriate to require Tribes and/or Tribal members to pay fees if the Tribes or its members harvest special forest products for commercial purposes (e.g., gathering raw special forest products for bulk sale).

*Response:* Decisions regarding what constitutes commercial use will be made at the regional level. When local

policies are developed or when consultations are held, regional foresters will need to consider factors such as the type and amount of special forest products that are needed to fulfill requests and sustainability issues.

#### Treaty Issues

*Comment:* Some treaty Tribes believe that the regulations as written violate treaty law. Several of their comments cite court decisions in support of that assertion. They noted that treaties have been determined by the courts to be the supreme law of the land, and that the courts have further ordered that treaties be interpreted in favor of Tribes whenever possible. Further, they noted that language in the current regulations suggests a fundamental misunderstanding of treaties with Tribes. Rather, these commenters asserted treaties were and are “a grant of rights from them—a reservation of those not granted.” In other words the commenter suggested that rights were conveyed to the United States by Tribes and not the other way around. As a result, the special status conferred by treaties must be respected and provided for throughout the regulations. Several commenters also indicated that the regulations as written eliminate local flexibility to negotiate access to special forest products/forest botanical products on a government-to-government basis. Other commenters indicated that the Forest Service does not recognize in the regulation, that some treaties do not have specific language regarding special forest products.

*Response:* Section 223.240 has been revised to make clear that nothing in this rule conflicts with any treaties. The Forest Service recognizes that the original proposed wording was construed by reviewers to be inaccurate and understands that Indian treaties are the supreme law of the land and that treaty rights are reserved rights that were negotiated and retained during treaty making through Congressional action. Further, the Forest Service has taken action to change some of the language in the rule to clearly reflect Indian Treaty rights.

In referring to treaty rights, the original language in the rule stated that Tribes “\* \* \* may harvest special forest products in accordance with the terms of such treaty rights.” This language was changed to recognize the fact that these gathering rights were never relinquished by Tribes. Further, by removing the word “may” the Forest Service is recognizing that the Agency is not in the position of allowing Tribes to harvest what rightfully belongs to them under their treaty rights. Section 223.240 now

states that “A member of a Tribe with treaty or other reserved rights related to special forest products retains his/her ability to harvest special forest products in full accordance with existing rights, including free-use harvest without obtaining a free-use permit.”

#### Trust Responsibilities

*Comment:* Commenters believe that the proposed regulations fail to meet the trust responsibilities of the Forest Service. These commenters assert that the Forest Service’s trust responsibility includes providing access to special forest products/forest botanical products for Tribes and Tribal members, and also includes protecting against excess commercial harvest of traditionally important plants. One Tribe cited a Forest Service Manual directive it believes supports its position. Several commenters indicated that gathering and gathering sites are central to American Indian culture and spiritual practices, and, therefore, the federal trust responsibility requires the Forest Service to protect them. Some commenters also believe that the Forest Service did not consult adequately with Tribes in the development of the proposed regulations and, in so doing, violated its trust responsibility. Nontribal commenters with federal agencies imply that they believe the regulations as written do not constitute a policy that is supportive of American Indian gathering and would impede the Forest Service’s ability to discharge its trust responsibilities in a respectful manner.

*Response:* This final rule is consistent with the Forest Service’s trust responsibilities. Further, as mentioned in the response titled “Consultation”, the Forest Service consulted with federally-recognized Tribes on matters related to this rule.

#### Cultural and Spiritual Uses

*Comment:* Commenters stated that special forest products/forest botanical products have important cultural and spiritual uses by Americans of diverse ethnic backgrounds. One commenter provided examples of cultural uses, while another provided a statement indicative of the personal importance of gathering that could be interpreted as a spiritual experience: “My time in the forests is the most meaningful time to me, when I can experience the beauty and fruitfulness of our world.”

*Response:* The Agency recognizes the importance of special forest products and forest botanical products to all users. This rule will help to increase the Forest Service’s ability to meet special

forest product demand, while assuring a sustainable supply.

#### Decision-Making Levels

*Comment:* Several comments discussed including Forest Service organizational levels at which decision-making authority should reside. Some commenters stated that decision-making concerning implementation of the special forest products and forest botanical products regulation should occur at the local or District level. The commenters asserted that local or district personnel are familiar with the local biological and cultural conditions and can develop appropriate programs to safeguard both. Commenters identified several types of decisions they believe should be made at the local level, including which species and types of special forest products and forest botanical products should require active management, harvest limits, and permit information. Commenters also expressed the belief that decisions, especially on exemptions from permit and fee requirements, are best made at the local level. One commenter called for local or regional decision-making within the scope of national guidance. Commenters further asserted that government-to-government consultations with Tribes should occur at the local level. Another commenter provided examples of successful consultations with local stakeholders, including Tribes, which resulted in programs that include a permitting program tied to ongoing monitoring.

In addition, some commenters prefer negotiating specific terms of agreements at the forest or district level. However, others expressed strong concerns about “too much discretion” at the local or regional level for interpretation of treaty rights and too much reliance upon local goodwill providing for the traditional gathering needs of non-treaty tribes and individuals.

*Response:* Decision-making authority for special forest products/forest botanical products has been delegated as follows: (1) The Forest Service Chief has been delegated authority to act for the Secretary of Agriculture in the sale and disposal of timber and forest products, pursuant to 7 CFR 2.60 and (2) FSM 2404.2 delegates the Chief’s authority over the sale and disposal of timber and other forest products to the Forest Management Director (Washington Office) and Forest Service line officers (such as regional foresters, forest supervisors, and district rangers) subject to specified reservations and limitations (FSM 2404.28, exhibit 01). Depending upon the scope of the project, responsibility, and/or delegated

authority, and, except as specified in this rule, decisions are generally made at the local forest or district level by the forest supervisor or district ranger, respectively.

#### Laws and Policies

*Comment:* The following were cited by commenters as possibly being in conflict with the proposed regulations: (1) Treaty and trust laws; (2) the American Indian Religious Freedom Act; (3) the National Historic Preservation Act; (4) Executive Order 13175; (5) Executive Order 12898; and (6) Public Law 106–113 as amended by 108–108. In addition, commenters cited specific Forest Service policy including: (1) Supplements to the FSM in Region 5 that allow free personal use with permit for tribal members; (2) FSM 1563.02 for Region 5 (Amendment 1500–2007–1, approved July 25, 2007) re: “regulation of commercial harvests and precedence of personal use over commercial”; (3) North Carolina National Forest (Region 8) supplement r8\_nc\_2400–2005–1, document 2467 (April 25, 2005), re: “calculation that ignores market values at the point of harvest”; (4) FSM 1563.1 and FSH 1509.13, Chapter 10, regarding directions on the exercise of regulatory authority and consultation with tribes and honoring of treaty rights and trust responsibilities; (5) FSH 2409.18, 87.17 regarding “consultation with treaty and non-treaty Tribes prior to the adoption of any harvest plan for areas that include Tribal ancestral ground”; (6) FSM 1563.01f, re: use of cooperative agreements with Tribe; (7) FSM 1563.01(d), re: interpreting treaties as they would have been by the tribes signing them at the time; and (8) FSM 1524 and 1563.03, re: constraints to Forest Service regulation of special forest products/forest botanical products by treaty rights and trust obligations.

*Response:* The rule is consistent with all applicable laws and regulations. The Forest Service will revise any provisions in the Forest Service Manual or Forest Service Handbook that are inconsistent with this rule.

#### Income

*Comment:* Many comments indicated that special forest products and forest botanical products are a source of income for individuals and communities. Some commenters believe the regulations will result in lower incomes and loss of self-employment for thousands of individuals in rural communities. One comment stated that the prohibition on gathering from some national forests already has resulted in “severe economic hardship.” Another

commenter stated, “We are trying to make a living without public assistance and without cutting down the trees.” One commenter does not believe that the scale of the potential negative impact on incomes in rural communities was adequately addressed in the preparation of the regulations.

*Response:* The rule will have little or no impact on the incomes of those who rely on the gathering of special forest products. The rule was reviewed under U.S. Department of Agriculture procedures and Executive Order 12866 on Regulatory Planning and Review as amended by Executive Order 13422. OMB determined that the rule is not significant and that it 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.

Implementation of the final rule increases the Forest Service’s ability to meet special forest products demand while assuring a sustainable supply. Maintaining a sustainable supply of special forest products should result in members of the public having a better opportunity to obtain special forest products.

#### Special Forest Products/Forest Botanical Products Industry

*Comment:* Commenters described the structure of the special forest products/forest botanical products-based industry, and expressed concerns about the rule’s effects on the industry. Several commenters disputed OMB’s finding that the regulation’s potential impact would be lower than \$100 million. One commenter stated that economists have estimated the economic value of floral greens and wild mushrooms alone in just three states at \$141 million. The same commenter also stated it’s highly probable that the aggregate economic value of the hundreds of SFPs harvested commercially in the United States is several billion dollars and that much of that harvest is taking place on national forests. Another commenter remarked that the \$3 million value of special forest products revenues from National Forest System lands appears to be a gross underestimate stating that special forest products revenues, based upon the Forest Service’s own reporting system, totaled \$6,119,947 for Forest Service Region Six.

Another commenter expressed concern regarding the advertisement and bidding processes, under sections 223.227 to 223.232, for the sale of a particular forest product for which the appraised value of the sale is equal to

or greater than \$10,000 and suggests that the minimum amount be increased to \$100,000. The same commenter was concerned that absent any clarification on how appraised values will be determined, that the “sale” of a forest product could consist of the entire annual nationwide harvest of a particular forest product, the value of which would, in many cases, very likely exceed \$10,000. The following industry generated figures were provided to support that assertion: \$30 million for maple syrup in 1997; \$2.5 million to collectors of black walnuts in 2002 (estimated); and \$340,000–\$800,000 to harvesters of wild black cohosh root in each of the three years 2003–2005 (calculated at the 2007 value to harvesters of \$2.50/pound based on AHPA’s tonnage surveys).

One commenter noted that special forest products/forest botanical products actually support several industries including food, floral, horticultural, and dietary supplements. The commenter noted that in most cases, the supply chain has 3 or 4 steps prior to any significant value-added process: (1) Harvest by self-employed individuals or small groups of family and/or friends; (2) Harvesters sell to local buyers (the point at which the commenter believes fair market value should be assessed); (3) Local buyers sell to regional consolidators (unless they have established direct connections farther up the supply chain); and (4) Regional consolidators sell to a manufacturer. The commenter stated that the largest price increases tend to occur beyond this point (step 4) in the supply chain and provided an example involving black cohosh root. The same commenter also offered to share its industry tonnage survey results with the Forest Service on an ongoing basis as one of the best available measures of volumes and values for 20 special forest products/forest botanical products species. The commenter noted, however, that there is no way to determine what proportion of that volume was harvested on national forests, although it is assumed to be more than \$10,000.

Commenters fear that implementation of the regulations, as written, would favor very large businesses, and would result in the industry being restructured in a way that would present an economic hardship for rural communities, low income people, and minorities. More than half of the comments on this specific topic stated that the bidding process would most likely push out very small businesses and self-employed individuals.

Commenters also identified permit prices and access to sufficient amounts



of special forest products/forest botanical products to supply the industry as concerns. Comments suggested that permit costs, if not calculated at a reasonable percentage of the price paid to a permittee's harvesters, could eliminate the harvesting activity as a source of income. In addition, commenters asserted that rising permit prices could ripple upward in the supply chain, resulting in product prices beyond what consumers are willing to pay.

Commenters also expressed concern that if access to special forest products/forest botanical products on national forests is shut down, as it has been on some forests, inability to supply product also would harm the industry. This comment was couched in terms of closing down access in the absence of sound scientific information indicating a need to do so. These commenters indicated general support for sustainable harvesting measures.

*Response:* As stated above, the rule fully complies with all applicable laws, regulations, U.S. Department of Agriculture procedures, and Executive Order 12866 on Regulatory Planning and Review, as amended by Executive Order 13422. Further, the OMB has determined that the rule is not significant, will not have an annual effect of \$100 million or more on the economy, and will not adversely affect productivity, competition, jobs, the environment, public health or safety, or state or local governments. The rule itself does not increase or decrease the supply of special forest products or forest botanical products thus does not impact the receipts received by the Forest Service. Further, the rule complies with Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking" 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 rule increases the Forest Service's ability to meet increased demand for special forest products, which benefits individuals and small businesses.

Many of the commenters provided values of special forest products based either upon wholesale or retail values of the product. The Forest Service bases its appraised value that it charges for a permit or a contract on a fair market value that reflects the cost to a permittee to collect or cut the product and transport the product to a point that it could be sold. In response to comments

regarding appraised values and product prices, the Chief of the Forest Service establishes minimum rates for the sale of special forest products or groups of special forest products pursuant to section 223.221. In addition, the Chief determines the appraised value of special forest products pursuant to section 223.222. Pursuant to sections 223.221 and 223.222, products must be sold at minimum rates or appraised value, whichever is higher. Under section 223.227 the Forest Service generally is required to advertise any sale of special forest products which has an appraised value of \$10,000 or greater rather than \$100,000 as suggested by one commenter. As there is competition for a lot of these special forest products, advertising them is a fair approach to work with the public.

In the past we have used the timber regulations and Forest Service Forest Management manuals and handbooks as the basis for appraising special forest products. Each sale is appraised per procedures identified in FSH 2409.18, sec. 45. Sales are not appraised based on the nationwide annual value of a particular product, as one commenter suggested. Sales are appraised individually, within each forest. One individual sale may include multiple products. Appraised values, including appraisal points, are determined in accordance with Forest Service policy.

The Forest Service has a minimum charge of \$20 for a permit or contract except for the minimum charge for an individual Christmas tree permit. As an example, if the minimum rate for a special forest product is \$5 for a particular unit of measure, a permit would allow up to 4 units of that particular product.

Regarding the comments about closing down access to forest product harvesting in the absence of sound scientific information based upon historical and other information, the Forest Service will only close down access to special forest products for reasons including but not limited to: (1) Ensuring public safety; (2) preventing interference with Forest Service and/or commercial operations; (3) ensuring the sustainability of a special forest product; or (4) otherwise protecting National Forest System land. Whenever possible, the Agency will consider scientific information in making determinations about whether to close down access.

#### Development Process of Proposed Regulations

*Comment:* Some comments referred to the process used to develop the proposed regulations. Several commenters believe that the regulations

as written should be abandoned and a new process should be commenced that involves a substantive public involvement process. Many of these individuals also contend that the regulations should be rewritten to include a requirement for stakeholders to be involved in establishing harvest limits, identifying fair market values, setting permit prices, etc., with some calling for the Forest Service to require training for its personnel on how to conduct such processes effectively. One commenter offered the example of a successful collaborative process that was used by a national forest to develop agreements for managing special forest products/forest botanical products.

*Response:* The proposed rule included a 60-day comment period, which was extended for an additional 30 days. Over 150 comments were received. All comments received were considered in development of the final rule. Further opportunities for collaboration and participation will occur at the regional, forest, and local level, including, but not limited to, during project planning, environmental analysis, and implementation.

#### Regulatory Impact Determination

*Comment:* Commenters believe that there was inadequate review for regulatory impact prior to the proposed regulation's publication. Read together, the comments asserted that a regulatory impact review is required based on at least three of the following reasons:

1. The annual national value of special forest products/forest botanical products exceeds the monetary threshold necessary to trigger the requirement for a regulatory impact review. Some of these comments cite values for the annual harvest of products to support their assertion.
2. The regulations as written would have a substantial impact on incomes in rural communities, which have not been considered.
3. Potential impacts on small businesses, particularly from the proposed bidding process, would be substantial and would effectively restructure the industry.

Many commenters also stated that a NEPA review is required because they believe the regulations are likely to have cultural and ecological impacts. Some requested public release of the data OMB used to determine that there would be no significant impacts. Other commenters stated that the requirement for free or personal use permits would be burdensome for both the public and the Agency and could expose the Forest Service to risk of litigation.

*Response:* The rule was reviewed under U.S. Department of Agriculture procedures and Executive Order 12866 on Regulatory Planning and Review, as amended by Executive Order 13422. OMB determined that the rule was not significant, would not have an annual effect of \$100 million or more on the economy, and would not adversely affect productivity, competition, jobs, the environment, public health and safety, or state and local governments.

The Agency believes the rule actually increases the Forest Service's ability to meet special forest products demand, while assuring a sustainable supply. Maintaining a sustainable supply will benefit individuals and small businesses.

After consideration of the rule under Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," and the Small Business Regulatory Enforcement Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Forest Service determined that this action will not have a significant economic impact on a substantial number of small entities as defined by the Executive Order. Further, the proposed rule will have no adverse impact on small business, small not-for-profit organizations, or small units of government.

The Forest Service also determined that the rule would have no direct or indirect effect on the environment. 36 CFR 220.6(d)(2) 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 the 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.

Pursuant to FSH 2409.18 section 87.13, the approving officer for the harvest and sale of special forest products must ensure that the actions are consistent with applicable land and resource management plans, including environmental quality standards.

Regarding the comment that the requirement for permits would be burdensome and could expose the Agency to litigation, in the proposed rule, the Agency unintentionally omitted disclosure of a current Office of Management and Budget (OMB) approved information collection for associated permits and contracts; this omission has been corrected and the

information now appears in the *Controlling Paperwork Burdens on the Public* section.

Permits and fees are not always required. For example, a person may harvest a forest botanical product or special forest product up to the incidental use harvest level without obtaining a permit. In addition, there are no fees associated with the free and personal use.

#### Stewardship

*Comment:* One commenter proposed collaborating with the Forest Service to develop guidelines for good stewardship of special forest products/forest botanical products. Other commenters stated that in many cases their practices enhance local populations of special forest products/forest botanical products. Another commenter believes that the regulations as written would be a barrier to promoting restoration of native medicinal species and their positive ecological outcomes. One commenter asserted that good stewardship is more likely to follow if harvesters are involved in decision-making processes regarding regulation of special forest products/forest botanical products and if they have a long-term stake in these resources. One commenter stated that in several years of working with tribes on traditional management of special forest products/forest botanical products, they had never observed damage by traditional harvesters but have seen ecologically beneficial effects.

*Response:* The final rule will result in the good stewardship of special forest products and forest botanical products and is not a barrier to promoting restoration of native medicinal species and their positive ecological outcomes. In addition, the Forest Service appreciates and welcomes the many opportunities it will have to work with members of the public throughout the planning, analysis, and implementation of special forest products and botanical forest products projects. We believe these opportunities for consultation and collaboration will ensure sustainability and good stewardship.

#### Subsistence

*Comment:* Commenters believe that the rules as written would have a negative effect on people who rely on special forest products/forest botanical products for subsistence. Several of the commenters are concerned that personal use levels set to satisfy what are deemed to be recreational needs will not be adequate for subsistence gatherers and ask that subsistence be identified as a separate category for which harvest

limits are set. Some note that this may be an environmental justice issue that should be considered under the terms of Executive Order 12898.

One commenter stated that there are people who are dependent upon subsistence gathering and indicated that special forest products/forest botanical products are an important aspect of subsistence. One commenter indicated that tan oak mushrooms have important subsistence uses in the local community and that its importance and use is not confined to American Indians. Another noted that subsistence gathering is recognized in an MOU between the Forest Service and tribes in several western forests. One individual asserted that the definition of subsistence in a contemporary context must include trade of traditional crafts, arts, etc.

*Response:* The Forest Service has promulgated this rule in order to promote the sustainable use of special forest products in light of the increased public demands, for both timber and non-timber special forest products, over the past 10 years. In many cases, these demands are challenging sustainability particularly in the most heavily used parts of the Nation's Forest System.

This rule will not interfere with the established rights of any group to harvest or use special forest products. It does provide, however, for the determination and monitoring of sustainable harvest levels and provides a mechanism for increasing or decreasing harvest levels as appropriate based on the monitoring results. This rule does not affect subsistence gathering; it just requires a permit process above the product's incidental-use harvest level. The rule also provides for the contracts and permits that will be used by the Agency to administer the harvest and use of special forest products and forest botanical products. By maintaining sustainability, this rule helps to provide for the continuity of all uses, including subsistence.

Responsible forest officers determine personal-use harvest levels for specific forest botanical products (section 223.279). These levels shall be equal to the amount or quantity authorized for free use under section 223.239(a), which references personal, non-commercial use, rather than recreational needs as one commenter believed.

In response to the commenter asking that subsistence be identified as a separate category for which harvest limits are set, regardless of the product's eventual use, prior to offering a special forest product for sale or free use, the responsible forest officer must determine the product's sustainable harvest level. The Agency does not feel

a separate category is needed for subsistence as subsistence is tied to a product's sustainable harvest level. A special forest product's sustainable harvest level is the total quantity of the product that can be harvested annually in perpetuity on a sustained yield basis. Responsible forest officers are not authorized harvest or free use of special forest products in an amount exceeding known sustainable harvest levels.

There are no environmental justice issues under this rule. The rule provides for free personal, non-commercial use of both special forest products and forest botanical products, under sections 223.239 and 223.279.

The rule allows for regional foresters to issue MOUs and MOAs, consistent with subparts G and H, to promote local collaboration, issue resolution, and local implementation of the rule. The rule also allows for continuance of existing MOUs and MOAs although they must be made consistent with the rule within 24 months from December 29, 2008 or those agreements will terminate.

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

##### *Proposed Section 223 Applicability*

Summary of Changes in Proposed Section 223.215 (Final Rule Section 223.215)

No comments were received directly relating to this section.

For clarification purposes, minor wording changes were made to this section and information regarding permit requirements for free use above the incidental-use harvest level was added.

##### *Proposed Section 223.216 Definitions*

Summary of Changes in Proposed Section 223.216 (Final Rule Section 223.216)

For clarification purposes, the title of section 223.216 was changed to include special forest products. In response to comments and for clarification, a definition of "person" was added. The term "purchaser" was replaced with "person" throughout the rule to reflect the fact that not everyone harvesting forest products will be purchasing the products through a sale. Some products may be obtained via permit or free use authorization. For clarification, the definition of special forest products was refined in the final rule by inserting the words "but not limited to" to clarify that the products identified in the definition are not all inclusive. Further, the reasons for collection were struck from the definition because the Agency did not intend to insert an intent element into the definition.

*Comment:* Commenters noted that the terms special forest products and forest botanical products are similar and/or confusing, aren't distinctive, do not contain certain species of particular importance (such as, but not limited to, epiphytes, bromeliads, orchids, and ferns), and include products that should not be regulated (such as fence material, mine props, post and poles, shingle and shake bolts, and rails).

*Response:* The definitions of special forest products and forest botanical products are very similar because forest botanical products are a naturally occurring subset of Special Forest Products. Further, the products mentioned by name in the definitions are not all inclusive. Regarding the commenters' question as to why certain special forest products are regulated, the Forest Service considers posts, poles, rails, shingle and shake bolts, firewood, fence stays, vegas, mine props, and bow staves as special forest products, but not forest botanical products because they do not occur naturally. The Agency has a history of regarding fence material, mine props, post and poles, shingle and shake bolts, and rails, as special forest products and plans to continue to do so. The authority for selling these products is found at 36 CFR 223.1.

*Comment:* Some commenters expressed the need to define "fair market value," "appraised value," and "minimum rates" and wanted these definitions written in such a manner that they were determined at the point of harvest and not on a value added basis. Another commenter requested a definition for the term "responsible officer," particularly in relationship to where the individual is stationed. One commenter noted that the terms "protect the forest" or for "purposes of health and safety" were not defined and the commenter was concerned that the regional forester would have unlimited discretion over the application of treaty-protected gathering rights to Forest Service lands. Another commenter was concerned that the terms "threatened" or "endangered" species were not defined and was unclear how or by whom such threat or danger would be determined.

*Response:* The Forest Service follows the regulations at 36 CFR 223.222, which set forth authorities for determining appraised value of special forest products and 36 CFR 223.278 for forest botanical products. The Forest Service determines fair market value of forest botanical products under 36 CFR 223.278. Per 26 CFR 223.278, the fair market value of a forest botanical product is equal to the appraised value.

The process that the Forest Service has used to determine "fair market value," appraised value, and minimum rates or standard rates for special forest products has historically been based upon the same process noted in the Forest Service manual and handbooks for timber sales. Special forest products, and now forest botanical products, were considered the "other forest products" identified in NFMA and in the manual and handbooks.

Minimum rates are the lowest rate that the Forest Service will accept for a product. Standard rates, based upon historical data, are set and used as the lowest rate that the Forest Service will accept for a product when an appraisal is not needed or is not practical for a product. For some products, minimum rates and standard rates may be the same.

Appraised rates are developed to provide a fair market value for a product. Under the rule, valid methods of appraisal include but are not limited to transaction evidence appraisals, analytical appraisals, comparison appraisals, and independent estimates based on average investments. The basic appraisal systems used by the Agency include residual value appraisals (a type of analytical appraisal) and transaction evidence appraisals, which are used depending on the information available. To determine an appraised value, either appraisal system selects an appraisal or marketing point at which a product can be further manufactured or sold to a collector or processor. The appraisal takes into consideration the costs to pick or produce the product and the cost to transport it to the marketing point. The rates that the Forest Service charges does not include any value added to the product after delivery to the appraisal or marketing point.

The Forest Service uses the term responsible forest officer for the official responsible for the particular decision being made. This individual may be stationed at any office (district, forest, regional, or national) depending upon the decision and/or their delegated authority.

The Forest Service uses the terms threatened or endangered Species as defined by the Endangered Species Act of 1973, as amended (16 U.S.C. 1532 *et seq.*).

Commenters expressed concern that the ambiguity of the terms "protect the forest" and "purposes of health and safety" gives a regional forester unlimited discretion over the application of treaty-protected gathering rights on National Forest System lands. In response, the Forest Service revised section 223.240 to specify that the

Forest Service will only set conditions on the harvest of a special forest product by a Tribe with treaty or other reserved rights related to that special forest product to ensure the product's sustainability or to otherwise protect National Forest System land. In addition, section 223.240 now states that the Forest Service will only prohibit Tribes with treaty or other reserved rights related to special forest products from harvesting that special forest product to protect public health and safety or to ensure sustainable harvest levels. The responsible forest officer has the discretion, on a case-by-case basis, to determine what may be needed to protect public health and safety and to ensure sustainability on National Forest System lands.

No definitions of "fair market value," "appraised value," "minimum rates," "responsible forest officer," "forest protection," "health and safety," or "threatened or endangered species" will be added to this subpart.

*Proposed Section 223.217 Authority To Dispose of Special Forest Products*

Summary of Changes in Proposed Section 223.217 (Final Rule Section 223.217)

No changes were made to this section.

*Comment:* Some respondents stated that Tribes have vested property interests in the resources, and that the resources are not solely owned by the Forest Service.

*Response:* The regulations at 36 CFR part 223 govern the sale and disposal of national forest system timber and forest products. This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and it has been determined that this action does not take any private property. Tribes with treaty or other reserved rights retain their ability to harvest special forest products in full accordance with existing rights.

*Proposed Section 223.218 Consistency With Plans, Environmental Standards, and Other Management Requirements*

Summary of Changes in Proposed Section 223.218 (Final Rule Section 223.218)

Minor changes in wording were made to this section for clarification.

*Comment:* A number of commenters asserted that the rule needs to undergo National Environmental Policy Act (NEPA) evaluation and that the rule should be consistent with NEPA. Other commenters mentioned forest plans,

environmental standards, and questioned the adequacy of or further need to consider/study/include other management standards, including treaty and other tribal rights, Executive Order 12898, the Regulatory Impact Analysis, the United Nations (UN) Convention on Biodiversity, the UN Declaration on the Rights of Indigenous Peoples, and the International Standard for Sustainable Wild Collection of Medicinal and Aromatic Plants (ISSC-MAP) principles.

*Response:* Although the rule itself has been determined to not require NEPA analysis, the harvest and sale of special forest products, including the subset of forest botanical products, shall be authorized in accordance with all applicable laws, regulations, and policies, including NEPA and forest land management plans on National Forest System lands (reference FSH 1909.15, sec. 31.1b (57 FR 43180; September 18, 1992)).

Responsible forest officers also follow policy found in FSH 1909.15 to determine the level of environmental analysis documentation needed for disclosing the environmental effects of individual programs or projects. During the NEPA process for land management plans and site-specific actions, interdisciplinary team members and the responsible forest officer may consider many sources of data and information.

*Proposed Section 223.219 Sustainable Harvest of Special Forest Products*

Summary of Changes in Proposed Section 223.219 (Final Rule Section 223.219)

Minor wording changes were made to this section. In addition section 223.219 was revised to specify that forest officers may consult with appropriate parties when determining sustainable harvest levels. This revision was made in response to comments received by the Forest Service. In response to comments, factors were added that the responsible forest officer may consider when making their sustainability determinations and establishing monitoring timeframes.

*Comment:* Comments included determining sustainable harvest limits specific to species and location because of year-to-year and site-to-site variability, and the need to consider factors including climate change, and geographic scale. Concerns were expressed doubting the Forest Service's resources and/or knowledge base to determine sustainability. Some respondents are concerned that the three-year baseline is not an adequate measure to set sustainable harvest levels

because of high variability of many species.

*Response:* A responsible forest officer is charged with determining the sustainable harvest level for each special forest product prior to offering them for sale or free use. In doing so, responsible forest officers may consider all sources of information and expertise available, including sources outside the Agency, when making their determination. In response to comments, language was added to reflect that "responsible forest officers will consult with Tribes, to the extent appropriate, to determine sustainable harvest levels based on historical information." In addition, the rule now provides that "responsible forest officers may consult with other appropriate parties to determine sustainable harvest levels based on historical information." Regarding commenters' concerns about the Forest Service's ability to determine sustainable harvest levels, the Forest Service has the resources to determine sustainability. The Forest Service has the appropriate knowledge base to comply with the regulation. Where applicable, the Forest Service considers the expertise and knowledge available from other parties, including Tribes. The rule now provides that responsible forest officers may consider factors such as year-to-year and site-to-site variability, climate, weather change, geographic scale, and scientific data available prior to making their sustainability determination and establishing monitoring timeframes (section 223.219(a)). In addition, the Forest Service is required to monitor the effects of harvesting on the sustainability of special forest products, at least once every three fiscal years, or as otherwise established by a regional forester (section 223.219(c)). Such monitoring may include, but is not limited to, 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.

*Proposed Section 223.220 Quantity Determination*

Summary of Changes in Proposed Section 223.220 (Final Rule Section 223.220)

No comments were received specific to this section.

No changes were made to this section.

## Appraisal and Pricing

### *Proposed Section 223.221 Establishing Minimum Rates*

Summary of Changes in Proposed Section 223.221 (Final Rule Section 223.221)

The language was revised to clarify that the Chief establishes minimum rates in addition to establishing methods for setting minimum rates. In addition, language was added to explicitly reference the Forest Service's statutory obligation to sell special forest products for minimum rates or appraised value, whichever is greater.

*Comment:* Commenters suggested conducting inventories prior to the issuance of permits and including the cost of such inventories in the minimum rate. Others suggested including the full range of stakeholders, including special forest products and forest botanical products harvesters and buyers, and involving the best available science in the process of setting minimum rates (and harvest levels, prices, and waivers). Some respondents believe that the Forest Service lacks the necessary expertise to establish sound minimum rates without the participation of knowledgeable stakeholders. To develop ecologically and economically sustainable and culturally sensitive harvesting limits, prices, and monitoring processes, some commenters believe the Agency will need to include harvesters and buyers in their decision-making process.

*Response:* For special forest products, the minimum rates are those as explained in the response to comments under section 223.216. For forest botanical products, a fee in addition to the charged rate may be included that would cover the cost of administering the permit/contract. In this instance, the fee may be used for administration of the permit/contract including inventories to determine harvest levels and sustainability levels of forest botanical products. As noted by the commenters, the Forest Service will need help from knowledgeable stakeholders, harvesters, and buyers to provide information relating to cost to produce products along with information concerning the amount harvested and/or available for harvesting. This information will be used in appraisal systems and in the monitoring needs to determine sustainability levels.

The Forest Service uses the Forest Products Free Use Permit (FS-2400-8) for the personal use of products above the product's incidental use harvest level for both special forest products

and forest botanical products. These products obtained under this permit can not be resold. For charge permits, under which the material can be resold, the Forest Service uses the Forest Products Removal Permit and Cash Receipt (FS-2400-1) for values up to \$300. For values above this amount, the Forest Service uses contracts identified earlier.

### *Proposed Section 223.222 Appraisal*

Summary of Changes in Proposed Section 223.222 (Final Rule Section 223.222)

The language was revised to clarify that the Chief establishes appraised value and establishes methods for determining appraised value. In addition, the inadvertent use of fair market value was replaced with appraised value.

*Comment:* Some commenters believe that fees should be set in relation to the point of harvest rather than at a later stage in the market chain and harvesters and buyers should be consulted and involved in the process of determining fair market value. Several commenters cautioned that fees should not be set as high as to price products made from special forest products/forest botanical products out of the market. One respondent asserted that if fees are set beyond the financial means of low-income or tribal harvesters, this may result in non-compliance and constitute an environmental justice issue under the terms of Executive Order 12898. This individual suggests that the Forest Service should seek advice from its Office of General Counsel in this regard.

*Response:* There are no permit fees for personal use and free use. There are no environmental justice issues under this rule. Under section 223.278, the responsible forest officer ensures that the sale price of any forest botanical product includes a portion of the product's fair market value and a portion of the costs incurred by the Department of Agriculture associated with granting, modifying, or monitoring the authorization for harvest of forest botanical products, including the costs of any environmental or other analysis. The fair market value of forest botanical products is equal to the appraised value determined in accordance with section 223.222. The sum of the portions of fair market value and costs making up the sale price must be greater than or equal to the forest botanical product's fair market value.

*Proposed Sections 223.223 Advance Payment; 223.224 Performance Bonds and Security Fees; 223.225 Contract, Permit, and Instrument Term; and 223.226 Adjustment of Term of Contract, Permit, or Other Instrument for Force Majeure Delay*

Summary of Changes in Proposed Sections 223.223, 223.224, 223.225, and 223.226 (Final Rule Sections 223.223, 223.224, 223.225, and 223.226)

Minor wording changes were made to sections 223.223 for clarification purposes. The word "purchaser" was replaced by "person" in section 223.223 for consistency with the definition of "person" added to section 223.216. Permits were inadvertently included in section 223.226 of the proposed rule. However, permits do not have force majeure. Thus, the word permit was removed from section 223.226 in the final rule. In addition, the finding regarding substantial public interest was deleted as this finding does not apply to force majeure extensions. The titles to 36 CFR 223.225 and 223.226 were changed slightly for clarification purposes.

*Comment:* Some commenters expressed concern that performance bonds and security fees would be beyond the reach of many native peoples. Others contend the rule should allow contracts with federally-recognized tribes to exceed 10 years. Additional commenters expressed a desire to place some areas within the national forests off limits to commercial activities, including wilderness areas, roadless areas, sensitive areas, areas with archaeological resources, and culturally significant and/or traditional religious areas. One commenter felt that provisions dealing with sales contracts, sales advertising, and performance bonds and security fees would be applied to all businesses, without regard to differences in size class, volumes harvested, or ecological impacts, and that, as a result, small businesses would endure a financial burden that may be borne more easily by large businesses.

*Response:* Under section 223.224, a contract, permit, or other authorizing instrument for the sale of special forest products may require a person to furnish a performance bond or other security for satisfactory compliance with its terms. Under 223.216, a person is defined to include any individual, partnership, corporation, association, Tribe, or other legal entity.

Sale contracts, by law, may not exceed 10 years in duration, unless there is a finding by the Chief that better utilization of the various forest resources (consistent with the

provisions of the Multiple-Use Sustained-Yield Act of 1960) will result. The disposal of special forest products must be consistent with applicable land management plans (36 CFR 223.218). Land management plans consider the effects of various land management activities on all resources, including, but not limited to, wilderness areas, roadless areas, sensitive areas, areas with archaeological resources, and culturally significant and/or traditional religious areas.

Effects on small entities and small business concerns were considered in light of Executive Order 13272. The Forest Service determined that the rule will have no adverse impact on small business, small not-for-profit organizations, or small units of government.

*Proposed Sections 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; and 223.232 Disclosure of Relation to Other Bidders*

Summary of Changes in Proposed Sections 223.227, 223.228, 223.229, 223.230, 223.231, and 223.232 (Final Rule Sections 223.227, 223.228, 223.229, 223.230, 223.231, and 223.232)

Minor wording changes were made to sections 223.227, 223.229, 223.230, 223.231 and 223.232 for clarification purposes.

*Comment:* Commenters expressed objections to a bidding system or process for special forest products/forest botanical products, and felt that a bidding system or process would place very small enterprises at a disadvantage and likely drive them out of business. Others call for set asides for very small businesses. Additional commenters asserted that any contracts, advertising, bonds, and security fees should be structured in relation to market conditions, harvest quantities, and ecological impacts. A few called for harvesters and buyers to be involved in developing appropriate sales processes. One commenter suggested that only very large-scale, potentially damaging harvests should require the contracting processes set forth in the regulations.

Another commenter felt that the appraised value of \$10,000 is too high a trigger for the advertisement process given the market value of many of the products that might be sold and that this threshold should be set at a lower value.

A different commenter believes that the Forest Service "is misinterpreting its statutory responsibility under the pilot

program law," asserting that the 2004 legislation requires the Agency to use a bidding process as one means of establishing fair market value for forest botanical products during the pilot program. The commenter believes that this does not constitute a mandate to institute a bidding process for special forest products like that used for timber.

Many comments stressed that where treaties exist, treaty terms prevail and tribes cannot be subject to the provisions of this section or any others that contravene guaranteed rights. The award process should prioritize sales to tribes and/or indigenous people for commercial harvests let on tribes' ancestral lands. Some respondents want to be allowed to purchase product sales for conservation purposes, that is, for the express intent not to harvest.

Provisions regarding allowable harvesting techniques should be strengthened with allowable techniques specified in contracts. For example, where appropriate, the contracts should adopt state prohibitions against certain berry harvesting techniques.

*Response:* Most special forest products have been sold on permits and small sales to individuals or small companies. Large business has not purchased much of the sales for special forest products in the past. The Small Business Administration sets the size class for purchasers but to-date a need has not been demonstrated that special attention is needed to protect the individuals purchasing special forest products. Market conditions, available harvest quantities, and ecological impacts all are considered in the appraisal and contracting processes. Where appropriate, information is obtained from harvesters and buyers to develop the information needed for the appraisals and for determining sustainable harvest levels.

One commenter felt that \$10,000 is too high a level to trigger the advertisement process. The Agency agrees and when there is either competition for a product or the product availability is scarce, the Forest Service may advertise the product. A commenter noted that bidding might be one way to determine fair market value. The Agency agrees and this is part of the transaction appraisal system that the Agency uses. As to prioritizing sales, this is a local concern that needs to be determined on a case-by-case basis based upon treaty or other reserved rights.

Another commenter suggested that a person be able to purchase special forest products and then not have to harvest the product as a means for environmental protection. The Forest

Service disagrees in that the intent of the special forest products program is to provide products to the American public. There are sufficient other means to protect the sustainability of a product such as harvesting only within the sustainable harvest levels.

In response to the comment regarding bonding, in accordance with 36 CFR 223.224 and Forest Service policy, sales contracts, permits, or other authorized instruments may require the purchaser to furnish a performance bond or other security.

This rule honors and recognizes the historical treaty and reserved rights retained by Indian tribes, and it recognizes the importance of traditional and cultural forest products in the daily lives of Indians.

When preparing appropriate contract or permit instruments, forest officers may add approved special provisions and appropriate other conditions, regarding proper harvesting techniques, per section 223.239.

*Proposed Sections 223.233 Award to Highest Bidder and 223.234 Determination of Purchaser Responsibility*

Summary of Changes in Proposed Sections 223.233 and 223.234—(Final Rule Sections 223.233 and 223.234)

In Section 223.233, minor word changes were made for clarification purposes. Specifically added the word bidder to 233(a)(2)(ii) so that it now reads " \* \* \* next highest qualified bidder" as the term bidder was inadvertently left out in the proposed rule. Also clarified 223.233(a)(2)(iii), as the proposed rule referenced "conditions of the sale" and the final rule now references "conditions in the sale's prospectus" to reflect what document these conditions are found in.

In section 223.234, minor word changes were made for clarification purposes. The word purchaser was dropped from the title as the section also pertains to persons. The word person was used in 223.234(a) in place of the term purchaser to reflect the fact that not everyone harvesting forest products will be purchasing the products through a sale; some products may be obtained via permit (or even free use under section 223.239). The term declared high bidder was used throughout the section in place of the terms purchaser and prospective purchaser, as appropriate, because the declared high bidder on a contract is a contractor, but a declared high bidder on a permit is a person.

In section 223.234(6) regarding satisfactory performance, the agency

reference was changed from Forest Service to U.S Government, as these same persons could be currently working on other federal ownerships as well.

Section 223.234(c) was added to recognize that in some instances the declared high bidder may be relying on affiliates for financial backing and thus, the responsible forest officer needs to consider the affiliates possible past performance and integrity in regards to how they may affect the declared high bidder's ability to meet the applicable standards for responsibility.

*Comment:* The one commenter recommended that the Forest Service consider the use of best value criteria, rather than highest bidder, for the sale of special forest products because their experience has shown that best value criteria leads to more competent contractors and provides benefits to local communities.

*Response:* Historically the Forest Service has relied upon the timber regulations, including authorized bidding methods and award to highest bidder, for the sale of timber and other forest products including special forest products. The Forest Service does use best value awards under the stewardship contracting authority authorized under Section 323 of Public Law 108-7 (16 U.S.C. 2104 Note, as revised February 28, 2003 to reflect Sec. 323 of H.J. Res. 2 as enrolled). The stewardship contracting authority grants the Forest Service authority until September 30, 2010, to enter into stewardship contracting projects for up to 10 years with private persons or public or private entities, by contract or by agreement, to perform services to achieve land management goals for the national forests or public lands that meet local and rural community needs. A stewardship contract or agreement could potentially include timber or special forest products.

*Proposed Sections 223.235 Unilateral Delay, Suspension, or Modification of Contracts, Permits, or Other Instruments Authorizing the Sale of Special Forest Products; 223.236 Unilateral Termination; and 223.237 Request by Purchaser for Delay, Suspension, Modification, or Termination*

Summary of Changes in Proposed Sections 223.235, 223.236, and 223.237 (Final Rule Sections 223.235, 223.236, and 223.237)

Minor wording changes to sections 223.235 through 223.237. The word person was used in place of the term purchaser to reflect the fact that not everyone harvesting forest products will

be purchasing the products through a sale; some products may be obtained via permit. The word purchaser was dropped from the title of section 223.237, as the section also pertains to persons.

*Comment:* One commenter believes the belief that the Forest Service needs authority to suspend or terminate contracts in order to mitigate harm that has already been done, or prevent harm that might result following an unanticipated natural disaster such as a fire. Another commenter felt that a 10-year term was entirely too long to issue a commercial permit without the Forest Service having any recourse to pull a permit if resource damage is being done.

*Response:* The Forest Service already has the authority to suspend, modify, or terminate contracts to prevent or mitigate harm including that from an unanticipated natural disaster, under 36 CFR 223.235 and 223.236.

*Proposed Sections 223.238 Free Use Authorization to U.S. Army, Navy, and Air Force and 223.239 Free Use by Individuals*

Summary of Changes in Proposed Sections 223.238 and 223.239 (Final Rule Sections 223.238 and 223.239)

No changes were made to section 223.238.

Title and minor word and format changes were made to section 223.239, for clarity. The format of section 223.239 was restructured to provide ease of interpretation and continuity including clarification regarding when permits are or are not required. In addition 223.239(e) was added to reflect the treaty or other reserved rights regarding free use without a permit. Further, 223.239(f) was added to provide opportunities, upon request of the governing body of a Tribe.

*Comment:* Some commenters are concerned about the implications of the free use regulations, as written, on regional and national forest level relations with tribes. These commenters urge that line officers at local and regional levels be given the latitude to develop and honor agreements with local traditional gatherers. One commenter asserted that the Forest Service should consult with tribes prior to designating free use areas to avoid culturally sensitive areas. Another commenter noted that the provision to allow denial of harvest "to otherwise protect the forest" is too broad, although there is support for local flexibility. One commenter suggested that if free use permits are required, these should be issued to American Indians on an

annual basis and cover the full range of items harvested.

Many comments focused on the feasibility of addressing all the species and materials that are harvested in national forests and/or the capacity of the Agency to do so. These comments implicitly and explicitly suggested there is a strong distinction between large-scale commercial harvests and the types of activities that might be included under the terms of these sections, which is not reflected in the regulations as written. Commenters expressed strong concerns about the implications and logistics of implementing these sections. These commenters believe that a very large number of species and materials are harvested in national forests, mostly in small quantities and that the Agency does not have the capacity to write permits for every one of these species and materials and indicated that requiring regions to do so would negatively impact their other functions. The commenters also are concerned about the feasibility or reasonableness of monitoring every species and the material gathered, given the generally small harvest quantities. They feel that setting free use harvest levels is problematic and asked who would make the determination(s).

Another commenter noted that motivations and volumes needed for recreational collection, subsistence, and cultural observance are all very different. If free use harvest levels are set at what are considered to be appropriate levels for recreational collecting, there will be inadequate material available for subsistence and cultural observance.

Some commenters felt that subjecting free use permits to the same requirements as commercial permits would be "excessive and unenforceable."

Another commenter stated that if the regulations are implemented, a free use permit system and designated free use areas will be essential to the public's continued ability to engage in traditional gathering.

One commenter wanted to know the frequency with which one would have to obtain a free use permit, the items and amounts that would be covered, and where and when one would be required to get a permit.

Another commenter was concerned that exempting American Indians from free use permit requirements could lead to actions that would violate the Agency's racial profiling directives.

*Response:* Regional foresters are encouraged to resolve issues concerning the granting of permits to tribes, racial profiling, and implementation of these

regulations through the use of locally based partnerships, supplemental guidance and collaborative projects. Further discussion regarding agreements has already been addressed in the comment section titled "Existing Memoranda of Understanding or Agreement." In addition, compliance with Executive Order 13175 and Forest Service policy (FSM 1560) regarding consultation and coordination with Tribal Governments is required. Further discussion regarding consultation that took place has already been addressed in the background section titled "Tribal Impact Summary."

Special Forest Products must be offered for sale or free use in a manner that maintains these products on a sustainable basis. An analysis, prior to the issuance of a contract, permit, or other authorized instrument, is required to determine the effects on the sustainability level if a special forest product is harvested and sold, or provided for free use, and to determine whether there is sufficient information to establish a sustainable sale or offer level. The responsible forest officer shall also determine personal use harvest levels, which shall be consistent with sustainable harvest levels. Issues concerning amounts to be harvested under a permit, duration of permits, and the type of products authorized for harvesting under a permit will be considered when establishing sustainability levels of a particular product. All such decisions shall be made by the responsible forest officer under various sections of the rule including sections 223.219, 223.239, and 223.279.

Regarding permit requirements for free use versus commercial use, under section 223.215, a commercial sale of special forest products shall be governed by a contract, permit, or other authorizing instrument. Free use above the incidental-use harvest level shall be conducted under a permit, unless otherwise provided.

The forest officer may deny harvest of special forest products to protect public safety, prevent interference with Forest Service and/or commercial operations on a forest, ensure the sustainability of a special forest product, and to otherwise protect National Forest System Land.

It was never our intent to require a permit for every cone, berry, or nut, and particularly for personal, non-commercial use. Therefore, section 223.239(b) has been revised to allow free use and personal use without a permit up to the incidental use harvest level. Incidental use harvest levels are not recreational harvest levels, as one

commenter suggested. The incidental use harvest level covers small amounts of special forest products, such as cones, mushrooms, berries, acorns, black walnuts, or medicinal roots. Any free use of a special forest product that does not have an incidental-use harvest level is subject to the permit requirements under section 223.239. Section 223.239(b) now provides that "[n]o permit is required for the free use of a special forest product at or below that product's incidental use harvest level, which shall be determined at the discretion of the Regional Forester or a Subordinate Officer."

The Agency has the capacity to address all the special forest in the National Forest System. Not every special forest product is found on every national forest. The regulations provide regional foresters discretion regarding determining free use without a permit up to the incidental use harvest levels. Also, the regulations allow forest officers to set conditions or deny free use harvest of a special forest product for a number of specified reasons. The free use regulations in section 223.239 are for personal, non-commercial use rather than large scale commercial harvests as noted by one commenter. Regarding feasibility or reasonableness of monitoring special forest products, although monitoring of established harvest levels is required (223.219(c)) the required "at least once every three fiscal years" time frame may be "or as otherwise established" by the regional forester (223.219(c)).

Finally, nothing in the final rule will result in Forest Service law enforcement officers engaging in racial profiling.

*Comment:* One commenter, a law enforcement officer, expressed concern about the 36 CFR 261.6 regulations. The commenter was concerned that the existing regulations prohibit the sale or exchange of timber or other forest products obtained under free use would not have been interpreted as including special forest products or forest botanical products.

*Response:* The rule revises 36 CFR 261.6(f) to reflect the new free use and personal use authorizations contained in subparts G and H. In addition, the rule specifies the types of contractual documents currently used by the Forest Service, explains the Forest Service's interpretation of the term "other forest products," and makes minor textual clarifications. The final rule makes these changes as discussed in the preamble section titled "36 CFR 261.6—Timber and other forest products."

#### *Proposed Section 223.240 Indian Tribes and Treaty and Other Reserved Gathering Rights*

##### Summary of Changes in Proposed Section 223.240 (Final Rule Section 223.240)

Title and minor wording changes for clarification purposes. In response to comments, we changed the wording that "any decision restricting tribal off-reservation treaty rights needs to be well documented" to "Regional Foresters will provide a Tribe with treaty or other reserved rights related to special forest products that is prohibited from harvesting a special forest product, with written documentation supporting the decision." This final rule is consistent with the Forest Service's trust responsibilities. Further, as mentioned in the response titled "consultation," the Forest Service consulted with federally-recognized Tribes early on matters related to this rule.

*Comment:* A commenter objected that the section-by-section discussion introduced significant elements not included or evident in the text of the regulations themselves, particularly with regard to Tribes and tribal access. Another commenter suggested that principles three and four of the International Standard for Sustainable Wild Collection of Medicinal and Aromatic Plants (ISSC-MAP) may be useful in modifying this section. Those principles are: Principle 3—Complying with Laws, Regulations, and Agreements and Principle 4—Respecting Customary Rights.

*Response:* The section-by-section analysis in the proposed rule did not introduce any new significant elements. The section-by-section analysis was only intended to further explain the proposed rule. We appreciate the comment about the ISSC-MAP information.

#### *Proposed Section 223.241 Disposal of Seized Special Forest Products*

##### Summary of Changes in Proposed Section 223.241 (Final Rule Section 223.241)

Minor word and format changes were made to this section. The list of parties to whom free use of seized products may be made available, was eliminated. The proposed rule appeared more restrictive and change was made as the proposed rule language unintentionally limited the parties to whom disposal of seized special forest products may be made available and also unintentionally appeared to place a priority order to the parties listed.



*Comment:* Some commenters expressed the sentiment that it is wasteful to destroy seized special forest products/forest botanical products. Others indicated that Tribes should be included in the list of institutions and/or given preference in the disposition of seized special forest products/forest botanical products. One respondent calls for the inclusion of provisions for Agency accountability in relation to seizure of special forest products/forest botanical products, particularly when it occurs in remote areas. Specifically, the commenter states that “identities of the chain of control of evidence must be made available to defendants, and defendants must be given a written receipt listing the exact weight and a written description of the material confiscated, including containers, fasteners, and carrying devices.” Another commenter believes that the list of criteria for seized material that cannot be disposed of is too broad and should be limited to species listed under the Endangered Species Act list or listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

*Response:* The Forest Service may make seized products available for free use or sale rather than destroy them. The proposed rule appeared more restrictive and change was made as the proposed rule language unintentionally limited the parties to whom disposal of seized special forest products may be made available and also unintentionally appeared to place a priority order to the parties listed. All parties, other than the person who collected the products illegally, and in any priority order may be considered by the Forest Service when making seized products available. The Forest Service is not authorized to sell or dispose of seized special forest products that are (1) listed or proposed for listing as threatened or endangered under the Endangered Species Act, (2) identified as prohibited for sale or trade under the Convention on International Trade in Endangered Species (CITES); or (3) listed on the regional forester’s sensitive plant list, species of concern or interest, or species of interest list.

Regarding the chain of custody comment, products harvested illegally remain the property of the United States and are recorded in the Law Enforcement Officer’s evidence log.

*Proposed Section 223.242  
Supplemental Guidance, Memorandum of Agreements and Memorandum of Understandings*

Summary of Changes in Proposed Section 223.242

This section was added to the final rule in response to numerous comments regarding the potential need for supplemental guidance, memorandums of understanding, and memorandums of agreement for effective implementation of the final rule. The Forest Service agrees that supplemental guidance and other agreements are important tools that may be helpful to promote local collaboration, issue resolution, and local implementation of these regulations. Existing Memorandum of Agreements and Memorandum of Understandings will be allowed to continue but must be made consistent with subparts G and H within 24 months from December 29, 2008 or those agreements will terminate. The period of 24 months was chosen to provide sufficient time for review and consultation with Tribes or discussions with other agreement parties in the revision process.

**Subpart H—Forest Botanical Products**

*Proposed Sections 223.275;  
Establishment of a Pilot Program;  
223.276 Applicability; and 223.277  
Definitions*

Summary of Changes in Proposed Sections 223.275, 223.276, and 223.277 (Final Rule Sections 223.275, 223.276, and 223.277)

Minor word changes were made to section 223.275 that clarify the pilot program’s duration. In addition, minor word changes were made in sections 223.276 and 223.277 for clarity.

*Comment:* A few commenters asked for clarification regarding the two dates presented in the discussion of the forest botanical products pilot program (September 30, 2009 versus September 30, 2010).

*Response:* The Secretary of Agriculture may collect fees under the pilot program authority through September 30, 2009, when the program terminates unless extended or made permanent by Congress. Collected funds may be spent on items authorized by the pilot program through September 30, 2010, as identified in section 223.282, and authorized by 16 U.S.C. 528.

*Proposed Section 223.278 Collection of Fees*

Summary of Changes in Proposed Section 223.278 (Final Rule Section 223.278)

Language was added to this section to clarify that the fair market value of forest botanical products equals the appraised value determined in accordance with section 223.222. In addition, the title of this section was changed for clarity.

*Comment:* Commenters are generally supportive of charging fees for commercial harvest of special forest products/forest botanical products on national forests, but did not agree with fees for personal harvest or for harvesting by Tribes and American Indian individuals. Commenters are concerned that if fees are charged, they be set at appropriate levels. Some commenters suggested that fees be set at 3% of a product’s value at the point of harvest. Many commenters stated that the Forest Service must or should consult harvesters (in particular), buyers, and/or their representatives in this and all decision making processes required by the proposed regulations. Respondents also stated their “belief that the proposed rule does not reflect the intent of Congress’s 2004 pilot program amendments, which only require the Forest Service to collect a portion of the fair market value and program administration costs; the original legislation required collection of not less than fair market value and all costs.

*Response:* Per section 223.279 of this rule, a person may harvest a forest botanical product from National Forest System lands free of charge for personal, non-commercial use up to the product’s personal-use harvest level. In addition, a permit is not required for personal use below a product’s incidental use harvest level, which shall be determined at the discretion of the regional forester or a subordinate officer.

In response to the comment that fees should be set at 3% of the product value, the standard rate established must equal or exceed the minimum rates (see section 223.221; FSM 2431.21b; and FSM 2431.31c). Forest supervisors are directed to set standard rates at the pre-harvested fair market value of the product, 10 percent (rather than the 3 percent suggested by the commenters) of the wholesale market value, or the minimum rate, whichever is higher (FSH 2409.18, 87.3).

Fees are required to be charged for all forest botanical products to recover a portion of the fair market value and a portion of the costs associated with

granting, modifying, or monitoring the harvest of forest botanical products through permits, contracts, or other authorized instruments issued for such products. However, under section 223.280, the Forest Service waives the collection of fees otherwise required, pursuant to section 223.278, for federally-recognized 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 for reasons similar to those provided in section 223.240 of subpart G. This final rule also waives fees for Tribes with treaty or other reserved rights seeking to harvest forest botanical products for cultural, ceremonial, and/or traditional purposes in accordance with such treaty or other reserved rights. Such purposes must be non-commercial, and any such harvest may be conditioned or denied for reasons similar to those provided in section 223.240 of subpart G. Tribes with treaty or other reserved rights were added to the final rule to recognize their rights to forest botanical products for cultural, ceremonial, and/or traditional purposes in accordance with such treaty or other reserved rights.

Regarding the commenter who stated their "belief that the proposed rule does not reflect the intent of Congress's 2004 pilot program amendments, which only require the Forest Service to collect a portion of the fair market value and program administration costs, the responsible forest officer ensures that the sale price of any forest botanical product includes a portion of the product's fair market value and a portion of the costs incurred by the Department of Agriculture (section 223.278). The Forest Service determines the costs incurred by the Department of Agriculture associated with granting, modifying, or monitoring the authorization for harvest of forest botanical products, including the costs of any environmental or other analysis (section 223.278). The Forest Service only has to collect the sum of the portions of fair market value and costs which then make up the sale price of the forest botanical product and which must be equal to or greater than the forest botanical product's fair market value (section 223.278). Per Section 223.278, the fair market value of forest botanical products is equal to the appraised value, and appraised values of forest botanical products are determined in accordance with section 223.222.

*Proposed Section 223.279 Personal Use Harvest Levels and Waiver of Fees*

Summary of Changes in Proposed Section 223.279 (Final Rule Sections 223.279 and 223.280)

For clarification, this section 223.279 was split into section 223.279 Personal use, and section 223.280 Waiver of fees and/or fair market value, and minor word and format changes were made. In addition, Tribes with treaty or other reserved rights were added to recognize their rights to forest botanical products for cultural, ceremonial, and/or traditional purposes in accordance with such treaty or other reserved rights.

*Comment:* Comments included (1) waivers should be provided to all federally-recognized Tribes (regardless of applicability of treaty and reserved rights), (2) treaty rights do not limit harvesting to non-commercial purposes, and (3) permits and fees may not be (or should not be) required for the exercise of treaty rights. Other commenters expressed the belief that personal use harvesting by American Indians is different from that of the general public and should be provided for differently by the regulations as a whole. Those commenters described several key aspects of traditional gathering that may not be accommodated by the current regulations. These aspects include the frequency of traditional gathering, which, for many species and materials, can occur year round or spontaneously in conjunction with other activities, and the inability to predict harvest conditions such as location and timing in advance. Further, commenters noted that traditional gathering is often a group activity and because of cultural norms and roles, "personal use" gathering often involves harvesting amounts to share with others and/or provide for community functions.

At least one commenter is not opposed to requiring free permits for American Indians. Others suggested (1) issuing American Indians annual permits, for the entire traditional gathering area that apply to the full range of species and materials harvested, (2) making tribal, family and/or group permits available, and (3) ensuring that allowable harvest levels accommodate American Indian cultural norms.

Several commenters questioned the methods for setting personal use levels, suggesting that doing so is culturally dependent and requires a knowledge base that forest Service personnel rarely possess. One commenter asserted that they should determine what qualifies as traditional gathering, while another commenter stated that they should be

involved in setting personal use levels for non-treaty harvests. A commenter expressed concern that personal use harvest limits will be set for recreational use levels and suggested that subsistence be established as a separate harvest level category.

Another commenter stated that legislation provides for broad authority to waive fees under the regulations. They proposed that fees be waived when gathering is done for: (1) Educational purposes, (2) non-commercial cultural, ceremonial and/or traditional purposes by people from any ethnic or cultural background (with examples of such purposes given), or (3) "salvage because other management activities will destroy or damage the product."

*Response:* Section 223.279 of the rule references section 223.240 which states, in part, Tribes with treaty or other reserved rights retain their rights to harvest special forest products in accordance with the terms of such rights.

It was never the Agency's intent to require issuance of a permit or charge a fee for every cone, berry, or nut. The rule is being clarified at 223.239 to allow incidental amounts (those at or below the personal use harvest level) of free use without a permit, as determined by the regional forester or a subordinate officer. Section 223.279(c) references section 223.239 subpart G regarding personal use of a forest botanical product.

The responsible forest officer is required, per section 223.278, to ensure that the sale price of any forest botanical product includes at least a portion of the product's fair market value of the product and a portion of the costs associated with administering the pilot program. Section 223.221 requires the Chief to establish minimum rates for the sale of special forest products or groups of special forest products. In addition, section 223.222 requires the Chief to determine the appraised value of special forest products, with valid methods including, but not limited to, transaction evidence appraisals, analytical appraisals, comparison appraisals, and independent estimates based on average investments. Special forest products are required to be sold at minimum rates or appraised values, whichever is higher.

Fees are required to be charged for all forest botanical products to recover a portion of the fair market value and a portion of the costs associated with granting, modifying, or monitoring the harvest of forest botanical products through permits, contracts, or other authorized instruments issued for such

products. However, under section 223.280, the Forest Service waives the collection of fees required, pursuant to section 223.278, for federally-recognized 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 for reasons similar to those provided in section 223.240 of subpart G. This final rule also waives fees for Tribes with treaty or other reserved rights seeking to harvest forest botanical products for cultural, ceremonial, and/or traditional purposes in accordance with such treaty or other reserved rights. Such purposes must also be non-commercial, and any such harvest may be conditioned or denied for reasons similar to those provided in section 223.240 of subpart G. The Forest Service also waives the collection of fees otherwise required, under section 223.280, pursuant to section 223.278 when a regional forester or forest supervisor, having proper authorization from the Chief, makes a written determination that the harvest of a specified forest botanical product will facilitate non commercial scientific research such as species propagation or sustainability, or a forest botanical product is salvage because other management activities will destroy or damage the product.

Free use amounts authorized by the designated official should not exceed amounts under 36 CFR 223.8.

#### *Proposed Section 223.280 Monitoring and Revising of Harvest Levels*

Summary of Changes in Proposed Section 223.280 (Final Rule Section 223.281)

This section was renumbered to 223.281. For clarification purposes, the word "sustainable" was added to the title of this section, to read "Monitoring and Revising Sustainable Harvest Levels." Minor word changes were also made to this section. Further, the proposed rule included federally-recognized Tribes seeking to harvest forest botanical products for cultural, ceremonial, and/or traditional purposes. Tribes with treaty or other reserved rights are now being added to recognize their rights to forest botanical products for cultural, ceremonial, and/or traditional purposes in accordance with such treaty or other reserved rights.

*Comment:* About one-fifth of the commenters discussed the 3-year monitoring cycle required by section 223.280, as set forth in section 223.219. Some stressed that many special forest products/forest botanical products

exhibit high degrees of inter-annual variability, making a 3-year return cycle too long for some species and too short for others. These comments suggest adopting species-specific monitoring cycles that match "the cycles of the products being harvested."

Several comments suggested that the Forest Service lacks the expertise and/or resources to conduct the required monitoring. Nearly all believe that the proposed regulations should be revised to require the involvement of commercial harvesters, buyers, and/or non-commercial local gatherers in the development and implementation of sound monitoring processes. Many also advocated required training for Forest Service personnel on special forest product/forest botanical product monitoring and harvester involvement. One commenter further suggested that involving harvesters in the monitoring effort would accomplish needed monitoring with fewer Forest Service resources. Some of these commenters also noted the importance of using the best available science for monitoring and revising harvest limits, with one suggesting that Forest Service and other researchers could provide valuable assistance in this regard. Two commenters stated that required monitoring should include monitoring of site conditions.

Some commenters were concerned about the reasonableness and feasibility of monitoring every species and material harvested on national forests. A clear distinction was drawn between commercial and non-commercial harvests in this regard, with the commenter requesting that they be allowed flexibility to monitor what they known to be ecologically and/or socially or culturally sensitive. Another stated that monitoring sustainability will be difficult if free use is not tracked. One commenter suggested that issuing free use permits to tribal members and individuals could serve as a monitoring strategy.

Another commenter requested that public gathering not be restricted unless monitoring indicates a clear need to do so. One commenter questioned the adequacy of the Forest Service's Timber Information Manager (TIM) database for monitoring or satisfying the requirement that the baseline levels be set based on the previous 3 years. Another commenter believes that the monitoring provisions are inadequate and calls for at least annual monitoring after sound baselines are established.

*Response:* The comments in this section are similar to those in section 223.219 and have been addressed there.

#### *Proposed Section 223.281 Disposition of Collected Fees*

Summary of Changes in Proposed Section 223.281 (Final Rule Section 223.282)

Section was renumbered to 223.282 due to changes made to 223.279 and 223.280. In addition, minor word and format changes were made to the title and regulatory text for clarification purposes.

*Comment:* Some commenters felt that Tribes may be legally entitled to a portion of the fees collected from the sale of forest botanical products. Other commenters stated funds should be spent to enforce the program, conduct inventory and monitoring, manage special forest products and forest botanical products, and develop and protect traditional and cultural properties.

*Response:* Federal ownership of timber and other forest products, and the Forest Service's authority to administer the products, collect monies from the sale of such products, as well as the authority to retain, use, and distribute the monies collected, is derived from a number of statutes, including the Organic Administration Act of June 4, 1897 (Ch. 2, 30 Stat. 11, as amended: 16 U.S.C. 473-475, 477-482, 551), NFMA, and the pilot program law. There are no provisions in these statutes authorizing the Secretary of Agriculture or the Forest Service to distribute a portion of the fees collected for forest products to Tribes.

The Agency agrees with the commenters who suggested that fees collected under the pilot program should be used to pay for costs associated with conducting inventories of forest botanical products and management of the products. The funds collected pursuant to the pilot program law will be used in accordance with section 223.282.

#### **Regulatory Certifications**

##### *Regulatory Impact*

This final rule has been reviewed under U.S. Department of Agriculture 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 final 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 final rule will not interfere with an action taken or planned by another agency nor raise new legal or policy

issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this final rule is not subject to OMB review under Executive Order 12866.

#### *Proper Consideration of Small Entities*

This final 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 final rule will have no adverse impact on small business, small not-for-profit organizations, or small units of government.

#### *Environmental Impact*

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

#### *Civil Justice Reform*

This final 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 final 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 final 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 final 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 federally-recognized Tribes in all Forest Service regions. Regional foresters and forest supervisors 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 final rule.

#### *Controlling Paperwork Burdens on the Public*

This final rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320, other than:

(a) 0596–0085 Forest Products Free Use Permit, Forest Products Removal Permit/Cash Receipt, Forest Products Sale Permit/Cash Receipt;

(b) 0596–0066 Bid for Advertised Timber; and

(c) 0596–0086 Operating Plans.

Therefore, this final rule 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 final 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 final 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.

##### *36 CFR Part 261*

Law enforcement, National forests.

■ Therefore, for the reasons set forth in the preamble, the Forest Service amends 36 CFR Parts 223 and 261 as follows:

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

■ 1. Revise the authority citation for part 223 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 to read as set forth above.

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

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

- 223.215 Applicability.
- 223.216 Special Forest Products 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.  
 223.225 Term.  
 223.226 Term adjustment 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 Authorizing Instruments

- 223.233 Award to highest bidder.  
 223.234 Determination of 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 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 Tribes and treaty and other reserved rights.  
 223.241 Disposal of seized special forest products.  
 223.242 Supplemental guidance, memorandums of agreement, and memorandums of understanding.

#### Subpart H—Forest Botanical Products

- 223.275 Establishment of a pilot program.  
 223.276 Applicability.  
 223.277 Forest botanical products definition.  
 223.278 Sale of forest botanical products and collection of fees.  
 223.279 Personal use.  
 223.280 Waiver of fees and/or fair market value.  
 223.281 Monitoring and revising sustainable harvest levels.  
 223.282 Deposit and expenditure 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 sale and free use. 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 (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, until termination of the forest botanical pilot program. A commercial sale of special forest products shall be governed by a contract, permit, or other

authorizing instrument. Free use above the incidental-use harvest level shall be conducted under a permit, unless otherwise provided.

##### § 223.216 Special Forest Products definitions.

As used in this subpart:  
*Person*: Any individual, partnership, corporation, association, Tribe, or other legal entity.  
*Special forest products*: Products collected from National Forest System lands that include, but are not limited to, 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. Special forest products do 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 authorizing instrument shall include, as appropriate, provisions requiring the person 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 with a curator of a nationally recognized herbarium in North America as identified in the *Index Herbariorum*

when the permit, contract, or other authorizing instrument allows bioprospecting.

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

(a) *Sustainable harvest levels*. Prior to offering a special forest product for sale or free use, the responsible forest officer must determine the product's sustainable harvest level. A special forest product's sustainable harvest level is the total quantity of the product that can be harvested annually in perpetuity on a sustained yield basis. Responsible forest officers shall not authorize harvest or free use of special forest products in an amount exceeding known sustainable harvest levels. In determining a sustainable harvest level, the responsible forest officer may consider harvest levels of the product for the previous three years, if such information is available. Responsible forest officers may consider factors such as year-to-year and site-to-site variability, climate, weather change, geographic scale, and scientific data available prior to making their sustainability determination and establishing monitoring time frames consistent with paragraph (c) of this section. Responsible forest officers will consult with Tribes, to the extent appropriate, to determine sustainable harvest levels based on historical information. In addition, responsible forest officers may consult with other appropriate parties to determine sustainable harvest levels based on historical information.

(b) *Harvest of protected species*. The sale or free use of special forest products listed or proposed for listing as endangered or threatened under the Endangered Species Act is prohibited, except as authorized by the U.S. Fish and Wildlife Service. Moreover, regional guidelines will identify when the sale or free use of any special forest product listed on the Regional Forester's sensitive plant list, species of concern list, species of interest list, or protected under the Convention on International Trade in Endangered Species may be authorized.

(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 on the sustainability of special forest products. Such monitoring may include, but is not limited to, 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 minimum rates for the sale of special forest products or groups of special forest products. Products must be sold for appraised value or minimum rates, whichever is higher. No products may be sold or harvested for less than minimum rates except to provide for the removal of insect infested, diseased, dead or distressed products.

**§ 223.222 Appraisal.**

The Chief of the Forest Service shall determine the appraised value of special forest products. Valid methods to determine appraised 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 sale of special forest products shall require advance payment, unless the contract, permit, or instrument authorizes the person 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 person or their successor in interest, subject to the requirements of the Debt Collection Improvement Act.

**§ 223.224 Performance bonds and security.**

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

**§ 223.225 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 Secretary of Agriculture finds that better utilization of the various forest resources consistent with the Multiple-Use Sustained-Yield Act of 1960, as amended (16 U.S.C. 528–531) will result. Any such finding by the Secretary of Agriculture shall be made in writing.

**§ 223.226 Term adjustments for force majeure delay.**

Contracts or other authorizing instruments for the sale of special forest products, excluding permits, may contain a provision allowing the term to be extended if circumstances beyond the person's reasonable control delay performance. In determining whether such an extension is appropriate, responsible forest officers shall consider the value of the products or species, the length and type of authorizing instrument, the need for early/accelerated harvest, and any other appropriate factors. Circumstances beyond a person's reasonable control 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 responsible forest officer may grant such an extension upon finding:

- (a) Circumstances beyond the person's reasonable control delayed performance; and
- (b) The person has diligently performed in accordance with the contract or other authorizing instrument.

**Advertisement and Bids**

**§ 223.227 Sale advertisement.**

(a) The Forest Service shall advertise any special forest products sales with an appraised value equal to or greater than \$10,000 for at least 30 days, except as provided in paragraph (c) of this section.

(b) When the sale's appraised value 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 the sale for no less than 7 days.

(c) Notwithstanding paragraphs (a) and (b) of this section, the Forest Service may, at its discretion, sell any special forest products without advertisement, or advertise a special forest products sale for a period less than 30 days if:

- (1) Deterioration of a special forest product threatens its value; or
- (2) The products were previously advertised for competitive bidding and no satisfactory bids were received; or

(3) The products are remaining from expired, cancelled, or abandoned contracts, permits, or other authorizing 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 for a product and the amount or rate of any deposits required in addition to the unit price of a product;
- (b) The amount of the bid guarantee that must accompany each bid;
- (c) The amount of the deposit or downpayment the successful bidder must make 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 authorizing instrument to be used for the sale;
- (i) The termination date and normal operating season, if any, of the contract, permit, or other authorizing instrument;
- (j) The amount of performance bond required; and
- (k) Such additional information about the sale as the Forest Service deems appropriate in order to encourage bidders to perform on-site investigations.

**§ 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.**

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:

- (a) Ensure open and fair competition;
- (b) Ensure that the Federal

Government receives minimum rates or appraised value, whichever is higher;

(c) Be consistent with the National Forest Management Act and other applicable federal laws;

(d) Require, as a prerequisite to participation in an oral auction, that a bidder 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; and

(e) Specify the use of sealed bids or a mix of bidding methods in the affected 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 bidder for special forest products to disclose its relationship with other potential bidders or operators. Such disclosure may include a certified statement listing:

- (a) Stockholders or members of the bidder's firm;
  - (c) Officers;
  - (d) Members of the board of directors;
- or

(e) Holders of bonds, notes, or other types of debt.

**Award of Contracts, Permits, or Other Authorizing 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 special forest products sale to the responsible bidder that submits the highest bid that conforms to the sale conditions in the prospectus.

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

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

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

(iii) 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.

(iv) If no bids meet the specified conditions in the sale's prospectus, or if there are other irregularities in the bidding process, the Forest Service may reject all bids, and, at its discretion, reoffer the sale.

(b) [Reserved]

**§ 223.234 Determination of responsibility.**

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

(b) In order to make an affirmative determination of responsibility, the Contracting Officer must find that:

(1) The declared high bidder has adequate financial resources to perform the contract, permit, or other authorizing instrument, or the ability to obtain such resources;

(2) The declared high bidder is able to complete the contract, permit, or other authorizing instrument within the relevant term, taking into consideration the declared high bidder's other existing commercial and governmental obligations;

(3) The declared high bidder has a satisfactory record of integrity and business ethics;

(4) The declared high bidder has or is able to obtain equipment and supplies suitable for harvesting the special forest product(s) and for meeting applicable resource protection requirements;

(5) The declared high bidder is otherwise qualified and eligible to receive an award of a contract, permit, or other authorizing instrument under all applicable laws and regulations;

(6) The declared high bidder has a satisfactory performance record on contracts, permits, and other agreements with the U.S. Government. Failure to apply sufficient diligence and perseverance to perform a contract, permit, or other instrument is strong evidence that a declared high bidder is not responsible. A declared high bidder that is, or has been deficient in performance shall be deemed not

responsible, unless the declared high bidder demonstrates that the deficiency arose from circumstances beyond their reasonable control.

(c) Affiliated concerns, as defined in 36 CFR 223.49(a)(5), are normally considered separate entities in determining whether the declared high bidder that is to perform the contract meets the applicable standards for responsibility. However, the responsible Forest Officer shall consider an affiliate's past performance and integrity when they may adversely affect the responsibility of the declared high bidder.

**§ 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 or free use of special forest products for any of the following reasons:

(1) To prevent actual or potential harm to the environment, including without limitation, 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) Existing or threatened litigation that might affect or involve a person's harvest of special forest products; or

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

(b) *Compensation.* (1) The Forest Service may compensate a person for the unilateral delay, suspension or modification of a contract, permit, or other authorizing instrument in accordance with the applicable provisions set forth in such document or, in the absence of such provisions, in accordance with applicable Forest Service methods and procedures in effect when a claim for compensation is submitted, giving due consideration to the cause, duration, and financial impact of the delay, suspension or modification.

(2) A person submitting a claim must comply with claim provisions in the governing contract, permit, or other authorizing instrument, or, in the absence of such provisions, must submit a written claim for compensation

accompanied by supporting documentation that fully substantiates the claim.

(c) *Authority to unilaterally delay, suspend or modify.* The Contracting Officer administering the sale or a responsible superior officer may delay, suspend, or modify the contract, permit, or other authorizing instrument by issuing instructions to a person to delay, suspend, or modify operations. Such instructions to delay, suspend or modify shall be issued to a person in writing, except when exigent circumstances warrant oral communication, in which case the officer shall promptly follow-up in writing.

**§ 223.236 Unilateral termination.**

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

(1) Any of the reasons provided in § 223.235(a);

(2) Material breach or continued violation of the contract, permit or other authorizing instrument;

(3) Violation of any Federal or State laws or regulations related to:

(i) Obtaining, attempting to obtain, selling, trading, or processing special forest products;

(ii) Obtaining, attempting to obtain, or performing a public contract or subcontract;

(iii) Harming or damaging public lands or protected species; or

(iv) Business integrity, honesty, or responsibility.

(b) *Compensation.* (1) The Forest Service may compensate a person for the unilateral termination of a contract, permit, or other authorizing instrument in accordance with the applicable provisions set forth in such document or, in the absence of such provisions, in accordance with applicable Forest Service methods and procedures in effect when a claim for compensation is submitted, giving due consideration to the cause, duration, and financial impact of the termination.

(2) A person submitting a claim must comply with claim provisions in the governing contract, permit, or other authorizing instrument, or, in the absence of such provisions, must submit a written claim for compensation accompanied by supporting documentation that fully substantiates the claim.

(3) No compensation shall be provided 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 to unilaterally terminate.* The Chief, or the Chief's designee, has

the authority to unilaterally terminate a contract, permit, or other instrument authorizing the sale or free use of special forest products. Any such termination shall be issued in writing, except when exigent circumstances warrant oral communication, in which case a written communication shall follow promptly.

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

(a) *Request.* A person authorized to harvest special forest products may request delay, suspension, modification, or termination of their contract, permit, or other authorizing instrument pursuant to the provisions set forth in the contract, permit, or instrument, if any, or for another reasonable cause, including without limitation, catastrophic damage to the product or substantially changed market conditions. Any such request must be submitted in writing and include 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 in the contract, permit, or other authorizing instrument, or, in the absence of such provisions, respond in a manner that is reasonable in light of the request's circumstances. The Forest Service may deny any request, in whole or in part, in accordance with the provisions of the relevant contract, permit, or instrument, or, in the absence of such provisions, at the Agency's discretion.

(c) *Authority.* The Contracting Officer administering a sale or a superior officer has the authority to deny or grant any request by a person authorized to harvest special forest products to delay, modify, suspend, or terminate a contract, permit, or other authorizing instrument. The Forest Service's response to a request for delay, modification, suspension, or termination shall be issued in writing, except when exigent circumstances warrant oral communication, in which case a written communication shall follow promptly.

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

Subject to delegations of authority by the Chief, 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.* A person may harvest a special forest product from National

Forest System lands free of charge for personal, non-commercial use up to the amount or quantity authorized by a designated Forest Service officer, a Forest Supervisor, or a Regional Forester, as delegated at 36 CFR 223.8.

(b) *Free use without a permit up to the incidental use harvest level.* No permit is required for the free use of a special forest product at or below that product's incidental-use harvest level, which shall be determined at the discretion of the regional forester or a subordinate officer. The incidental use harvest level covers small amounts of special forest products, such as cones, mushrooms, berries, acorns, black walnuts, or medicinal roots. Any free use of a special forest product that does not have an incidental-use harvest level is subject to this section's permit requirements.

(c) *Free-use permit requirement.* No person seeking free use of a special forest product, except one identified in § 223.239(e), may harvest a special forest product above the product's incidental-use harvest level without submitting an application to a forest officer and obtaining a free-use permit, unless the permit requirement has been waived for a specific special forest product in a designated free-use area.

(d) *Contents of the permit.* The permit shall indicate the type, amount, and/or value of the product to be harvested, the permit's duration, and shall contain other restrictions and requirements as appropriate.

(e) *Free use without a permit for members of Tribes with treaty or other reserved rights related to special forest products.* A member of a Tribe with treaty or other reserved rights related to special forest products retains his/her ability to harvest such products in full accordance with existing rights, including free-use harvest without obtaining a free-use permit, as specified in treaty or other reserved rights.

(f) *Free use without a permit upon the request of the governing body of a Tribe.* At the Agency's discretion, responsible forest officers may, upon the request of an authorized representative of the governing body of a Tribe, issue a permit that would not otherwise be required under paragraph (e) of this section to a Tribe with treaty or other reserved rights related to special forest products for the free use of a specified quantity of special forest products. That Tribe may then allocate specified quantities of the special forest product(s) to individual Tribal members, up to the maximum amount specified in the Tribal free-use permit. Any Tribe issued such a permit must provide the Forest Service with



information related to the permitted harvest, upon request.

(g) *Free-use restrictions.* A Forest Officer may set conditions on the free-use harvest of a special forest product or deny the free use of a special forest product. Reasons for denying free-use access or setting conditions on free use, except as specified in § 223.240, may include, but are not limited to:

- (1) Ensuring public safety;
- (2) Preventing interference with Forest Service and/or commercial operations;
- (3) Ensuring the sustainability of a special forest product; or
- (4) Otherwise protecting National Forest System land.

(h) *Unilateral termination of a free-use permit.* The responsible forest officer, or any superior officer, may terminate a free use permit without compensation at any time for reasons including, but not limited to, resource protection, weather factors, fire season, road access, conflicts with other users, or permit violations.

(i) *Subsistence in Alaska.* This section does not affect subsistence uses implemented under Title VIII of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101–3126).

**§ 223.240 Tribes and treaty and other reserved rights.**

Tribes with treaty or other reserved rights related to special forest products retain their ability to harvest special forest products in full accordance with existing rights. However, consistent with all applicable rights, Regional Foresters may set conditions on Tribes with treaty or other reserved rights related to special forest products to protect the sustainability of special forest products or to otherwise protect National Forest System land. Regional Foresters may only prohibit Tribes with treaty or other reserved rights related to special forest products from harvesting a special forest product to protect public health and safety or to ensure sustainable harvest levels. Regional Foresters will provide a Tribe with treaty or other reserved rights related to special forest products that is prohibited from harvesting a special forest product with written documentation supporting the decision.

**§ 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 by sale or free use. Any sale of such products shall be conducted in accordance with the

requirements of this subpart; however, no seized special forest products shall be sold to the person who collected them illegally. The Forest Service shall not dispose of a seized product by sale or free use if that product is:

- (a) Listed or proposed for listing as threatened or endangered under the Endangered Species Act;
- (b) Identified as prohibited for sale or trade under the Convention on International Trade in Endangered Species; or
- (c) Listed on the Regional Forester's sensitive plant list, species of concern list, or species of interest list.

**§ 223.242 Supplemental guidance, Memorandum of Agreements and Memorandums of Understanding.**

Consistent with subparts G and H of this part, regional foresters may issue supplemental guidance and approve Memorandums of Agreement and Memorandums of Understanding to promote local collaboration, issue resolution, and local implementation of these regulations. Existing Memorandums of Agreement and Memorandums of Understanding related to forest products must be made consistent with subparts G and H within 24 months from December 29, 2008 or those agreements will terminate.

**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, unless extended or made permanent by Congress.

**§ 223.276 Applicability.**

This subpart applies to the sale and free use of forest botanical products, as defined in § 223.277, from National Forest System lands, until September 30, 2009, unless the pilot program is extended or made permanent by Congress. The Forest Service shall dispose of 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 Forest botanical products definition.**

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

*Forest botanical products are:* Naturally occurring special forest products, including, but not limited to, 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. Forest botanical products are not 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 Sale of forest botanical products and collection of fees.**

The responsible Forest Officer shall ensure that the sale price of any forest botanical product includes a portion of the product's fair market value and a portion of the costs incurred by the Department of Agriculture associated with granting, modifying, or monitoring the authorization for harvest of forest botanical products, including the costs of any environmental or other analysis. The fair market value of forest botanical products shall be equal to the appraised value determined in accordance with § 223.222. The sum of the portions of fair market value and costs making up the sale price must be greater than or equal to the forest botanical product's fair market value. All other aspects related to the sale of forest botanical products shall be governed under 36 CFR part 223 Subpart G.

**§ 223.279 Personal use.**

(a) *Personal use.* A person may harvest forest botanical products from National Forest Systems lands free of charge for personal, non-commercial use up to the personal-use harvest level.

(b) *Personal use harvest level.* In conjunction with determining sustainable harvest levels under § 223.219, the responsible Forest Officer shall determine personal-use harvest levels for specific forest botanical products, which shall be equal to the amount or quantity authorized for free use under § 223.239(a).

(c) *Personal-use permit requirement.* A person seeking personal use of a forest botanical product must comply with the free-use permitting requirements of § 223.239.

**§ 223.280 Waiver of fees and/or fair market value.**

The Forest Service waives the collection of fees otherwise required pursuant to § 223.278 of this subpart as follows:

(a) For all federally-recognized 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 for reasons similar to those provided in § 223.240 of subpart G; and

(b) For Tribes with treaty or other reserved rights seeking to harvest forest botanical products for cultural, ceremonial, and/or traditional purposes in accordance with such treaty or other reserved rights. Such purposes must be non-commercial, and any such harvest may be conditioned or denied for reasons similar to those provided in § 223.240 of subpart G; and

(c) When a Regional Forester or Forest Supervisor, having proper authorization from the Chief, makes a written determination that:

(1) The harvest of a specified forest botanical product will facilitate non-commercial scientific research such as species propagation or sustainability; or

(2) A forest botanical product is salvage because other management activities will destroy or damage the product.

#### **§ 223.281 Monitoring and revising sustainable harvest levels.**

The Forest Service shall monitor and revise sustainable harvest levels for forest botanical products in accordance with § 223.219 of subpart G.

#### **§ 223.282 Deposit and expenditure 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, unless the program is extended.

(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 an amount equal to the fees collected at that unit and shall be used to pay for the costs of:

(1) Conducting inventories of forest botanical products;

(2) Determining, monitoring, and revising sustainable harvest levels for forest botanical products;

(3) Monitoring and assessing the impact of harvest levels and methods;

(4) Conducting restoration activities, including vegetation restoration; and

(5) Administering the pilot program, including environmental or other analyses.

## **PART 261—PROHIBITIONS**

■ 4. The authority citation for part 261 continues to read as follows:

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

■ 5. Revise 261.6 to read as follows:

### **§ 261.6 Timber and other forest products.**

The following are prohibited:

(a) Cutting, removing, or otherwise damaging any timber, tree, or other forest product, including special forest products and forest botanical products, except as authorized by Federal law, regulation, permit, contract, special use authorization, free-use authorization, or personal-use authorization.

(b) Cutting any standing tree under any permit or contract before a Forest Officer has marked it or has otherwise designated it for cutting.

(c) Unless otherwise provided for in any permit or contract, removing any timber or other forest product, including special forest products and forest botanical products, except to a place designated for scaling, measuring, counting, or other method of accounting by a forest officer.

(d) Stamping, marking with paint, or otherwise identifying any tree, or other forest product, including special forest products and forest botanical products, in a manner similar to that employed by forest officers to mark or designate a tree or any other forest product for cutting, or removal.

(e) Loading, removing or hauling timber, or other forest products, including special forest products and forest botanical products, acquired under any permit, contract, free-use authorization, memorandum of agreement, memorandum of understanding, or personal-use authorization unless such product is designated for loading, removing, or hauling as required or authorized in such permit, contract, free-use authorization, memorandum of agreement, memorandum of understanding, or personal-use authorization

(f) Selling or exchanging any timber or other forest product, including special forest products and forest botanical products, obtained under free use or personal use pursuant to §§ 223.5 through 223.11, § 223.239 or § 223.279 of this chapter.

(g) Violating any timber export or substitution restriction in §§ 223.160 through 223.164 of this chapter.

(h) Violating the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*), or its implementing regulations at §§ 223.185 through 223.203 of this chapter.

Dated: December 19, 2008.

**Melissa M. Simpson,**

*Deputy Under Secretary, NRE.*

[FR Doc. E8–30672 Filed 12–22–08; 11:15 am]

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## **NATIONAL ARCHIVES AND RECORDS ADMINISTRATION**

### **36 CFR Parts 1250, 1251, and 1256**

[NARA–07–0006]

RIN 3095–AB32

### **Testimony by NARA Employees Relating to Agency Information and Production of Records in Legal Proceedings**

**AGENCY:** National Archives and Records Administration.

**ACTION:** Final rule.

**SUMMARY:** The National Archives and Records Administration (NARA) is revising its regulations relating to demands for records or testimony in legal proceedings. The rule is intended to facilitate access to records in NARA's custody, centralize agency decision making in response to demands for records or testimony, minimize the disruption of official duties in complying with demands, maintain agency control over the release of agency information, and protect the interests of the United States. In addition, this rule consolidates existing regulations and applies to demands in legal proceedings where the United States is a party and to demands in legal proceedings where the United States is not a party. The rule affects parties to lawsuits and their counsel.

**DATES:** Effective Date: January 28, 2009.

#### **FOR FURTHER INFORMATION CONTACT:**

Laura McCarthy at (301) 837–3023 or via fax number 301–837–0319.

**SUPPLEMENTARY INFORMATION:** On November 16, 2007, NARA published a proposed rule (72 FR 64558) for a 60-day public comment period on new regulations containing NARA's policy and procedures in response to demands for testimony or records in legal proceedings.

We notified several listservs and researcher organizations about the proposed rule and its availability on regulations.gov. We also posted a notice about the rule on our Web site, <http://www.archives.gov>. We received no public comments. We are adopting the proposed rule as a final rule after making a number of minor changes to clarify the rule.