DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596–AB36

Land Uses; Special Uses; Recovery of Costs for Processing Special Use Applications and Monitoring Compliance With Special Use Authorizations

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: The Department is adopting final regulations for recovering costs associated with processing applications for special use authorizations to use and occupy National Forest System lands and monitoring compliance with these special use authorizations. This final rule provides the agency with the regulatory authority to implement provisions in several statutes that authorize the Forest Service to collect fees to recover administrative costs associated with managing special uses on National Forest System lands. The provisions of this rule apply to applications and authorizations for use of National Forest System lands, including situations in which the land use fee may be waived or exempted, such as facilities financed or eligible to be financed with a loan pursuant to the Rural Electrification Act of 1936, as set forth in Public Law 98–300, and applications and authorizations involving Federal, State, and local governmental entities. The provisions of this rule do not apply to applications and authorizations for noncommercial group uses; applications and authorizations for recreation special uses, identified in Forest Service Handbook 2709.11, Chapter 50, by use codes 111 through 165, requiring 50 hours or less to process or monitor; and other uses specifically exempted by law or regulation. The rates established in this rule are the same as those adopted by BLM in its final right-of-way rule published in the **Federal Register** (70 FR 20969, Apr. 22, 2005).

EFFECTIVE DATE: This rule is effective March 23, 2006.

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SUPPLEMENTARY INFORMATION:

Table of Contents

1. Background

Special Uses Program

Approximately 74,000 special use authorizations are in effect on National Forest System (NFS) lands, authorizing a variety of activities that range from individual private uses to large-scale commercial facilities and public services. Examples of authorized special uses include public and private road rights-of-way, apiaries, domestic water supply conveyance systems, telephone and electric service rights-of-way, oil and gas pipeline rights-of-way, communications facilities, hydroelectric power-generating facilities, ski areas, resorts, marinas, municipal sewage treatment plants, and public parks and playgrounds. The agency estimates that it receives approximately 6,000 applications for special use authorizations each year. Each application is subject to some level of environmental analysis. For many cases, the collection of data, consultations, and scoping associated with the analysis and decisionmaking process can be costly in terms of both time and resources.

Need for Cost Recovery

Requirements of the National Environmental Policy Act, the Wilderness Act of 1964, the Endangered Species Act, the National Historic Preservation Act of 1966, additional requirements of the Federal Land Policy and Management Act of 1976, Executive Order 11990 (Floodplains), and Executive Order 11998 (Wetlands) directly affect the manner in which special use proposals must be evaluated and how authorizations are conditioned and administered. Compliance with these statutory authorities and Executive orders often can require extensive analysis and documentation of the impacts of use and occupancy on a wide array of environmental, cultural, and historical resources. As a result, processing applications for authorizations for new uses and reauthorizing existing uses often can become time-consuming and expensive for the Forest Service, applicants, and holders of authorizations. These impacts were a major factor in the development of amendments to the agency's regulations at 36 CFR part 251, subpart B, promulgated November 30, 1998 (63 FR 65949), to streamline the manner in which proposals and applications for special uses are processed and authorizations are administered.

Despite these streamlining procedures, the agency is finding it increasingly difficult to provide timely reviews and evaluations of special use applications due to limited appropriations and staffing. The result is a growing backlog of applications for new uses and a growing number of expired authorizations for existing uses. The agency is increasingly unable to respond in a manner that meets the needs and expectations of special use applicants and authorization holders.

In the past 10 years, the Government Accountability Office (GAO) and the U.S. Department of Agriculture's Office of Inspector General have conducted more than 15 reviews or audits of various aspects of the Forest Service's special uses program. Two of the more recent audits, GAO Report #RCED–96–84 (April 1996) and GAO Report #RCED–97–16 (December 1996), recommended that the Forest Service (1) operate its special uses program in a more businesslike manner and (2) promulgate regulations to exercise statutory authorities to recover from applicants and holders the agency's costs to process special use applications and monitor compliance with special use authorizations.

In April 1997, the Forest Service completed a reengineering study of its special uses program. The study identified changes needed to manage the program in a more businesslike and customer service-oriented manner. The study also cited the need for regulations enabling the agency to exercise its cost recovery authorities. Recovery of processing and monitoring costs will provide additional funding for the agency to respond more promptly to special use applications, to take action on expired authorizations, to monitor compliance with authorizations more effectively, and to satisfy the needs and expectations of applicants and holders.

Use of Cost Recovery Fees

The Forest Service will use the processing and monitoring fees paid by applicants to fund the time and resources that the agency spends on the decisionmaking process in response to applications for the use and occupancy of NFS lands; to prepare and issue special use authorizations when the agency decides to authorize the proposed use and occupancy; and to monitor compliance with the terms and conditions of special use authorizations.

The final rule will require an applicant or holder to pay a processing fee and, where applicable, a monitoring fee. The final rule will establish categories to be assigned on a case-by-case basis to the processing of each special use application and to the monitoring of compliance with each authorization. These categories are based on the estimated number of hours that agency personnel will spend in conducting activities directly related to processing an application and monitoring compliance with an authorization.

This final Forest Service cost recovery rule is consistent with statutes that authorize the use and occupancy of NFS lands and the Independent Offices Appropriations Act of 1952 (IOAA), as amended (31 U.S.C. 9701). The IOAA provides that Federal agencies should recover the costs they incur in providing specific benefits and services to an identifiable recipient beyond those provided to the general public, with an exception for official government business. Subsequent statutes, such as section 504(g) of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1764(g)) and section 28(l) of the Mineral Leasing Act of 1920 (MLA), as amended (30 U.S.C. 184(1)), provide more specific authority to the Forest Service to recover costs associated with processing an application and monitoring an authorization. The Forest Service's processing of a special use application provides a specific benefit and service to applicants for new authorizations and to those proposing modifications to existing authorizations. The service and benefit provided consist of the agency's review and consideration of requests to use and occupy NFS lands. Likewise, monitoring activities for which cost recovery fees are charged, as enumerated in § 251.58(d)(1) of the final rule, provide a specific benefit to holders in the form of actions necessary to ensure, in the case of minor category authorizations, compliance with the terms and conditions of the authorization during construction or reconstruction of temporary or permanent facilities and rehabilitation of the construction or reconstruction site and, in the case of major category authorizations, compliance with the terms and conditions of the authorization during all phases of its term. The final processing and monitoring fee schedules are set out in tables in section 3 of this final rule. A comparison of the provisions in the proposed and final rules appears in section 7 at the end of this final rule.

2. Public Comments on the Proposed Rule

Overview

On November 24, 1999, the Forest Service published a proposed rule in the **Federal Register** (64 FR 66342) and sought public comment on adopting regulations for the recovery of costs for processing special use applications and monitoring compliance with special use authorizations. The notice explained that the proposed rule would apply to applications and authorizations for use of NFS lands, including situations where the land use fee may be exempted or waived, and to applications and authorizations involving Federal, State, and local governmental entities. The notice further explained that the proposed rule would not apply to applications or authorizations for noncommercial group uses and other uses specifically exempted, or where processing and monitoring fees were being collected by another Federal agency on behalf of the Forest Service. The notice provided for a 60-day public comment period that ended on January 24, 2000.

During the 60-day comment period, the agency received 11 requests for an extension of the comment period. Respondents indicated that additional time was needed due to the complexity of the proposed regulations and the occurrence of the holiday season. Although the Forest Service did not agree that the proposed regulation was complex, the agency twice extended the comment period by notice in the **Federal Register** (64 FR 72971, Dec. 29, 1999, and 65 FR 10042, Feb. 25, 2000), so that the comment period finally ended on March 9, 2000.

To ensure the widest possible public review of the proposed regulations, the Forest Service conducted a series of eight public meetings between January 4 and March 6, 2000. Forest Service staff at the national and regional levels explained the proposed regulatory provisions and answered questions posed by the attendees. Approximately 250 persons attended those meetings. The agency's regional offices also were encouraged to notify all authorization holders of record of the proposed cost recovery regulations and the dates and times of the regional public meetings. In addition, a list of associations and organizations provided by the Bureau of Land Management (BLM), whose membership includes special use authorization holders, were notified of the proposed regulation by either letter or electronic mail. These addressees were directed to the agency's World Wide Web site where the proposed regulation, press release, and questions and answers pertaining to cost recovery were posted.

The Forest Service received 602 letters or electronic messages in response to the proposed rule. The 602 respondents represented 38 States and the District of Columbia. Each respondent was grouped in one of the following categories:

Respondent category	Number	Percent
Authorization holder ..	275	46
Commercial entity	29	5
Environmental organization	1	<1
Trade/special interest organization	59	10
Private individual	173	29
Forest Service employee	14	2
Federal agency	9	1
State or local governmental agency	34	6
Member of Congress	2	<1
Unknown	6	<1
Total	602	100

Two special use authorization holder groups accounted for the majority of the comments on the proposed rule. The 194 responses from outfitters and guides (those holders providing commercial recreation services on the National Forests) or entities writing in behalf or in support of outfitters and guides represented 32 percent of the total number of responses. Almost all of those 194 responses were in the form of a standardized letter. The 77 responses from holders of authorizations for recreation residences (privately owned homes occupying NFS lands), or entities writing in behalf or in support of recreation residence holders, represented 13 percent of the total number of responses.

Most respondents offered only general comments supporting or not supporting the proposed rule. Twenty-four respondents stated that they supported the proposed rule; 38 stated that they would support the proposed rule if certain modifications were made; 406 respondents stated, or their comments

implied, that they did not support the proposed rule or the general concept of cost recovery; and the remaining 134 respondents were either noncommittal concerning cost recovery or not responsive to the issues presented in the proposed regulation. Responses categorized as nonresponsive to the **Federal Register** notice included comments on other **Federal Register** notices published by the Forest Service, such as the roads policy and the roadless area conservation initiative, or comments expressing a dislike for the Forest Service or the Federal Government in general. Most of those supporting the proposed rule do not hold a special use authorization, while the majority of those opposing the rule were special use authorization holders.

Response to General Comments

In more than 300 comments, respondents offered recommendations in their support of the proposed rule or explained their opposition to the proposed rule. These comments did not address a specific section of the proposed rule, but rather dealt generally with the issue of cost recovery and the Forest Service's special uses program. These comments and the Department's responses have been grouped into 8 major categories.

Comment. Adoption of cost recovery regulations should prompt the agency to conduct the special uses program in a more businesslike, consistent, and equitable manner. Some respondents were concerned that implementation of cost recovery without limits on the amount of fees to be charged would lead to an uncontrolled bureaucracy. Many respondents urged that the agency adopt strong customer service standards to ensure that officials implementing the regulations treat applicants and holders fairly, promptly, and consistently. A timely response to an application was important to respondents, which suggested that the final rule should clarify how the agency would improve its responsiveness and business practices. Several respondents recommended that the agency specify in the final rule how much time the agency would take to process applications.

Response. The Department agrees that improvements in management of the special uses program are needed, and the Forest Service is aggressively working to achieve that goal. The reengineering study of the special uses program conducted by the agency from 1994 through 1997, which is described in the preamble (**SUPPLEMENTARY INFORMATION**) to the proposed rule and referenced in this section of the final rule, provided the impetus for improving the agency's management of its special uses program. One outcome of the study was the adoption of the special uses streamlining regulation on November 30, 1998 (63 FR 65949). That regulation has helped reduce costs to applicants and holders and allows the agency to provide more customer-oriented service. A second product from the study involved the addition of two new special use authorization categorical exclusion categories (69 FR 40591, Jul. 6, 2004) to its procedures for implementing the National Environmental Policy Act (NEPA). These new categorical exclusion categories are intended to simplify documentation and analysis where experience has shown there are no significant environmental effects associated with applications that involve only an administrative change to an existing authorization, thus reducing the time and funding needed to process these types of special use applications. These final cost recovery regulations represent one more step in the agency's continuing effort to streamline its processes and be more responsive to its special uses customers.

Further, the Department is incorporating customer service standards in § 251.58(c)(7) of the final rule that will apply to all applications processed under these cost recovery regulations. Under these customer service standards, the Forest Service will endeavor to make a decision on an application that falls into minor processing category 1, 2, 3, or 4, and that is subject to a categorical exclusion pursuant to NEPA, within 60 calendar days from the date of receipt of the processing fee. If the application cannot be processed within the 60-day period, then prior to the 30th calendar day of the 60-day period, the authorized officer will notify the applicant in writing of the reason why the application cannot be processed within the 60-day period and will provide the applicant with a projected date when the agency plans to complete processing the application. For all other applications, including all applications that require an environmental assessment or an environmental impact statement, the authorized officer will, within 60 calendar days of acceptance of the application, notify the applicant in writing of the anticipated steps and timeframes that will be needed to process the application. The Forest Service will endeavor to process applications that are subject to a waiver of or exempt from cost recovery fees in the same manner as applications subject to cost recovery fees. However, the Forest Service cannot commit to the customer service standards for these applications since the resources necessary to process them will be subject to the availability of appropriated funding.

Comment. The agency must be accountable for the cost recovery funds it receives. Many respondents said that they were skeptical that the Forest Service would be accountable for funds received from cost recovery. Some respondents supported the cost recovery concept with the expectation that the funds collected would result in an increased level of service and equal access by all submitting applications. Others stated that the fees collected must be commensurate with the agency's cost of processing an application or monitoring an authorization.

Response. The Department shares these respondents' concerns. All cost recovery funds will remain at the local agency offices that collect them and will be used specifically for processing applications or monitoring authorizations. The agency will develop performance metrics to measure costs and timeframes for processing applications at the unit level against specified performance standards and report these to Congress as required by Section 331 of the Interior and Related Agencies Appropriations Act of November 29, 1999 (Pub. L. 106–113). The agency will also provide local offices with guidance on fiscal accountability and auditing processes specific to cost recovery. The agency will implement direction and train agency personnel on fiscal and accounting procedures for determining, collecting, and spending cost recovery funds. In addition, applicants and holders will be given the opportunity to dispute assessments of processing and monitoring fees. The final rule will provide applicants and holders with the opportunity to dispute a cost recovery fee, on a case-by-case basis, by submitting a written request to change the fee category or estimated costs to the immediate supervisor of the authorized officer who determined the fee category or estimated costs.

To those respondents who doubted that cost recovery would improve the Forest Service's responsiveness to special use applicants, the Department reiterates its previously stated customer service standards. Under these standards, authorized officers will be directed to communicate with applicants within a specified time frame about the status of processing their applications and to estimate when a

decision will be made regarding their applications.

Comment. Holders already pay a land use fee that should include the costs of application processing and permit monitoring. Many respondents stated that the annual land use fee they pay covers the agency's cost to process their applications and monitor their authorizations. Some respondents believed that cost recovery fees constitute a tax on applicants and holders and suggested that the agency recover its costs through improved efficiency. Recreation residence authorization holders stated that they were being unfairly singled out in the proposed regulation because they must pay a higher annual land use fee due to recent appraisals of the market value of their use of Federal lands, and under the proposed rule also would be expected to pay cost recovery fees. Holders of outfitting and guiding permits noted that they already pay 3 percent of their gross revenues to the agency to operate a business on NFS lands, and that this payment should be adequate to cover the cost to process their applications and monitor their authorizations.

Response. The statutes that authorize cost recovery and Office of Management and Budget (OMB) Circular No. A–25, which implements the IOAA, clearly distinguish between land use fees and administrative costs. Land use fees are charged to the holder of a special use authorization based upon the market value of the holder's use and occupancy of Federal lands. Land use fees do not include the agency's administrative costs to process applications or monitor authorizations. Section 251.58(a) of the final rule specifically states that cost recovery fees are separate from any land use fees charged for the use and occupancy of NFS lands. Additionally, almost all the land use fees the Forest Service collects cannot be retained and expended by the agency and therefore are not available for processing or monitoring special use authorizations.

In most cases, the effect of the cost recovery regulations on recreation residence permit holders will be minimal and considerably less than the effects on applicants for and holders of authorizations for most of the other special uses covered by the final rule. The final rule exempts recreation special use applications or authorizations requiring 50 hours or less to process or monitor. Recreation residences are defined as a recreation special use in the agency's directive system. Recreation residence special use permits are typically issued for a 20-year term. Upon expiration of a recreation residence permit, a new permit is, in all but a few cases, issued to the existing holder with no changes in the current use and occupancy. Thus, in almost every case, an application for a new recreation residence permit will require 50 hours or less to process and will, therefore, be exempt from a processing fee. In addition, under the final rule, a recreation residence permit holder will be assessed a monitoring fee only if monitoring compliance with the holder's authorization requires more than 50 hours.

Comment. Applicants and holders already pay taxes that should cover the agency's cost to process applications and monitor compliance with authorizations. These respondents believed that their Federal taxes, paid into the U.S. Treasury and Congressionally appropriated for Federal programs, should be sufficient for the Forest Service to administer its special uses program. Respondents stated they would be taxed twice if required to pay cost recovery fees. Some respondents believed that cost recovery fees should be levied on commercial or profit-making entities, but that nonprofit entities should not have to pay because they are otherwise relieved of taxation.

Response. The Department disagrees with the respondents. The language in applicable statutes and OMB Circular No. A–25 is clear: identifiable recipients who receive specific benefits or services from a Federal agency beyond those received by the public generally may be charged for those benefits or services. The Department believes that the promulgation of this final rule is fully consistent with applicable law and that no revisions to the rule or other actions are needed to address these concerns. Like other entities, nonprofit entities may qualify for a waiver of cost recovery fees, as described in the section of the preamble pertaining to § 251.58(f) of the final rule.

Comment. The value of cost recovery is limited if the agency is not allowed to keep the funds and use them locally to administer the special uses program. Respondents believed that cost recovery fees would not improve the agency's performance in processing applications or monitoring authorizations if cost recovery fees were not available to the agency or retained at the administrative unit where they were generated. Several respondents said that there should be strict limits on the amount of overhead included in determining cost recovery rates.

Response. The Department agrees with the respondents on these issues. The purpose of the cost recovery regulations is undermined if cost recovery fees are deposited into the U.S. Treasury and cannot be used to process applications more promptly and to monitor authorizations more effectively. The preamble to the proposed rule stated that the Forest Service did not have the authority to retain and spend cost recovery fees collected by the agency. Since the publication of the proposed rule, the agency has obtained statutory authority to retain and spend cost recovery fees it collects pursuant to this rule to cover costs incurred by the agency for processing special use applications and monitoring compliance with special use authorizations. This authority is contained in the Interior and Related Agencies Appropriations Act passed on November 29, 1999 (Pub. L. 106–113), which provides for Forest Service appropriations. Section 331 of the act authorized the Secretary to develop and implement a pilot program for the purpose of enhancing Forest Service administration of rights-of-way and other land uses through September 30, 2004. Section 345 of the Consolidated Appropriations Act for fiscal year 2005 (Pub. L. 108–447, Division E) extended this authority through September 30, 2005. Section 425 of the Interior and Related Agencies Appropriations Act for fiscal year 2006 (Pub. L. 109–54) extended this authority through September 30, 2006. With this pilot authority and upon adoption of this final rule, the agency will have the necessary tools to assess, collect, and spend cost recovery fees at the administrative unit where the special use processing and monitoring work is performed.

The Department agrees with those respondents who expressed a concern about excessive overhead costs associated with cost recovery fees. For minor processing and monitoring categories 1 through 4 in the final rule, overhead costs are included in the flat fee rates established for each category. The only determining factor for establishing the appropriate minor fee category will be the estimated number of agency personnel hours needed to process an application or monitor an authorization. For major category 5 and category 6 processing and monitoring cases, the overhead rate will be established using the current nationwide average overhead rate for the Forest Service. For calendar year 2005, this rate is 17.8 percent. It is the goal of the Forest Service to reduce the overhead rate to approximately 10 percent by 2008. The overhead rate and yearly updates to it will be included in the agency's directive system.

Comment. Adoption of cost recovery regulations will not resolve the delays in processing applications or improve

agency performance; the agency must streamline the application process and reduce the amount of environmental documentation required before reaching a decision on whether to approve an application. This was a significant concern for respondents and generated more comments than any other issue. Respondents believed that the application process was too burdensome, particularly the requirements that stem from NEPA, and stated that the agency should not require applicants to fund this burdensome process. Some respondents believed that cost recovery regulations could be used by the Forest Service, special interest groups, or individuals to prevent or dissuade special use permitting activity on NFS lands. Respondents also referred to ''scope creep,'' a term they used to describe use of processing fees to conduct environmental analysis and documentation beyond that necessary to reach a decision on the application being processed. These respondents urged that the regulations place limits on the scope and cost of environmental studies.

Response. The Department recognizes these respondents' concerns. The Department emphasizes the significance of the amendments made to the special use regulations in November 1998 to 36 CFR part 251, subpart B, and firmly believes that those streamlining regulations should allay most of the respondents' concerns about delays and excessive costs in processing applications. The Department points out that the Government-wide requirements for environmental analysis and documentation for activities that impact Federal lands are well established and must be strictly observed. The agency has implemented those requirements through procedures issued in its directive system. The agency acknowledges that its NEPA procedures regarding special use application processing may not provide sufficient flexibility to expedite processing and prevent excessive analysis. Therefore, the agency revised its environmental analysis requirements by adding two new categorical exclusion categories for certain special use authorization actions to its environmental policy and procedure handbook (FSH 1909.15) on July 6, 2004 (69 FR 40591). This revision streamlines NEPA compliance in the special use application process within the context of statutory and regulatory requirements. Further, the final cost recovery regulations include guidance at 36 CFR 251.58(c) on processing requirements. Additional direction in the agency's directive system, employee training during implementation of the final rule, and internal agency oversight will specifically focus on this concern to ensure consistency in assessing a processing fee that is based only on costs necessary for processing an application.

Comment. Adoption of the cost recovery regulations would violate other Federal laws and would conflict with the Forest Service's own regulations at 36 CFR 251.54(g)(2). Respondents stated that the agency lacks the authority to promulgate cost recovery regulations and in so doing would violate one or more Federal laws. For example, a national trade association stated that the agency violated the Administrative Procedure Act (APA) in not giving notice that it would consider public comments submitted in response to BLM's proposed amendments to its cost recovery regulations.

Another respondent stated the proposed rule would violate the Civil Rights Act of 1964 because it would impose fees on low-income Hispanic families who seek authorizations to gather on NFS lands. Other respondents stated that the regulation would violate the IOAA because costs and activities that benefit a broad segment of the public, such as environmental protection, cannot be passed on to individual applicants and holders. Respondents also cited the IOAA in claiming that water storage facilities on NFS lands are specifically exempted from cost recovery fees.

Several respondents stated that the Forest Service, not the applicant, is responsible for costs associated with NEPA compliance. These respondents supported this position by citing 36 CFR 251.54(g)(2), which states that ''the authorized officer shall evaluate the proposed use for the requested site, including effects on the environment.''

Response. The IOAA authorizes all agencies of the Federal Government to recover costs associated with providing specific benefits and services to an identifiable recipient. This authority applies to costs incurred by the Forest Service in processing applications for special use authorizations, including costs incurred in completing analyses required by NEPA and the Endangered Species Act. These studies are conducted to meet legal requirements in processing applications and monitoring authorizations, which are submitted on behalf of individuals or entities, not the public. Therefore, the Department disagrees with respondents who stated that the proposed cost recovery rule violates the IOAA. It is appropriate to require applicants for special use authorizations to provide information necessary to process their applications. While the Forest Service must comply with NEPA and other statutes in processing special use applications, the costs associated with complying with those statutory requirements in that context are incurred for the benefit of the applicants.

The IOAA authorizes Federal agencies to recover all types of costs associated with providing goods and services that benefit an identifiable recipient. The IOAA does not limit cost recovery to certain types of goods and services and therefore does not preclude recovery of processing and monitoring costs associated with special use authorizations for water storage facilities. Moreover, the cost recovery provisions in FLPMA also apply to processing and monitoring costs associated with special use authorizations for water storage facilities. FLPMA's cost recovery provisions apply to rights-of-way, which, as defined in FLPMA, include authorizations for water uses.

BLM and the Forest Service published separate proposed cost recovery rules in the **Federal Register** for public notice and comment (64 FR 32106, Jun. 15, 1999 and 64 FR 66342, Nov. 24, 1999, respectively). BLM's proposed rule addressed cost recovery procedures specific to applications and authorizations for rights-of-way authorized by FLPMA and the MLA. Nevertheless, because of the significant overlap in the subject matter of the agencies' proposed rules, each agency notified the public that the Forest Service would consider comments on BLM's proposed rule, which was published first. Therefore, both BLM and the Forest Service complied with the rulemaking requirements in the APA.

Subsequently, BLM published another proposed rule in the **Federal Register** (65 FR 31234, May 16, 2000) for public notice and comment that proposed changes to BLM's cost recovery regulations for special recreation permits. To maximize consistency between the agencies, the Forest Service also considered comments received by BLM regarding cost recovery for special recreation permits. On October 1, 2002, BLM published in the **Federal Register** (67 FR 61732) the final rule amending its cost recovery regulations for special recreation permits. In that rule, BLM changed its threshold for exempting special recreation permit applicants and holders from processing and monitoring fees, from cases where BLM's costs to process an application or monitor an

authorization do not exceed $5,000 to cases where an application or authorization requires more than 50 hours to process or monitor. Applicants for and holders of a BLM special recreation permit are now assessed cost recovery fees only when BLM requires more than 50 hours to process an application or monitor a permit. This final rule establishes the same threshold for assessing a processing or monitoring fee for all Forest Service recreation special uses. A further discussion of consistency between the Forest Service and BLM cost recovery regulations is found in the section of the final rule entitled ''Response to Comments on the Supplementary Information Section in the Preamble to the Proposed Rule.''

The Department disagrees with the respondent who stated that the cost recovery regulation violates the Civil Rights Act of 1964. Families gathering on NFS lands will not have to pay a processing or monitoring fee under the final rule. A family gathering does not require a special use permit unless it involves 75 or more people (36 CFR 251.50(c)(3) and 251.51). Moreover, such a family gathering would constitute a noncommercial group use, and the final rule exempts noncommercial group uses from cost recovery fees. In addition, any cost recovery fees applicable to other special uses under the final rule will be assessed in a fair and nondiscriminatory manner.

Comment. Adoption of cost recovery regulations will adversely impact small businesses operating on the National Forests and/or will impact the economies of local communities. These respondents, mostly those providing recreation services to the public, believed that the regulations would increase the cost of doing business on NFS lands and would force current and future holders of authorizations off those lands. Other respondents felt the potential loss of business through higher costs would ultimately impact those local communities where the businesses are headquartered. Some respondents suggested that the agency could prevent such an eventuality by asking Congress for the necessary funds to process special use applications and monitor special use authorizations.

Response. The Department recognizes these respondents' concerns but notes that implementation of these regulations, coupled with the recently adopted streamlining regulations, will allow the agency to become more efficient and cost-effective in administering its special uses program. Applicants and holders will directly benefit from these efficiencies.

The final rule exempts individuals and entities, including small businesses, from cost recovery fees for recreation special use applications and authorizations requiring 50 hours or less to process or monitor. The final rule also exempts from processing or monitoring fees those applications or authorizations that take one hour or less to process or monitor. In addition, the basis for assessing a monitoring fee has been limited in the final rule.

For nonrecreation special use applications and authorizations requiring 50 hours or less to process or monitor, the cost recovery fees, which will be determined from the applicable rate in a schedule, will be modest and should not adversely impact small businesses, other entities, or individuals who wish to use Federal lands for personal or commercial gain.

For example, an application that is subject to a categorical exclusion pursuant to FSH 1909.15, section 31, most likely will take 50 hours or less to process. In the absence of extraordinary circumstances, i.e., a significant environmental effect on certain sensitive resource conditions, FSH 1909.15, section 31, categorically exempts from documentation in an environmental assessment or environmental impact statement (1) approval, modification, or continuation of minor, short-term (1-year or less) special uses of NFS lands; (2) approval, modification, or continuation of minor special uses of NFS lands that require less than 5 contiguous acres of land; and (3) issuance, amendment, or replacement of a special use authorization that involves only administrative changes (such as a change in ownership of the authorized facilities or a change in control of the holder) and does not involve any changes in the authorized facilities, an increase in the scope or intensity of the authorized activities, or an extension of the term of the authorization, and the applicant is in full compliance with the terms and conditions of the authorization.

For processing or monitoring fees for more complex applications or authorizations, the authorized officer will estimate the agency's full actual costs. The Forest Service has prepared a cost-benefit analysis of the final rule, which concludes that the final rule could have an economic impact on small businesses if their application or authorization requires a substantial amount of time and expense to process or monitor. These entities could be economically impacted, for example, when they apply for agency approval to expand or change their authorized use, or when an expired authorization prompts them to apply for a new authorization to continue their use and occupancy, and the application requires a substantial amount of time and expense to process.

Because for major category processing and monitoring fees, the authorized officer will estimate the agency's full actual costs, it is difficult to quantify the impacts of those fees programmatically. However, the agency will endeavor to minimize these costs. In addition, the final rule provides all applicants and authorization holders with the opportunity to discuss with the authorized officer determinations that are made to establish a cost recovery fee category (for minor processing and monitoring cases) or estimated costs (for major category processing and monitoring cases). The final rule also provides applicants and authorization holders the opportunity to request that the authorized officer's immediate supervisor review an authorized officer's determination of a fee category or estimated costs. Based on the foregoing, the Department believes that cost recovery fees adopted by this final rule will not broadly impact or pose an economic barrier to local economies.

It is not reasonable to assume that Congress will support additional funding for the agency's special uses program as an alternative to cost recovery. In recent years, Federal agencies' appropriations have remained relatively constant or have decreased. Congress has, however, provided alternative authorities to fund government programs that are equitable and fiscally and administratively sound. The Department firmly believes that the cost recovery provisions contained in this final rule exemplify this approach. Respondents raised a similar issue regarding regulatory impact that is discussed in the following section concerning comments on the preamble to the proposed rule.

Response to Comments on the Supplementary Information Section in the Preamble to the Proposed Rule

Many respondents commented on the supplementary information section in the preamble to the proposed rule, which outlined the agency's expected procedures for implementing cost recovery and explained the provisions of the proposed rule. The preamble also provided readers with a table showing the Forest Service's and BLM's proposed processing and monitoring fee rates.

Comment. The information in the preamble is vague and open-ended. Respondents stated that the descriptions

for the specific sections of the proposed rule were insufficient. A few were concerned that certain types of special uses were not addressed, leaving the respondents uncertain as to whether they would be affected by the proposed rule. Others were uncertain whether cost recovery would apply to existing applications and authorizations on file with the agency. Some respondents cited the need for clarification of certain terms used in the preamble. Several respondents said that the definition for authorized officer gives too much discretion to the deciding official in determining cost recovery fees. Respondents questioned the definition for monitoring in the proposed rule and stated that the term ''reasonable costs'' as discussed in the preamble and fee schedule was vague. Use of the term ''noncommercial group uses'' caused confusion among several respondents as to its applicability to special uses. Some respondents commented that the term ''right-of-way'' in FLPMA refers only to roads, and since the right-of way granted to these respondents is not a road, it is not subject to the cost recovery provisions of FLPMA or any other statute.

Response. The proposed language at 36 CFR 251.58(b) outlined the situations in which a cost recovery fee would be assessed. In response to concerns about the scope of the proposed rule, the Department is tightening and more clearly stating the types of applications and authorizations that will be subject to processing and monitoring fees.

This final rule will be incorporated into existing regulatory text, which already includes the definitions for authorized officer, group use, and noncommercial use or activity at 36 CFR 251.51. Nevertheless, the Department recognizes the need for clarification of some of the terms and processes described in the preamble of the proposed rule. The final rule has been carefully reviewed and revised to ensure that the purpose and intent of cost recovery are fully documented and explained and that respondents' concerns about clarity of terms are addressed.

The authorized officer has a specific role within the Forest Service as the agency official delegated the authority to perform the duties and responsibilities for managing an administrative unit of NFS lands. Specific to the special uses program, the Chief of the Forest Service is responsible for accepting and evaluating special use applications and issuing, amending, renewing, suspending, or revoking special use authorizations. This authority is delegated to the appropriate line officer at the Regional, Forest, or District level as provided in 36 CFR 251.52. This line officer, or authorized officer, has the authority to issue special use authorizations and assess land use fees for use and occupancy of NFS lands and, once this final rule goes into effect, will have the authority to determine and assess processing and monitoring fees associated with issuance and administration of those authorizations. The Department has addressed respondents' concerns that too much authority would rest with the authorized officer in determining processing and monitoring fee categories and estimated costs by providing in the final rule that applicants and holders may request a review of these determinations by the authorized officer's immediate supervisor.

Section 251.51 of the current special use regulations contains definitions for group use and noncommercial use or activity. The term ''group use'' applies to those activities that involve a group of 75 or more people, either as participants or spectators; the term ''noncommercial use or activity'' is a use or activity that does not involve the charging of an entry or participation fee or the sale of a good or service as its primary purpose. The phrase ''noncommercial group use'' in the proposed rule combined the two terms to identify a specific type of special use. This type of activity may involve the exercise of First Amendment rights. Federal court decisions required the Department to amend its special use regulations with regard to this type of activity to meet First Amendment requirements. These revisions were made to 36 CFR 251.51 and 251.54 in accordance with the court decisions (60 FR 45293, Aug. 30, 1995).

The definition for monitoring has been revised in the final rule to address respondents' concerns about the activities included in monitoring, specifically for minor category cases, and is further explained in the specific comments on 36 CFR 251.51.

The term ''reasonable cost'' is used in section 504(g) of FLPMA, which provides that the Secretary concerned may, by regulations or prior to promulgation of such regulations, require an applicant for or holder of a right-of-way to reimburse the United States for all reasonable administrative and other costs incurred in processing an application for the right-of-way, and in monitoring the construction, operation, and termination of the facilities authorized pursuant to the right-of-way. Applicants for and holders of authorizations issued under the MLA may be required to pay full actual costs instead of full reasonable costs.

Section 4 of the preamble to the proposed rule (64 FR 66342) clearly stated that processing fee provisions would apply to all special use applications, not just to applications for rights-of-way under FLPMA. In addition, section 501(a) of FLPMA defines right-of-way as a reservoir, canal, ditch, flume, lateral, pipe, pipeline, tunnel, facility for the impoundment, storage, transportation, or distribution of water, electronic communications use, road, trail, railroad, tramway, or airway. Therefore, the definition for right-of-way under FLPMA includes more than roads and other linear uses. In addition, FLPMA is just one of the numerous statutes that authorize use and occupancy of NFS lands.

Comment. If a special use provides a public benefit, it is not subject to the cost recovery provisions in the IOAA and FLPMA. Several respondents, commenting on the listing in the preamble of the statutory authorities governing special uses administration, stated that certain water uses and recreation residences are not subject to the cost recovery requirements of the final rule because these uses provide benefits to the public.

Response. This comment relates to the concern addressed previously about violation of Federal statutes. The Department reiterates that this final cost recovery rule is well founded in law. The IOAA authorizes all agencies of the Federal Government to recover costs associated with providing specific benefits and services to an identifiable recipient, including applicants for and holders of water use and recreation residence special use authorizations. Additional authority to recover processing and monitoring costs is provided by section 504(g) of FLPMA and section 28(l) of the MLA. There is no exemption in these statutes for uses that provide a public benefit in addition to benefiting identifiable recipients.

Comment. Facilities authorized on NFS lands that are financed, or eligible to be financed, with a loan pursuant to the Rural Electrification Act of 1936 (REA) should be exempted from cost recovery fees. The preamble to the proposed rule stated that the provisions of the cost recovery regulations would apply in situations where the land use fee may be exempted or waived. The preamble specifically mentioned facilities financed or eligible to be financed under the REA as an example where the land use fee is exempted, but a cost recovery fee would be assessed.

Several REA entities and their national representatives commented that a 1984 amendment to FLPMA specifically exempts REA-financed facilities on NFS lands from cost recovery fees. These respondents believed that it was the intent of Congress, in passing the 1984 amendment to FLPMA, to exempt these facilities from all fees, including cost recovery fees.

Response. The Department disagrees with these respondents. The 1984 amendment to FLPMA explicitly differentiated between a land use fee and an administrative fee and excluded the latter from the fee exemption provided for by that amendment. With respect to administrative fees, the proviso to the amendment stated that ''nothing in this sentence shall be construed to affect the authority of the Secretary granting, issuing, or renewing the right-of-way to require reimbursement of reasonable administrative and other costs pursuant to the second sentence of this subsection'' (43 U.S.C. 1764(g), as amended by Pub. L. 98–300). The Department also notes that BLM has been collecting cost recovery fees from holders of rights-of-way for these facilities on public lands for many years under its cost recovery regulations. No revision to 36 CFR 251.51(g) of the final rule has been made to respond to this concern.

Comment. Processing and monitoring fees should be displayed in separate schedules. Several respondents stated that displaying both processing and monitoring fees in the same schedule was confusing because it appeared to link the two fees, when in fact they were not linked. They recommended that the two types of fees be displayed in separate schedules.

Response. The Department concurs with this recommendation. The processing and monitoring fees that appear in section 3 of the preamble are displayed in separate schedules. These separate schedules will be incorporated into the Forest Service's directive system.

Comment. The proposed regulations constitute a significant rule. Several respondents disagreed with the agency's conclusion in the preamble that the proposed rule is not significant and would not have an annual effect of $100 million or more on the economy or adversely affect productivity, competition, jobs, the environment, public health or safety, or State or local governments. These respondents believed that the proposed regulations could impose substantial financial burdens on small businesses and their customers, which could hurt local economies. Therefore, the proposed regulations should be subject to OMB review. In a related concern, a few respondents stated that the agency failed to consider the economic impacts of the proposed rule on small entities pursuant to the Regulatory Flexibility Act.

Response. The criteria for determining whether a proposed rule is significant are prescribed by United States Department of Agriculture procedures and Executive Order 12866 on regulatory planning and review. The Department has estimated that the annual cost recovery fees collected under the provisions of this final rule will be less than $10 million, well below the $100 million threshold for significance of a rule.

The Forest Service's final rule has been deemed significant under the EO 12866. Accordingly, the agency has prepared a programmatic cost-benefit analysis and a threshold Regulatory Flexibility Act analysis for the final rule, as referenced in section 5 of the supplementary information section in the preamble of this rule. The threshold Regulatory Flexibility Act analysis was conducted to ascertain if the final rule would have a significant economic impact on a substantial number of small entities and if so, if more detailed analyses were required pursuant to the Regulatory Flexibility Act. Based on the cost-benefit and threshold Regulatory Flexibility Act analyses, the Department believes that the final rule will not have a significant economic impact on a substantial number of small entities.

Comment. Greater use should be made of master agreements. Some respondents, particularly large commercial entities holding several authorizations involving several sites on NFS lands, advocated use of master agreements to allow for processing multiple applications and monitoring multiple authorizations through a single document. These respondents suggested that master agreements should be issued for a 10-year period and should cover an entire Forest Service administrative unit, up to and including a Regional unit. Some suggested that master agreements provide for monitoring by the holder, rather than by the Forest Service.

Response. The Department agrees that there should be greater use of master agreements. The Forest Service, as part of its efforts to increase the efficiency and cost-effectiveness of its special uses program, will seek to expand use of master agreements with the implementation of this final rule. In addition, the final rule has been modified to include provisions for master agreements in the monitoring fee schedules. The Department does not believe, however, that master agreements should provide for monitoring solely by the holder, rather than by the Forest Service. Master agreements may provide for some monitoring tasks to be performed by the holder. Any monitoring tasks performed by the holder under a master agreement will not be subject to cost recovery fees under the final rule.

Comment. Greater consistency is needed between the Forest Service and BLM on cost recovery. Respondents stated that there were inconsistencies between the regulations proposed by each agency and urged that the final regulations be made consistent. The inconsistency that respondents mentioned most often was that under its proposed rule, BLM would not assess cost recovery fees for outfitters and guides operating on BLM-administered lands. The same respondents believed that BLM is more responsive to requests to use BLM-administered lands.

Response. The Forest Service and BLM sought consistency between the Forest Service's proposed cost recovery rule (64 FR 66342, Nov. 24, 1999) for special uses and BLM's proposed cost recovery rule for its right-of-way program (64 FR 32106, Jun. 15, 1999) in terms of schedule categories, rates, definitions, and other matters relating to implementation of cost recovery. However, the Department agrees that there can be greater consistency between the Forest Service's and BLM's cost recovery rules, and the final rules of both agencies have been modified to achieve that goal, as discussed below.

Subsequent to publication of the Forest Service's proposed cost recovery rule for special uses and BLM's proposed regulations for its right-of-way program, BLM published another proposed cost recovery rule in the **Federal Register** (65 FR 31234, May 16, 2000) to amend cost recovery requirements for its special recreation permit program in 43 CFR part 2900. In their proposed rule, BLM proposed to change its threshold for exempting special recreation permit applicants and holders from processing and monitoring fees where BLM's costs to process an application or monitor an authorization do not exceed $5,000, to cases where an application or authorization requires more than 50 hours to process or monitor. The proposed rule also stated that full costs would be charged for special recreation permit applications or authorizations that require over 50 hours to process or monitor. A final cost recovery rule for BLM's special recreation permits that adopted this new

threshold was published in the **Federal Register** on October 1, 2002 (67 FR 61732).

To maximize consistency with BLM, the Department is adopting the same approach for Forest Service recreation special uses in this final rule. Recreation special uses are identified in FSH 2709.11, chapter 50, by use codes 111 through 165. Recreation special use applications or authorizations that require 50 hours or less to process or monitor will be exempt from cost recovery fees. This change from the proposed rule also addresses the concerns that many small businesses expressed regarding the financial hardship that would be created by the cost recovery rule if it were adopted as originally proposed. Other revisions to the final rule that provide for greater consistency between the Forest Service and BLM are addressed in the response in the following comment.

Comment. Some respondents recommended that the fee rates and schedules be revised. There were 7 respondents who thought the proposed fees were acceptable, 20 who thought the fees were too high, and 4 who thought the fees were too low. Forty-one respondents offered other comments on the proposed cost recovery fees presented in the schedules in the preamble of the proposed rule. Several respondents stated that the fees for category A, the minimal impact processing fee category in the proposed rule, were too high considering the processing effort required. A fee of $25 was suggested as an alternative. Others suggested that subcategories of category A be established that would recognize that some actions have substantially no impact. Others suggested that issuance of a temporary permit (with less than a 1-year term), issuance of a new permit due to a change in ownership, and renewal of a permit were actions with minimal impact that should have a flat processing fee of $75. One respondent stated that there is a disparity in the hourly rate for each processing and monitoring category when that rate is determined by dividing the rate in each category by the maximum number of hours for each category. Respondents also suggested that the table display a fee in the proposed policy for monitoring category B–IV and that monitoring fees be limited to construction or reconstruction activities. Several respondents suggested that the Department add a master agreement category for monitoring.

Response. The Forest Service proposed two separate fee schedules to track the two separate fee schedules in BLM's cost recovery rule for its right-of-way program: One for applications and authorizations subject to the MLA, and one for applications and authorizations subject to FLPMA. Separate fee schedules were established because of the differences in the legal standard for calculating cost recovery fees under the MLA and FLPMA. The preamble of the proposed rule also stated that the Forest Service proposed to adopt cost recovery fee rates similar to BLM's proposed fee rates for processing applications and monitoring authorizations because (1) the Forest Service's costs to process applications and monitor authorizations for use and occupancy of NFS lands are comparable to BLM's costs to process applications and monitor authorizations for rights-of-way on BLM-administered lands and (2) the public is better served by maintaining consistency in administration of special uses and rights-of-way by the Forest Service and BLM. To maximize interagency consistency, the fee schedules and rates established in this final rule are the same as those adopted by BLM in its final right-of-way rule published in the **Federal Register** (70 FR 20969, Apr. 22, 2005). Changes to the fee schedules and rates in the Forest Service's proposed rule are discussed below.

In the preamble of its final rule, BLM acknowledged that in establishing processing and monitoring fees under FLPMA, the agency is required to consider the reasonableness factors in section 304(b) of FLPMA. These factors include an agency's actual costs, the monetary value of the rights and privileges sought, that portion of the costs which may be incurred for the benefit of the general public interest, the public service provided, the efficiency of the Government processing involved, and other factors relevant to determining the reasonableness of costs.

However, BLM also stated that in its proposed rule (64 FR 32110) it recognized that ''for all but complex projects * * * the reasonability factors have little or no effect on actual costs.'' BLM's final rule reflects this conclusion. In its final rule, BLM determined that for categories 1 through 4, processing and monitoring fees under FLPMA are identical to processing and monitoring fees under the MLA, which does not require consideration of reasonableness factors in establishing cost recovery fees. For example, a category 2 processing fee for applications submitted under authorities other than the MLA is identical to a category 2 processing fee for applications submitted under the MLA. A category 3 monitoring fee for authorizations issued under authorities other than the MLA is identical to a category 3 monitoring fee for authorizations issued under the MLA.

BLM supported this analysis by citing a 1996 Solicitor's Opinion on cost recovery (M–36987), entitled ''BLM's Authority to Recover Costs of Minerals Document Processing.'' That opinion clarified that ''[a] factor such as the 'monetary value of the rights and privileges sought by the applicant' could, when that value is greater than BLM's processing costs, be weighed as an enhancing factor, offsetting a diminution due to another factor such as 'the public service provided' '' (see M–36987 at 36).

Conversely, BLM's final rule acknowledged that there is more likely to be a disparity between FLPMA and MLA fees for category 5 and category 6 cases, which are equivalent to the agency's full costs. Accordingly, BLM's final rule establishes one schedule for minor category processing fees and one schedule for minor category monitoring fees, both of which are based on actual costs. In addition, BLM's final rule establishes two schedules for major category processing fees and two schedules for major category monitoring fees to differentiate between applications or authorizations subject to the MLA, for which full actual costs will be charged, and applications and authorizations subject to FLPMA, for which full reasonable costs will be charged.

In the preamble of its proposed rule, the Department acknowledged that the proposed fee schedules and rates for categories B–I through B–IV (categories 1 through 4 in the final rule), would be identical to those proposed by BLM and are based on the cost data that BLM has collected to support those schedules and rates. Therefore, it is logical for the Department to adopt the same fee schedules and rates established in BLM's final rule. Thus, the Department's final rule establishes one schedule for minor category processing fees and one schedule for minor category monitoring fees, both of which are based on actual costs. Also consistent with BLM, the Department's final rule establishes two schedules for major category processing fees and two schedules for major category monitoring fees to differentiate between applications or authorizations subject to the MLA, for which full actual costs will be charged, and applications or authorizations subject to other authorities, for which full reasonable costs will be charged.

Several respondents thought that the rates in the Department's proposed rule (64 FR 66342) were either too high or too low. However, none of these

respondents offered documentation or other information as to what the rates should be.

The Department concurs with the respondent who expressed concern about disparity among the hourly rates for the minor categories in the processing and monitoring fee schedules. BLM received a similar comment on its proposed regulations for its right-of-way program (64 FR 32106). In response to those comments, BLM and the Department revised their minor category rates.

In its final rule, BLM defined each minor processing and monitoring category by the estimated number of hours needed to process or monitor an application or authorization. In doing so, BLM needed to determine a mean hour or average number of hours for processing and monitoring for each category. For example, for category 1 the mean hour is 4.5; for category 2 the mean hour is 16; for category 3 the mean hour is 30; and for category 4 the mean hour is 43.

BLM derived a mean per-hour rate using category 4 (which in the Forest Service proposed rule was processing Category B–III) and determined the mean per-hour rate to be $21.46 (which reflects actual costs based on BLM field studies). BLM then multiplied the mean hour in each category by the same mean per-hour rate, to ensure that each minor category is cost-weighted the same. Multiplying the mean hour for each category by the mean per-hour rate produced the fee for each category. For example, the mean hour for minor category 2 (> 8 and ≤ 24 hours) is 16. Thus, the rate for minor category 2 is $21.46 multiplied by 16, or $343. As another example, the mean hour for minor category 4 (> 36 and ≤ 50 hours) is 43. Thus, the rate for that category is $21.46 multiplied by 43, or $923. The Department reiterates that it is adopting in this final rule the same rates and the same rationale for those rates as BLM (70 FR 20969, Apr. 22, 2005) and considers the changes to be within the scope of public comment on both agencies' proposed cost recovery rules.

In justification of the mean hour and mean per-hour rate for each category, BLM stated in the preamble of its final right-of-way rule that the $21.46 mean per-hour rate for processing and monitoring fees would approximate the hourly wage in 2005 for an employee at the GS–9, Step 3, level. These rates compare favorably with BLM's 1987 minor category processing rates. These rates, if adjusted to a mean per-hour rate, would average $11 per mean hour, which was the hourly wage earned by a BLM employee in 1987 at the GS–9, Step 2, level, according to the 1987 General Schedule. Most of BLM's right-of-way applications and authorizations are processed and monitored by employees who are at the GS–9 to GS–11 levels and who will earn between $20.02 (GS–9, Step 1) and $31.48 (GS–11, Step 10) per hour in 2005.

The Department is adding a new processing fee category 1 (> 1 and ≤ 8 hours) (formerly category A for applications processed under authorities other than the MLA) to its minor category processing fee schedule to exempt those applications that require 1 hour or less to process and is also adding a new minor category monitoring fee category 1 (> 1 and ≤ 8 hours, paragraph (d)(2)(i)) to its monitoring fee schedule, to provide consistency between the processing and monitoring fee schedules. With the addition of the new category 1 (> 1 and ≤ 8 hours) to the monitoring fee schedule, the range of hours for monitoring fee category 2 in the final rule is revised to more than 8 and up to and including 24 hours.

The Department agrees with some of the concerns regarding the $75 minimal impact category. Revisions to the minimal impact category are discussed further in the next section in the response to comments on 36 CFR 251.58(b), (d), and (f) of the proposed rule. The Department also agrees with those who suggested the need for a master agreement category for monitoring, and one has been added in 36 CFR 251.58(d)(2)(v) of the final rule.

Additional changes to the processing and monitoring fee schedules in the final rule include enumerating categories by Arabic numerals instead of alpha-Roman numerals, establishing one minor category processing fee schedule and one minor category monitoring fee schedule, clarifying the criteria in the minimal impact processing category, and distinguishing between minor and major fee categories. The final processing and monitoring fee schedules and rates are set out in section 3 of the preamble. As displayed, all minor category fee rates are consistent with those established by BLM in its final rule and have been indexed using the cumulative rate of change from the calendar year (CY) 2004 second quarter to the CY 2005 second quarter in the Implicit Price Deflator-Gross Domestic Product (IPD–GDP) index to reflect CY 2006 rates. This approach is consistent with the indexing of these minor category fee rates that was identified in the proposed rule, and will be used to index these minor category processing and monitoring fee rates annually for CY 2007 and beyond.

The following tables have been prepared to display the differences between the proposed and final processing and monitoring fee categories:

Proposed rule processing category	Final rule processing category
Processing Fees for Minor Category Applications	
None proposed	No processing fee ≤ 1 hour.
(A) Minimal Impact < 8 hours.	(1) Minimal Impact > 1 and ≤ 8 hours.
(B–I) > 8 and ≤ 24 hours.	(2) > 8 and ≤ 24 hours.
(B–II) > 24 and ≤ 36 hours.	(3) > 24 and ≤ 36 hours.
(B–III) > 36 and ≤ 50 hours.	(4) > 36 and ≤ 50 hours.
Processing Fees for Major Category Applications	
(C) Master Agreement.	(5) Master Agreement.
(B–IV) > 50 hours	(6) > 50 hours.
Monitoring Fees for Minor Category Authorizations	
None proposed	No monitoring fee ≤ 1 hour.
(A) Minimal Impact <8 hours.	(1) Minimal Impact >1 and ≤ 8 hours.
(B–I) > 8 and ≤ 24 hours.	(2) > 8 and ≤ 24 hours.
(B–II) > 24 and ≤ 36 hours.	(3) > 24 and ≤ 36 hours.
(B–III) > 36 and ≤ 50 hours.	(4) > 36 and ≤ 50 hours.
Monitoring Fees for Major Category Authorizations	
None proposed	(5) Master Agreement.
(B–IV) > 50 hours	(6) > 50 hours.

Response to Comments on Specific Sections of the Proposed Rule

The following are comments on specific sections of the proposed rule and the Department's responses.

Section 251.51 Definitions. The proposed rule added a definition for monitoring to ensure consistency in the identification of activities subject to a monitoring fee and in the determination of monitoring fee categories and amounts. The term encompassed monitoring of construction and reconstruction activities and on-site inspections of facilities and activities to ensure compliance with an authorization, and excluded costs associated with routine administrative actions. Activities that would be

included in determining monitoring costs were identified in § 251.58(d)(1) of the proposed rule.

Comment. Several respondents stated that the definition was too broad and provided too much discretion to the authorized officer. Some stated that it should be revised to exempt routine compliance inspections of authorized activities and that it should be limited to construction activities. Others believed that the definition as proposed would limit cost recovery for monitoring to 1 year, and that it should instead be an annual event for the life of the authorization.

Response. The Department agrees that the term ''monitoring'' in the proposed rule was unclear and that the activities that would be covered by that term could be interpreted differently than intended. In the proposed rule, ''monitoring'' was intended to include actions required to ensure compliance during construction or reconstruction of facilities and the estimated time needed to inspect the authorized facility or operations during a 1-year period. This latter provision concerning the estimated time needed to ensure compliance during a 1-year period seemed to create the most confusion. Therefore, the final rule distinguishes between monitoring in general and the basis for charging monitoring fees. In the final rule, monitoring, which is an activity that occurs in administration of the special uses program generally, is defined as ''actions needed to ensure compliance with the terms and conditions in a special use authorization.'' The basis for charging a monitoring fee for minor category cases has been limited in the final rule to include only those activities required to monitor construction or reconstruction of temporary or permanent facilities and rehabilitation of the construction or reconstruction site. The 1-year restriction on charging monitoring fees has been removed, and a minimal impact monitoring fee category 1 (>1 and ≤8) has been added. With the addition of the minimal impact category 1 to the monitoring fee schedule, the range of hours in category 2 has been modified to >8 and ≤24, which is consistent with the range of hours established for processing fees.

In the final rule, major category 5 and category 6 monitoring fees may include the agency's estimated cost to ensure compliance with the terms and conditions of the authorization during all phases of its term, including, but not limited to, monitoring to ensure compliance with the authorization during the construction or reconstruction of temporary or permanent facilities and rehabilitation of the construction or reconstruction site. For example, monitoring fees may be charged for communications site engineering inspections, ski area tramway inspections, water quality monitoring, or threatened or endangered species habitat monitoring. For major category 5 and category 6 cases, the authorized officer will estimate the agency's full actual monitoring costs.

Monitoring for all categories does not include billings, maintenance of case files, annual performance evaluations, or scheduled inspections to determine compliance generally with the terms and conditions of an authorization.

Based on the respondents' concerns with the provisions of § 251.58(c), the Department believes that the categories for processing and monitoring fees need to be clarified. Accordingly, definitions for major category and minor category have been added to this section. A minor category in the final rule refers to actions in processing categories 1 through 4 (in the proposed rule, categories A through B–III for applications other than those authorized under the MLA, and B–1 through B–III for applications authorized under the MLA) and monitoring categories 1 through 4 (in the proposed rule monitoring categories A through B–III for authorizations other than those issued under the MLA, and B–1 through B–III for authorizations issued under the MLA). This revision to the final rule incorporates several changes to § 251.58(c) and (d) to ensure that the processing and monitoring fee categories are correctly identified.

Section 251.58 Cost Recovery

Section 251.58(a) Assessment of fees to recover agency processing and monitoring costs. This section of the rule provides an overview of the cost recovery concept. This section states that the agency shall assess processing and monitoring fees and that those fees are to be separate from any fees charged for use and occupancy of NFS lands. This section also provides broad guidance on how these fees are to be determined.

Comment. Respondents asked for clarification of the provisions on several points. Several requested that agency overhead costs not be included in the fee calculation; that current authorizations, including renewals, be exempted from the regulations; and that authorizations issued annually for the same activity to the same holder, such as some outfitting and guiding permits, be charged a one-time processing fee covering a 5-year period. Finally, one respondent recommended that processing fees not include costs incurred in compiling baseline information and resource data.

Response. The Department acknowledges these concerns, but notes that this section provides broad guidance and that the subsequent sections of the rule set forth detailed requirements. Thus, these issues are addressed in the response to comments in several of the following sections. Several other sections have been revised in response to these comments, and § 251.58(a) of the final rule has been revised as needed for consistency with the revised text of those other sections.

The provision in § 251.58(b)(3) of the proposed rule requiring applicants and holders to submit sufficient information for the authorized officer to assess the number of hours required to process their applications or monitor their authorizations was revised in the final rule for clarity and moved to § 251.58(a) because this requirement relates to processing and monitoring fees generally, not just to processing fees charged under § 251.58(b)(3).

The Department has removed provisions in § 251.58(a) regarding fee categories and rates because they are addressed in § 251.58(c)(2), (d)(2), and (i).

Section 251.58(b) Special use applications and authorizations subject to cost recovery requirements. This section of the final rule describes those situations in which processing and monitoring fees will be assessed.

Comment. Many respondents commented on this section. Nearly all stated that cost recovery should not apply to those special uses that are currently authorized on NFS lands, including modifications of existing authorizations and issuance of new authorizations when existing authorizations terminate according to their terms or when there is a change in ownership or control of the authorized facilities or the holder of the authorization. For example, recreation residence holders stated that their authorization does not require them to apply for a new authorization upon termination of their existing authorization. Therefore, they should not be subject to a processing fee each time they seek a new authorization to continue their use and occupancy of NFS lands. Several respondents stated that authorizations the agency issues annually, such as many outfitting and guiding permits, should not be subject to an annual processing fee. Several other respondents suggested that cost recovery not apply to applications the agency accepted prior to adoption of the final rule. Some respondents stated that

cost recovery fees should apply only to commercial activities, or that the fees should be credited back to the holder upon payment of the annual land use fee. In addition, some respondents believed that the minimal impact processing fee in the proposed regulation was excessive in some situations. Several respondents suggested that special uses that take very little time to process or have minimal impact should not be subject to a $75 processing fee, or to any processing fee at all.

Response. The Department believes that a number of these recommendations have merit. Applications that are being processed with funding provided by the applicant under the terms of a collection agreement negotiated by the agency and the applicant should proceed and not be disrupted by the provisions of the final rule. Similarly, in cases where the agency has started processing an application before adoption of the final rule, it is fair to complete processing the application with appropriated funds. However, the Department believes that where a proposal has been formally accepted as an application and the Forest Service has not yet initiated processing the application, the cost recovery regulations should apply. Accordingly, the final rule at § 251.58(b)(1) has been revised to state that the processing fee provisions of the final rule will not apply to or supersede written agreements providing for recovery of processing costs executed by the agency and applicants prior to adoption of the final rule. Further, § 251.58(b)(1) now states that proposals accepted as applications which the agency has commenced processing prior to adoption of the final rule will not be subject to processing fees.

The Department also has revised § 251.58(g) of the final rule regarding exemptions from cost recovery. The Department has amended the proposed rule to exempt from cost recovery all recreation special use applications and authorizations that require 50 hours or less to process or monitor. This change, as previously mentioned, is consistent with BLM's cost recovery rule for special recreation permits on BLM-administered lands. This change will alleviate the concerns expressed by most holders of recreation residence special use permits, as an application for a new permit to replace an expiring permit often will require 50 hours or less to process.

The Department does not agree, however, with those respondents who wish to exempt from cost recovery noncommercial activities other than noncommercial group uses (which may involve First Amendment activities and therefore are already properly exempted), or special uses that are currently authorized on NFS lands. The Department points out that it is inappropriate to exempt these types of uses, as they generate the same administrative costs to the agency as other uses. Applicants and holders who benefit from having the agency process their applications or monitor their authorizations should have to pay the costs of those government services. Therefore, the Department has not changed the provisions in the final rule for charging cost recovery fees for these uses.

However, the Department has revised § 251.58(b)(2) to clarify that the cost recovery provisions also apply to agency actions to amend a special use authorization, not just to proposals submitted by an applicant or holder to amend a special use authorization.

Section 251.58(b)(3) of the final rule clarifies that the cost recovery provisions apply to agency actions to issue a special use authorization, such as situations where an authorization does not specifically require submission of an application to request continuation of the authorized use upon termination of the authorization, as is the case with recreation residence permits. In addition, § 251.58(b)(3) of the final rule provides that cost recovery fees apply to applications for issuance of a new special use authorization after termination of an existing special use authorization. Section 251.58(b)(3) gives examples of events triggering termination, including expiration, a change in ownership or control of the authorized facilities, or a change in ownership or control of the holder of the authorization. The final rule adds the example of termination due to a change in ownership or control of the holder of the authorization.

The Department concurs that applications and authorizations that take very little time to process or monitor, that is, 1 hour or less, should not be charged a processing or monitoring fee. The Department has revised the final rule at § 251.58(c)(2) and (d)(2) to provide, in concert with BLM, that an application or authorization taking 1 hour or less to process or monitor is not subject to a cost recovery fee.

Section 251.58(c) Processing fee requirements. This section describes those agency actions that would require applicants to pay processing fees. It sets forth 6 processing fee categories; describes how processing fees are handled when multiple related applications are submitted, such as when the agency solicits applications for special uses, and when unsolicited proposals are submitted and competitive interest exists; and describes how refunds of processing fees are handled.

Comment. This section generated many comments that generally focused on the need to clarify what agency costs are properly included in cost recovery. Many respondents had concerns about what constitutes ''reasonable costs'' as set forth in the fee schedule for category B–IV (> 50 hours) for processing and monitoring fees in the proposed rule. Several respondents asked for clarification concerning those situations where applicants respond to a Forest Service prospectus and stated that cost recovery should not apply in those situations. Several respondents stated that applicants should not be required to pay processing fees for environmental analysis, since it is the Federal Government's responsibility, or for environmental documentation beyond the scope of the application. Some respondents suggested that the agency might overcharge or overestimate processing costs and inappropriately use those funds to complete unfunded field studies or assessments not pertinent to the applicant's request but important to the agency. In a related concern, respondents stated that processing fees should be reduced when an applicant provides data or studies relevant to the environmental documentation needed to process an application.

Respondents holding authorizations in the National Forests in Alaska concluded that all processing activities in Alaska would fall into proposed categories B–IV (> 50 hours) and C (master agreement), which the respondents believed would increase already burdensome paperwork requirements. Some respondents asked that bills for payment of cost recovery fees be due and payable in 60 days, rather than the 30 days set forth in the proposed regulation. Several respondents asked that processing fees for proposed categories A (minimal impact) through B–III (> 36 and ≤ 50 hours) be refunded to the applicant when payments exceed the agency's costs, as they would be in proposed categories B–IV and C, and that processing fees for proposed category B–IV (≥ 50 hours) applications remaining after withdrawal of an application be refunded to the applicant.

Response. The Department recognizes respondents' concerns about the scope of environmental documentation

required and what would be considered reasonable costs. As stated earlier, some level of environmental analysis pursuant to NEPA must be conducted with respect to the environmental effects of a proposed use and occupancy. This analysis considers the use proposed by the applicant, and includes a cumulative effects analysis with respect to other activities related to the proposed use. There is also a need, however, to place limits on how far the environmental analysis should go, and to identify where the responsibility of the applicant ends and the public benefit begins. Therefore, the Department has incorporated in the final rule direction that the processing fee for an application be based only on costs necessary for processing that application.

Some examples of where the responsibility of the applicant ends and the public benefit begins include studies to determine the capacity of the land and its resources to accommodate a type of use in an area, analysis and development of a habitat management plan, and utility corridor studies. In general, cost recovery fees should not be charged for studies that relate to management programs that affect more than one applicant and that could involve amendment of a land management plan.

The Department believes that clearer direction on this point is needed and has modified § 251.58(c)(1) to state that the processing fee for an application will be based only on costs necessary for processing an application and will not include costs for studies for programmatic planning or analysis or other agency management objectives, unless they are necessary for the application being processed. The processing fee for an application shall be based on costs for studies relating to programmatic planning or analysis or other agency management objectives to the extent these costs are necessary for the application to be processed. ''Necessary for'' means that but for the application, the costs would not have been incurred and that the costs cover only those activities without which the application cannot be processed.

In the first sentence of the provision governing the basis for processing fees, the Department is changing the phrase ''the amount of time that the Forest Service spends'' to ''the costs that the Forest Service incurs'' because in major category cases the basis for the processing fee may in some instances be based on costs other than agency time. In the eighth sentence, governing processing work conducted by the applicant or a third party, the Department is adding the phrase ''contracted by the applicant'' to distinguish between costs incurred by the applicant and costs incurred by the Forest Service.

In addition, the Department has reorganized and revised § 251.58(c)(1) to clarify how processing fees are determined and to provide for reconciliation of category 5 and category 6 processing fees.

For category 6 applications submitted under authorities other than the MLA, the Department has clarified in § 251.58(c)(1)(ii)(A) that the Forest Service will determine whether actual costs should be reduced based upon an analysis submitted by the applicant or holder of the factors relevant to determining the reasonableness of the costs, and will notify the applicant or holder in writing of this determination.

For category 5 applications, the Department has clarified in § 251.58(c)(2)(v), consistent with BLM, that in signing a master agreement for a major category application submitted under authorities other than the MLA, an applicant waives the right to request a reduction of the processing fee based upon the factors relevant to determining the reasonableness of the costs.

The Department disagrees with the comment that cost recovery fees should not be charged in the case of agency-driven solicitations. Solicitations come in many forms, from simple campground concession offerings to complex offerings that require two levels of environmental analysis spread over several years of implementation. The Department accepts responsibility for the programmatic level of environmental analysis to determine whether the concept of the agency offering is environmentally acceptable. Under the proposed rule at § 251.58(c)(3)(ii), when the agency solicited applications for the use and occupancy of NFS lands, the agency would be responsible for the costs of environmental analyses conducted prior to issuance of the prospectus. The selected applicant would pay a processing fee that would cover only the agency's costs to process the selected applicant's proposal, including any subsequent project-level environmental analysis and documentation.

To address this comment and to distinguish solicitations driven by the agency from solicitations driven by multiple applications for a limited number of authorizations, § 251.58(c)(3) in the final rule has been retitled ''multiple applications other than those covered by master agreements (category 5).'' Paragraphs (i) through (iii) under § 251.58(c)(3) also have been added to the final rule to address different cases of multiple related applications.

Paragraph (i) deals with multiple unsolicited applications where there is no competitive interest. Processing costs that are incurred in processing more than one of these applications, such as the cost of environmental analysis or printing an environmental impact statement that relates to all of the applications, must be paid by each applicant in equal shares or on a prorated basis, as deemed appropriate by the authorized officer.

Paragraph (ii) covers unsolicited proposals where competitive interest exists. Under this scenario, a prospectus will be issued, and all proposals accepted pursuant to the solicitation will be processed as applications. The applicants will be responsible for the costs of environmental analyses that are necessary for their applications and that are conducted prior to issuance of the prospectus. Processing fees for these cases will be determined pursuant to the procedures for establishing a category 6 (> 50 hours) processing fee and will include such costs as those incurred in printing and mailing the prospectus; having parties other than the Forest Service review and evaluate applications; establishing a case file; recording data; conducting financial reviews; and, for selected applicants, any additional environmental analysis required in connection with their applications. The processing fee determined by the authorized officer will be paid in equal shares or on a prorated basis, as deemed appropriate by the authorized officer, by all parties who submitted proposals that were processed as applications pursuant to the solicitation.

Paragraph (iii) covers agency-solicited applications. The agency will be responsible for the cost of environmental analyses conducted prior to issuance of the prospectus. All proposals accepted pursuant to that solicitation will be processed as applications. Processing fees for these cases will be determined pursuant to the procedures for establishing a category 6 processing fee and will include such costs as those incurred in printing and mailing the prospectus; having parties other than the Forest Service review and evaluate applications; establishing a case file; recording data; conducting financial reviews; and, for selected applicants, any additional environmental analysis required in connection with their applications. Processing fees will be paid in equal or prorated shares, as deemed appropriate by the authorized officer, by all parties who submitted proposals that were

processed as applications pursuant to the solicitation.

Provisions have been added in the final rule to address applications for recreation special uses that individually are exempt from cost recovery because the estimated time to process each of them is 50 hours or less but, when combined with other similar applications for a single project or type of use, the cumulative processing time exceeds 50 hours. In those situations, a cost recovery fee will be assessed, but the costs associated with processing all applications for a single project or type of use will be spread evenly among all the applicants.

The Department does not agree with respondents from Alaska who stated that the proposed processing fees would perpetuate burdensome paperwork requirements. The process for determining cost recovery fees is not overly complex and is based upon information that the applicant is already required to submit to the Forest Service for purposes of determining the appropriateness of the request. The Department acknowledges that costs for all goods and services are generally more expensive in Alaska. However, the Department reiterates that the minor category fee rates are reasonable costs and that all applicants may elevate disputes in processing fee determinations to the next higher administrative level within the Forest Service.

The Department has added a statement in § 251.58(c)(4)(i) that a processing fee will be assessed when the authorized officer is prepared to process the application. This provision clarifies that a processing fee will not be assessed until the Forest Service is ready to process the application.

The provisions in § 251.58(c)(4)(ii) of the proposed rule dealing with revision of processing fees has been modified in the final rule to state that minor category processing fees will not be reclassified into a higher level minor category once the processing fee category has been determined.

The Department also considered the request by respondents that the billing period during which cost recovery fees are due and payable be expanded from 30 to 60 days. Thirty days is the standard billing period used in the special uses program for other fees (such as land use fees). The Department does not believe that there are any compelling reasons for changing the billing period for cost recovery fees. Therefore, no changes have been made in the final rule to the billing period in which cost recovery fees are due and payable.

The Department does not agree with respondents who requested that unspent processing fees for categories A through B–III in the proposed rule be refunded to the applicant. The fee rates for the minor processing categories are designed to provide efficiencies in the assessment and collection of cost recovery fees, one aspect of which is avoiding a separate accounting for every application that falls into these categories. Separate accounting would be necessary to track case-by-case costs and provide for refunds, and would be burdensome and expensive.

The Department has added provisions to § 251.58(c)(5)(ii) and (c)(6)(ii) of the final rule to provide for underpayment and overpayment of category 5 processing fees. Under § 251.58(c)(5)(ii), when estimated processing costs are lower than the final processing costs for applications covered by a master agreement, the applicant will pay the difference between the estimated and final processing costs. Under § 251.58(c)(6)(ii), if payment of the processing fee exceeds the agency's final processing costs the applications covered by a master agreement, the agency either will refund the excess payment to the applicant or, at the applicant's request, will credit it towards monitoring fees due.

The Department has clarified provisions in § 251.58(c)(5)(iii) and (c)(6)(iii) governing underpayment and overpayment of category 6 processing fees to provide that reconciliation of those fees will not be based upon full reasonable costs for applications submitted under authorities other than the MLA when the applicant has waived payment of reasonable costs.

Section 251.58(d) Monitoring fee requirements. This section of the rule describes those agency actions that would require payment of monitoring fees and sets forth the fee categories.

Comment. Many respondents commented on this section of the proposed rule. They indicated significant concern with and misunderstanding of this provision. Most respondents were concerned about the activities that would be monitored and stated that monitoring should not be conducted annually or for ongoing operations. Several respondents noted that BLM has exempted outfitting and guiding authorizations from monitoring fees and suggested that the Forest Service do the same. Some respondents recommended that all unspent monitoring fees be refunded to the holder.

Response. Most of the issues respondents identified have been addressed in the revision to the definition for monitoring, which was discussed previously in the response to comments on § 251.51, ''Definitions.'' Section 251.58(d) of the final rule has been revised to narrow the basis for monitoring fees. In addition, the Department has reorganized and revised § 251.58(d)(1) to clarify how monitoring fees are determined and to provide for reconciliation of category 5 and category 6 monitoring fees.

For category 6 authorizations issued under authorities other than the MLA, the Department has clarified in § 251.58(d)(1)(ii)(A) that the Forest Service will determine whether actual costs should be reduced based upon an analysis submitted by the holder of the factors relevant to determining the reasonableness of the costs, and will notify the holder in writing of this determination.

For category 5 authorizations, the Department has clarified in § 251.58(d)(2)(v), consistent with BLM, that in signing a master agreement for a major category authorization issued under authorities other than the MLA, a holder waives the right to request a reduction of the monitoring fee based upon the factors relevant to determining the reasonableness of the costs.

The Department has added provisions in § 251.58(d)(3)(ii) and (d)(4)(ii) of the final rule to provide for underpayment and overpayment of category 5 monitoring fees. Under § 251.58(d)(3)(ii), when estimated monitoring costs are lower than the final monitoring costs for authorizations covered by a master agreement, the holder will pay the difference between the estimated and final monitoring costs. Under § 251.58(d)(4)(ii), if payment of the monitoring fee exceeds the agency's final monitoring costs for the authorizations covered by a master agreement, the agency either will adjust the next periodic payment to reflect the overpayment or will refund the excess payment to the holder.

The Department has clarified provisions in § 251.58(d)(3)(iii) and (d)(4)(iii) governing underpayment and overpayment of category 6 monitoring fees to provide that reconciliation of those fees will not be based upon full reasonable costs for authorizations issued under authorities other than the MLA when the holder has waived payment of reasonable costs.

Several other revisions have been made to this section of the final rule to ensure correct application of the monitoring fee categories; to clarify the descriptions of the monitoring fee categories; and to make the categories for processing and monitoring fees consistent.

Section 251.58(e) Applicant and holder disputes concerning processing or monitoring fee assessments; requests for changes in fee categories or estimated fee amounts. This section of the rule describes the actions the agency will take when an applicant or holder disagrees with a processing or monitoring fee category or estimated fee amount assigned by an authorized officer.

Comment. Several respondents took issue with the provisions at paragraphs (e)(2)(i) and (e)(3) that would suspend processing an application or suspend an authorization while a dispute is being resolved. Many respondents expressed concern that the authorized officer who assigned the fee category or estimated fee amount would be the same official who would review the dispute. Some respondents suggested that an entity other than the Forest Service should review disputed cost recovery fee determinations.

Response. The Department concurs with these respondents' concerns. The regulation should allow the applicant or holder to dispute the determined fee category or estimated costs without suspension of the application or authorization and should provide for a Forest Service officer other than the one who determined the fee category or estimated costs to review cost recovery disputes. However, the Department does not believe it is appropriate for cost recovery disputes to be reviewed outside the agency. The final rule at § 251.58(e)(1)–(4) has been revised to provide the applicant or holder with one level of review. Before a disputed fee is due, the applicant or holder may submit a written request for substitution of an alternative fee category or alternative estimated costs to the immediate supervisor of the authorized officer who determined the fee category or estimated costs. The applicant or holder must provide documentation that supports the alternative fee category or estimated costs. The supervisory officer must make a decision within 30 calendar days of receipt of the written request disputing the fee category or estimated costs. The dispute will be decided in favor of the applicant or holder if the supervisory officer does not respond to the written request within 30 days of receipt (paragraph (e)(4)).

Paragraphs (e)(2)(i)–(ii) of the final rule have been revised to remove the reference to suspension and to set forth new provisions describing agency action when the applicant or holder (1) has paid the disputed processing fee or (2) has failed or refuses to pay the disputed processing fee. In the former case, the authorized officer will not interrupt the processing while the dispute is being reviewed and the supervisory officer is making a decision, unless the applicant requests it. In the latter case, the authorized officer will suspend processing pending the supervisory officer's consideration of the dispute and determination of an appropriate fee. Paragraph (e)(3) dealing with monitoring fee disputes has been revised to remove the reference to suspension and to make revisions similar to those described above for processing fees (paragraphs (e)(2)(i)–(ii)).

Section 251.58(f) Waivers of processing and monitoring fees. This section of the rule provides for applicant or holder requests for fee waivers and describes criteria for the authorized officer to use in granting full or partial waivers of processing and monitoring fees.

Comment. This section prompted more comments than any other section of the proposed rule. Most respondents sought to clarify or expand the criteria for granting fee waivers, particularly to benefit applicants for or holders of authorizations for nonprofit activities. However, other respondents insisted that nonprofit status alone should not be the criterion for granting a fee waiver. A principal concern of these respondents was the application of the public benefit criterion in paragraph (f)(1)(vi)(B). Respondents asked that it be broadened to allow waiver of processing fees for environmental analysis considered beyond the scope of the proposed activity. Respondents also were concerned that the authorized officer would have sole authority to grant fee waivers. State and local governmental entities recommended that the fee waiver criteria be clarified to ensure that activities they conduct on NFS lands qualify for a fee waiver.

Response. The nature of the responses indicates that the public is not familiar with the distinction between the terms ''waiver'' and ''exemption.'' Although their effect may be the same, there is a difference between them.

A fee waiver may occur after the authorized officer has determined the appropriate fee category or estimated costs for a processing or monitoring activity. When one or more of the fee waiver criteria are met, the authorized officer may waive all or part of the cost recovery fee.

A fee exemption occurs when the authorized officer determines that the application or authorization is not subject to processing or monitoring fees based on law or regulation. In those situations, the authorized officer has no discretion in exempting the application or authorization from a cost recovery fee.

The Department has declined to broaden the criteria for fee waivers because the agency's processing of a special use application or monitoring of a special use authorization provides a specific benefit or service to the applicant or holder beyond that provided to the general public. The Department also believes that it is not appropriate to identify specific special use activities that are eligible for fee waiver, and thus has not done so in the final rule.

Section 251.58(f)(vi) of the proposed rule would authorize waiver of a processing fee for nonprofit entities when ''(A) [t]he studies undertaken in connection with processing their application have a public benefit or (B) [t]he proposed facility or project will provide a free service to the public or a program of the Secretary of Agriculture.'' The Department is removing § 251.58(f)(vi)(A), redesignating § 251.58(f)(vi)(B) as § 251.58(f)(vi), and clarifying its text. The Department believes that the waiver provision in proposed § 251.58(f)(vi)(A) is unnecessary because § 251.58(c)(1) of the final rule states that processing fees shall not include costs for studies for programmatic planning or analysis or other agency management objectives, unless they are necessary for the application being processed. Thus, under the final rule, processing fees for all applicants, not just nonprofit applicants, will not include studies for programmatic planning or analysis or other agency management objectives that are not necessary for an application. When these studies are necessary for an application, they are providing a specific benefit or service to the applicant beyond that provided to the general public and therefore may be included in a cost recovery fee. Section 251.58(c)(1) of the final rule addresses the comment that the nonprofit status of an applicant alone should not qualify an entity for a fee waiver.

The Department has given careful consideration to the recommendations by State and local governmental agencies and other Federal agencies regarding full fee waivers. The Department recognizes that the criteria in proposed paragraph (f)(1)(i) describe only those situations where reciprocity between the governmental entity and the Forest Service exists. In situations where the agency has no reciprocal business dealings or relationships with the Federal, State, or local governmental agency, there is no opportunity for that entity to demonstrate that it would

waive similar fees that it might assess the Forest Service in such dealings. Thus, the final rule has been revised at paragraph (f)(1)(i) to state that the Forest Service may waive a processing or monitoring fee for a local, State, or Federal governmental entity that does not or would not charge processing or monitoring fees for comparable services the entity provides or would provide to the Forest Service. The comparability of fees charged will not be based on the dollar amount, but rather on the type of services for which the fees are charged.

Section 251.58(g) Exemptions from processing or monitoring fees. This section of the rule sets forth direction regarding those uses and activities that are exempted from paying processing and monitoring fees.

Comment. This section of the proposed rule prompted many comments. Nearly all respondents who commented advocated that a particular use, activity, or group be exempted, such as recreation residences, houseboats, scientific studies, private clubs, and traditional Native American groups. Several respondents stated that rights-of-way granted under the Alaska National Interest Lands Conservation Act (ANILCA) across NFS lands to reach non-Federal land should be exempt from cost recovery fees because section 1323(a) of ANILCA gives those who own non-Federal land adjoining Federal land a right of access across the Federal land. In addition, many respondents claimed that authorized water storage facilities on NFS lands should be exempted from cost recovery fees.

Response. As outlined in the discussion of § 251.58(f), exemptions will be granted only as provided by law or regulation. Relief from cost recovery fees for any special use that is not specifically exempted will be considered under the criteria for fee waivers set forth in § 251.58(f).

The summary of the proposed rule stated that cost recovery would not apply where processing and monitoring fees were being collected by another Federal agency on behalf of the Forest Service. The Department has removed this provision from the summary of the final rule because it relates to collection, rather than assessment, of cost recovery fees. The Forest Service has cooperative agreements with BLM for administration of some special uses. The Forest Service's final cost recovery rule will apply to these special uses, but the cost recovery fees in some instances may be collected by BLM and remitted to the Forest Service.

In response to concerns raised by the public, and to enhance interagency consistency between the Forest Service and BLM, the Department has exempted from cost recovery all applications and authorizations for recreation special uses that require 50 hours or less to process or monitor. Applications and authorizations for recreation special uses requiring more than 50 hours to process or monitor are subject to the cost recovery provisions of the final rule.

The Department has considered the respondents' recommendation that rights-of-way granted under section 1323(a) of ANILCA be exempted from processing and monitoring fees. Section 1323(a) of ANILCA provides that land owners have a right of access to their property across NFS lands for the reasonable use and enjoyment of the property, subject to such terms and conditions as the Forest Service may prescribe. The Department believes that the cost recovery regulations are a reasonable term and condition applicable to applicants for and holders of authorizations for rights-of-way granted under section 1323(a) of ANILCA. Accordingly, the Department has not modified the final rule to exempt rights-of-way granted under section 1323(a) of ANILCA from cost recovery.

The Department disagrees with those who stated that authorized water storage facilities on NFS lands are specifically exempted from cost recovery fees. There are currently no provisions in law that specifically exempt this type of use from cost recovery. Therefore, the final rule will not provide for a specific exemption for water storage facilities. A waiver for this use may still be considered under the provisions set forth in § 251.58(f) of the final rule.

In the fall of 1999, the Forest Service commissioned a national task force to conduct a broad review of the agency's programs and policies involving Tribal governments and to recommend a unified policy regarding the need for a special use authorization for Tribal use and occupancy of NFS lands for traditional or cultural purposes. Until the agency adopts such a policy, it would be premature to exempt these uses from cost recovery fees. Moreover, once such a policy is adopted, whether a special use authorization is required, and if so, the nature of the use, will determine whether cost recovery fees are required in this context.

The Department is modifying the exemption relating to closure orders by stating that it applies to ''a noncommercial activity,'' rather than ''activities,'' that are exempt from a closure order to make it clear that the exemption does not apply to commercial activities that are exempt from a closure order.

The Department is adding an exemption for applications and authorizations for water systems authorized by section 501(c) of FLPMA (43 U.S.C. 1761(c)). Section 501(c) of FLPMA precludes cost recovery for these applications and authorizations. In addition, the Department is adding an exemption for a use or activity conducted by a Federal agency that is not authorized under Title V of FLPMA (43 U.S.C. 1761–1771); the MLA (30 U.S.C. 185); the National Historic Preservation Act (NHPA), 16 U.S.C. 470h–2; or the statute governing authorizations for commercial filming (16 U.S.C. 460*l*–6d). The Forest Service does not have the authority to require cost recovery from Federal agencies that apply for and hold special use authorizations issued under statutes other than FLPMA, the MLA, the NHPA, and the commercial filming statute.

Section 251.58(h) Appeal of decisions. This section of the rule provides that a decision by the authorized officer to assess a processing or monitoring fee and the determination of a fee category or estimated costs are not subject to administrative appeal.

Comment. This section received many comments, all stating that there should be an appeal process. Without such a process, the respondents believed that they were denied due process. Some respondents stated that this regulation should provide an applicant or holder the opportunity to appeal to the next higher agency line officer or to a board or individual who was not involved in the initial fee determination. Respondents believed that agency action on an application or authorization should not be suspended while an appeal is being decided.

Response. The Department believes that the determination of cost recovery fees should be kept separate from the review process required by the Department's administrative appeal regulations. To make that process available to applicants and holders would reduce the value of cost recovery to special use applicants, authorization holders, and the agency, as it would surely lead to delays in processing applications and monitoring authorizations while the authorized officer's attention is diverted to responding to appeals.

The Department, however, recognizes the importance of providing administrative recourse to those who dispute the authorized officer's determination of a cost recovery fee category or estimated costs. Thus, the Department has revised § 251.58(e) in

the final rule to allow an applicant or holder to submit a written request before the disputed fee is due for substitution of an alternative fee category or alternative estimated costs to the authorized officer's immediate supervisor. The applicant or holder must provide documentation that supports the alternative fee category or estimated costs. Further, unless requested by the applicant or holder, or unless the applicant or holder fails to pay the full disputed fee, the revised dispute resolution process will not result in the agency suspending action on the application or authorization while the dispute is being addressed. The authorized officer's immediate supervisor must render a decision on a disputed processing or monitoring fee within 30 calendar days of receipt of the written request from the applicant or holder. The dispute will be decided in favor of the applicant or holder if the immediate supervisor does not respond to the written request within 30 days of receipt. The Department believes that these revisions are sufficient to allay respondents' concerns regarding review of cost recovery determinations.

Section 251.58(i) Processing and monitoring fee schedules. This section provides that the agency will place its processing and monitoring fee schedules in its directives system, and will review the rates in the schedules 5 years after the effective date of the final rule.

Comment. The only comment received on this section was the suggestion that the fee schedules appear in the Code of Federal Regulations (CFR), rather than in the agency's directive system.

Response. The Department disagrees with the suggestion that the CFR is the appropriate place to post and update cost recovery fee schedules. The fee schedules will be updated annually using the IPD–GDP index. It would be cumbersome to go through the regulatory process annually to amend the CFR to revise the cost recovery rates based on changes in the IPD–GDP. It is appropriate to post cost recovery fee schedules in the agency's directive system. Currently, all other Forest Service fee schedules are found in the directive system. Directives are easily amended, which is particularly important when fee schedules need to be updated annually. Additionally, these directives are available at all administrative levels within the agency and are accessible to the public through the agency's World Wide Web directive home page (*http://www.fs.fed.us/im/directives*). Therefore, the provision in the proposed rule for posting cost recovery fee schedules in the Forest Service's directives system remains unchanged in the final rule.

The Forest Service, in discussions with BLM, has determined that it should not necessarily wait 5 years to review its cost recovery fee schedules. The agency believes that it should have the latitude to evaluate consistency between the fee schedules and its actual costs of doing business at any point after adoption of the final rule. The Department concurs that the agency should review and, if necessary, revise the minor category fee rates to make them commensurate with the agency's cost to process applications and monitor authorizations. The Department affirms, however, that any evaluation of fee schedules will be based on case-specific samplings of costs that the agency will collect following implementation of the final rule. Therefore, § 251.58(i)(2) of the final rule has been revised to state that the agency will review the cost recovery rates within 5 years of the effective date of the final rule.

3. Final Processing and Monitoring Fee Schedules

The following schedules contain the fee categories and rates for cost recovery that are adopted by this final rule. As displayed, all minor category fee rates have been indexed to reflect CY 2005 rates using the cumulative rate of change from the CY 2003 second quarter to the CY 2004 second quarter in the IPD–GDP index, as discussed earlier in section 2 under ''Response to General Comments'' and are consistent with the rates adopted by BLM in its final regulations for its right-of-way program (70 FR 20969, Apr. 22, 2005). The Forest Service will incorporate these fee schedules in its internal directive system.

CALENDAR YEAR 2006 PROCESSING FEES

Category	Hours	Rate*
Processing Fee Schedule for Minor Category Applications		
1 (Minimal Impact)	> 1 and up to and including 8	$100.
2	> 8 and up to and including 24	$354.
3	> 24 and up to and including 36	$665.
4	> 36 and up to and including 50	$953.
Processing Fee Schedule for Major Category Applications, Other Than Those Authorized Under the Mineral Leasing Act		
Category	Hours	Rate
5 (Master Agreement)		As specified in the agreement.
6	> 50	Full reasonable costs as determined case by case.
Processing Fee Schedule for Major Category Applications Authorized Under the Mineral Leasing Act		
Category	Hours	Rate
5 (Master Agreement)		As specified in the agreement.
6	> 50	Full actual costs as determined case by case.

* Pursuant to 36 CFR 251.58(g), no processing fee shall be charged for:
- Applications that require 1 hour or less for the agency to process.
- Applications for recreation special uses that require 50 hours or less to process.
- Applications for a noncommercial group use (36 CFR 251.51).
- Applications to exempt a noncommercial activity from a closure order, except for applications for access to non-Federal lands within the boundaries of the National Forest System granted under section 1323(a) of ANILCA (16 U.S.C. 3210(a)).
- Applications for water systems authorized by section 501(c) of FLPMA (43 U.S.C. 1761(c)).

• Applications submitted by a Federal agency under authorities other than Title V of FLPMA (43 U.S.C. 1761–1771); the MLA (30 U.S.C. 185); the NHPA (16 U.S.C. 470h-2); or the Act of May 26, 2000 (16 U.S.C. 460*l*–6d).

CALENDAR YEAR 2006 MONITORING FEES

Category	Hours	Rate*
Monitoring Fee Schedule for Minor Category Authorizations		
1 (Minimal Impact)	> 1 and up to and including 8	$100.
2	> 8 and up to and including 24	$354.
3	> 24 and up to and including 36	$665.
4	> 36 and up to and including 50	$953.
Monitoring Fee Schedule for Major Category Authorizations, Other Than Those Issued Under the Mineral Leasing Act		
Category	Hours	Rate
5 (Master Agreement)		As specified in the agreement.
6	> 50	Full reasonable costs as determined case by case.
Monitoring Fee Schedule for Major Category Authorizations Issued Under the Mineral Leasing Act		
Category	Hours	Rate
5 (Master Agreement)		As specified in the agreement.
6	> 50	Full actual costs as determined case by case.

* Pursuant to 36 CFR 251.58(g), no monitoring fee shall be charged for:
• Authorizations that require 1 hour or less for the agency to monitor.
• Authorizations for recreation special uses that require 50 hours or less to monitor.
• Authorizations for a noncommercial group use (36 CFR 251.51).
• Authorizations to exempt a noncommercial activity from a closure order, except for authorizations for access to non-Federal lands within the boundaries of the National Forest System granted under section 1323(a) of ANILCA (16 U.S.C. 3210(a)).
• Authorizations for water systems authorized by section 501(c) of FLPMA (43 U.S.C. 1761(c)).
• Authorizations issued to a Federal agency under authorities other than Title V of FLPMA (43 U.S.C. 1761–1771); the MLA (30 U.S.C. 185); the NHPA (16 U.S.C. 470h–2); or the Act of May 26, 2000 (16 U.S.C. 460*l*–6d).

4. Authority

Laws or administrative directives that authorize the Forest Service to recover costs include:

1. *Independent Offices Appropriations Act of 1952, as amended (IOAA; 31 U.S.C. 9701).* Title V of this act provides that each Federal agency may charge for specific benefits and services the agency provides to an identifiable recipient, with an exception for official government business. Such charges must be fair and must be based on the costs to the Federal Government and the value of the specific benefits and services provided to the recipient.

2. *Office of Management and Budget (OMB) Circular No. A–25, as revised July 15, 1993.* This circular provides Federal agencies with specific direction for implementing the cost recovery provisions of Title V of the IOAA. Section 4a specifies that the circular covers all Federal activities that convey specific benefits or services to identifiable recipients beyond those accruing to the general public.

3. *Section 28(l) of the Mineral Leasing Act of 1920, as amended (MLA; 30 U.S.C. 185(l)).* The 1973 amendment to section 28 of this act authorizes oil and gas pipeline uses; requires that an applicant for an oil and gas right-of-way or permit reimburse the Federal Government for actual administrative and other costs incurred in processing the application (such as the cost of preparing environmental impact statements, including environmental analyses and biological evaluations for Endangered Species Act compliance); and requires that a holder of an oil and gas right-of-way or permit reimburse actual administrative and other costs incurred by the Federal Government in monitoring the construction, operation, maintenance, and termination of any pipeline and related facilities within the scope of the right-of-way or permit. The legislative history of the 1973 amendment to the MLA states that the reimbursement for these administrative and other costs is in addition to fees charged for use and occupancy of land within the scope of the right-of-way.

4. *Section 504(g) of the Federal Land Policy and Management Act of 1976 (FLPMA; 43 U.S.C. 1764(g)).* Section 504(g) of FLPMA provides for reimbursement of administrative and other costs in addition to the collection of a land use fee. The act authorizes agencies to require reimbursement of the Federal Government for all reasonable administrative and other costs incurred in processing right-of-way applications and in monitoring right-of-way authorizations. Factors that must be considered in establishing such reasonable costs under FLPMA include actual costs, the monetary value of the rights and privileges sought, that portion of the costs incurred for the benefit of the general public interest, the public service provided, the efficiency of the Government processing involved, and other factors relevant to determining the reasonableness of processing or monitoring costs. The act also provides a concise statement of Congressional intent concerning cost recovery generally.

Public Law 98–300 amended section 504(g) of FLPMA to exempt certain facilities financed under the Rural Electrification Act from Federal land use fees, but notably retains the authority of agencies to require reimbursement of reasonable administrative and other costs related to processing applications and monitoring authorizations for such facilities.

5. *Section 110(g) of the National Historic Preservation Act of 1966 (NHPA; 16 U.S.C. 470h–2(g)).* Section 110(g) of this act provides that Federal agencies may require prospective licensees and permittees to pay for the Federal Government's cost of preservation activities as a condition of issuance of a license or permit.

6. *Section 331 of the Interior and Related Agencies Appropriations Act of*

November 29, 1999 (Pub. L. 106–113) and Section 345 of the Consolidated Appropriations Act for fiscal year 2005 (Pub. L. 108–447, Division E), and Section 425 of the Interior and Related Agencies Appropriations Act of August 2, 2005 (Pub. L. 109–54). Section 331 of this act allows the Forest Service to retain and spend funds collected under its existing statutory authorities for cost recovery for fiscal years 2000 through 2004 to cover the costs incurred by the agency in processing special use applications and monitoring compliance with special use authorizations. Section 345 of the Consolidated Appropriations Act for fiscal year 2005 (Pub. L. 108–447, Division E) extended this authority through September 30, 2005. Section 425 of the *Interior and Related Agencies Appropriations Act for fiscal year 2006 (Pub. L. 109–54) extended this authority through September 30, 2006.*

7. Section 1(b) of *the Act of May 26, 2000 (16 U.S.C. 460l–6d(b)).* Section 1(b) of this act authorizes the Forest Service to recover any costs incurred as a result of commercial filming or similar projects, including, but not limited to, administrative and personnel costs.

5. Regulatory Certifications

Environmental Impact

This final rule establishes administrative fee categories and procedures for processing special use applications and monitoring special use authorizations on National Forest System (NFS) lands. Section 31b of Forest Service Handbook 1909.15 (57 FR 43180, September 18, 1992) excludes from documentation in an environmental assessment or environmental impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.'' The Department's assessment is that this final rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Regulatory Impact

In accordance with OMB's determination that this final rule is significant, it has been subject to OMB review under Executive Order 12866. In addition, the Forest Service has prepared a cost-benefit analysis and a threshold Regulatory Flexibility Act analysis of this final rule to identify its effects on applicants for and holders of special use authorizations and on the agency's management of its special uses program.

Cost-Benefit Analysis

In this analysis, the Forest Service concluded that implementation of the final rule will result in a change in the agency's management of its special uses program. The most significant change will be experienced by those applicants for and holders of special use authorizations who have previously never been exposed to cost recovery and who will be required to pay cost recovery fees pursuant to the final rule. A summary of the key costs and benefits of the final rule for applicants, holders, and the Forest Service follows.

Primary Costs Associated With Implementing the Final Rule

1. The economic impacts of the final rule will not be evenly distributed among applicants and holders.

2. Those who may be most impacted by the added costs resulting from the final rule include:

a. Individuals or entities that need to have an authorization to secure access to their lands within the NFS, especially in those cases where the application will require a considerable amount of time to process due to the magnitude of the proposal or the environmental sensitivity of the proposed use. These applicants will have little or no opportunity to pass cost recovery fees on to clients or customers.

b. Some small businesses or individuals who apply for or hold special use authorizations, if their application for a new authorization or for modification of an existing authorization will require more than 50 hours to process. However, under the final rule, recreation special use applications and authorizations (such as for outfitting and guiding, resorts, or marinas) that require 50 hours or less to process or monitor are exempt from cost recovery fees.

3. The final rule gives the authorized officer the discretion to grant a waiver to local, State, and Federal governmental entities that do not or would not charge processing or monitoring fees for comparable services they provide or would provide to the Forest Service.

Primary Benefits Associated With Implementing the Final Rule

1. In return for assessing a processing fee from applicants for and holders of special use authorizations, the Forest Service is establishing customer service standards in its directives system that direct the authorized officer to communicate with applicants and holders about the status of application processing.

2. The Forest Service will have additional resources to fund a more skilled and efficient workforce, which will enhance the agency's ability to satisfy the needs and expectations of applicants for and holders of special use authorizations.

3. In some cases, more timely processing of applications will reduce opportunity costs and allow applicants to plan and operate in a more business-like manner.

4. Taxpayers will benefit from having governmental services that are currently being provided with appropriated funds but that are benefiting identifiable recipients, rather than the general public, paid for instead by the recipients of those services.

5. The public also will benefit from the reduction in the backlog of applications, which in turn will reduce the liability of the United States arising from uses and occupancies that continue on NFS lands under expired special use authorizations.

6. NFS lands will benefit, in that the agency will have the resources needed to issue new authorizations with terms and conditions that mitigate environmental impacts for thousands of uses and occupancies that are continuing under expired authorizations.

Regulatory Flexibility Act Analysis

The Department concludes that this final rule will not have a significant economic impact on a substantial number of small entities, based upon a cost-benefit analysis and a threshold Regulatory Flexibility Act analysis prepared for this final rule. Therefore, certification of no significant economic impact on a substantial number of small entities is appropriate, and further analysis pursuant to the Regulatory Flexibility Act is not required.

Basis for Charging Cost Recovery Fees

This cost recovery rule establishes the procedures to charge applicants for and holders of special use authorizations for the cost of processing applications and monitoring authorizations. The processing fee for an application will be based only on costs necessary for processing that application and will not include costs for studies for programmatic planning or analysis (such as species viability, the recreational carrying capacity of a wilderness area, or analysis associated with designating a multi-user communications site) or other agency management objectives, unless they are necessary for the application being processed.

Entities Affected by Cost Recovery

The cost recovery rule will apply to individuals, large and small businesses, large and small nonprofit entities, and local, State, and Federal governmental entities that are applicants for or holders of special use authorizations.

Scope of Impacts

a. *Business Entities.* Large, complex projects are most commonly proposed by larger companies and corporations, which are most able to absorb the higher cost recovery fees that will be associated with these larger, more complex projects, and which in many cases can pass these fees on to a broad base of clients and customers. Conversely, smaller business entities and individuals commonly propose smaller, less complex projects on NFS lands and therefore more often will be assessed lower cost recovery fees than large businesses and corporations. The primary type of small business affected by the proposed cost recovery rule would be outfitters and guides, who provide outdoor recreation opportunities on the National Forests. Approximately 5,700 of these businesses operate partially or entirely on NFS lands. To address the concern expressed by these entities that they would be unduly burdened by this rule, as well as to enhance consistency with BLM's cost recovery regulations, the Department is establishing an exemption from cost recovery fees for recreation special use applications and authorizations that require 50 hours or less to process or monitor.

b. *Nonprofit Entities.* As with larger versus smaller business entities, the larger, more complex projects that will have higher cost recovery fees are usually associated with larger nonprofit entities, and the smaller, less complex projects that will have lower cost recovery fees are associated with smaller nonprofit entities.

c. *Governmental Entities.* The correlation between the size of a governmental entity and the size of a proposed special use project is not as direct as it is with nongovernmental entities. Some small governmental entities propose large public works projects that will have high cost recovery fees. Conversely, some Federal projects are small and will prompt low cost recovery fees.

Mitigation of Impacts on Small Entities

The Forest Service has taken several steps to mitigate impacts on small entities in this final cost recovery rule. Revisions to the final rule were made in response to written comments received during the public comment period (November 27, 1999, through March 9, 2000); concerns voiced at public meetings held by the Forest Service in various locations throughout the United States in January and February 2000; and the need to enhance consistency between the Forest Service's and BLM's cost recovery rules.

Revisions to the final rule to mitigate impacts on small entities include:

1. The provision governing the basis for processing fees has been clarified to state that the processing fee for an application will be based solely on costs necessary for processing that application and will not include costs for studies for programmatic planning or analysis or other agency management objectives, unless they are necessary for the application being processed. This revision addresses a major concern expressed by outfitters and guides and other small businesses with respect to the scope of the basis for charging a processing fee.

2. Cost recovery fees may be waived for individuals and all types of entities, not just nonprofit entities, when the proposed facility, project, or use will provide, without user or customer charges, a valuable benefit to the general public or to the programs of the Secretary of Agriculture.

3. The basis for charging monitoring fees has been narrowed. The basis for charging a monitoring fee for minor category cases will include only those activities required to ensure compliance with an authorization during construction or reconstruction of temporary or permanent facilities and rehabilitation of the construction or reconstruction site. As a result of this change, monitoring fees will not be assessed for most outfitting and guiding operations.

4. Processing and monitoring fees have been eliminated for recreation special use applications and authorizations that require 50 hours or less to process or monitor. Processing and monitoring fees have been eliminated for any other applications or authorizations that take 1 hour or less to process or monitor.

5. The processing fee schedule in the proposed rule for applications other than those authorized under the MLA included a minimal impact rate of $75 for applications that take up to and including 8 hours to process. The minimal impact category has been modified in the processing fee schedule for minor category applications in the final rule and added to the monitoring fee schedule for minor category authorizations in the final rule. The minimal impact category now includes applications or authorizations that take more than 1 hour, but less than or equal to 8 hours, to process or monitor. This revision provides relief for individuals and small businesses by exempting from cost recovery fees those applications or authorizations that require 1 hour or less to process or monitor.

6. The agency has revised the dispute resolution process by providing that applicants and holders may submit a written request for substitution of an alternative fee category or alternative estimated costs to the immediate supervisor of the authorized officer who determined the fee category or estimated costs.

7. The agency has retained modest fees in the fixed rate processing and monitoring categories 1 through 4. For major category 5 and category 6 cases, the authorized officer will estimate the agency's full actual processing and monitoring costs.

The threshold Regulatory Flexibility Act analysis concludes that the economic impact of the final rule on small entities will be insignificant for the following additional reasons:

1. Most small entities' applications will fall into minor categories. Recreation special use applications that fall into minor categories are exempt from processing fees. The estimated average minor category processing fee for non-recreation special uses is $491, which is minimal. The estimated average major category processing fee is $3,500 for non-recreation special use applications and $2,500 for recreation special use applications. Since processing fees are not assessed annually, but rather assessed only when an application covered by the cost recovery rule is submitted, minor and major category fees can be amortized over the term of a special use authorization for business planning purposes. The cost per year associated with an amortized processing fee generally will be minimal.

2. Facilities or services that are already authorized will continue to operate without the imposition of costs recovery fees, unless the authorization for those facilities or services terminates or the holder proposes a new or modified use.

3. Small governmental entities that do not or would not impose similar fees for comparable processing or monitoring services they provide or would provide to the Forest Service will qualify for a full or partial waiver of cost recovery fees under the final rule.

4. Some small entities that propose large-scale projects that fall into major categories could be impacted by the final rule. However, the Forest Service's

special use regulations require that applicants for special use authorizations consult with Forest Service officials concerning applicable requirements before submitting a special use application and that applicants be financially and technically capable of providing the services or facilities they propose. In most cases, a cost recovery fee associated with processing an application for a major undertaking will constitute a small percentage of the total investment needed to conduct that activity on NFS lands.

5. The Forest Service has developed its final cost recovery rule to be consistent with the cost recovery requirements imposed by BLM for its right-of-way and special recreation permit programs. These programs are comparable to the Forest Service's lands and recreation special use programs. BLM has been exercising its statutory authority to recover costs from its customers, including small entities, for nearly 20 years. In its proposed and final cost recovery rules for special recreation permits (65 FR 31234, May 16, 2000, and 67 FR 61732, Oct. 1, 2002) and in its proposed and final cost recovery rules for its right-of-way program (64 FR 32106, Jun. 15, 1999, and 70 CFR 20969, Apr. 22, 2005), BLM concluded that the imposition of cost recovery fees would not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act.

6. Applicants for new uses may structure their applications to avoid areas with significant environmental concerns, thus reducing the costs associated with evaluating the environmental effects of a proposed use. In addition, applicants will be encouraged to fulfill as many of the application requirements as possible from sources other than the Forest Service. Doing so will minimize the processing fee by reducing the Forest Service's cost to process the application.

Benefits of the Final Rule

Any minimal economic impacts on small entities are more than offset by the benefits associated with this rule, including the agency's establishment of customer service standards for processing applications subject to these cost recovery regulations; the agency's enhanced ability to satisfy the needs and expectations of applicants for and holders of special use authorizations; and reduction of environmental impacts and the liability of the United States associated with uses and occupancies that are continuing under expired authorizations. Moreover, if the agency fails to adopt this rule, many holders will continue to operate in a short-term manner under expired authorizations and will forego opportunities for long-term stability until the agency is appropriated the resources to conduct the analyses needed to issue longer-term authorizations.

Final Rule Certification

Based on the cost-benefit and threshold Regulatory Flexibility Act analyses conducted for this rulemaking, the Department has determined that this final rule will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act because it will not impose recordkeeping requirements on them; it will not affect their competitive position in relation to large entities; and it will not affect their cash flow, liquidity, or ability to remain in the market.

Federalism

The Department has considered this final rule under the requirements of Executive Order 13132 on federalism. The Department has made a final assessment that the rule conforms with the federalism principles set out in this Executive Order; will not impose any compliance costs on the States; and 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. Moreover, the cost recovery processing and monitoring fees set out in this final rule may be waived for local and State governmental entities that do not or would not charge processing or monitoring fees for comparable services they provide or would provide to the Forest Service. No further consultation with State and local governments is necessary upon adoption of this final rule.

No Takings Implications

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

Civil Justice Reform

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

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 final rule 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.

Energy Effects

This final rule has been reviewed under Executive Order 13211 of May 18, 2001, ''Actions Concerning Regulations That Significantly Affect the Energy Supply.'' It has been determined that this final rule will not have an adverse effect on the supply, distribution, or use of energy. Conversely, the Department believes that this final rule will allow the Forest Service to respond more expeditiously to industry requests for use of NFS lands for energy and energy-related facilities by providing the Forest Service with additional resources to process applications for these facilities.

Consultation With Tribal Governments

This final rule has been reviewed under Executive Order 13175 of November 6, 2000, ''Consultation and Coordination with Indian Tribal Governments.'' It has been determined that this final rule does not implicate the consultation provisions of that Executive Order.

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 U.S.C. part 1320 that are not already required by law or not already approved for use. The information collection required as a result of this rule has been approved by OMB and assigned control number 0596–0082. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

Government Paperwork Elimination Act Compliance

The Forest Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option

of submitting information or transacting business electronically to the maximum extent possible.

6. Revisions to 36 CFR Part 251, Subpart B

List of Subjects in 36 CFR Part 251

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

■ Therefore, for the reasons set forth in the preamble, amend part 251, subpart B, to read as follows:

PART 251—LAND USES

Subpart B—Special Uses

■ 1. The authority citation for part 251, subpart B, is revised to read as follows:

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

■ 2. Amend § 251.51 by adding definitions for *major category, minor category,* and *monitoring* in alphabetical order, to read as follows:

§ 251.51 Definitions.

* * * * *

Major category—A processing or monitoring category requiring more than 50 hours of agency time to process an application for a special use authorization (processing category 6 and, in certain situations, processing category 5) or more than 50 hours of agency time to monitor compliance with the terms and conditions of an authorization (monitoring category 6 and, in certain situations, monitoring category 5). Major categories usually require documentation of environmental and associated impacts in an environmental assessment and may require an environmental impact statement.

Minor category—A processing or monitoring category requiring 50 hours or less of agency time to process an application for a special use authorization (processing categories 1 through 4 and, in certain situations, processing category 5) or 50 hours or less of agency time to monitor compliance with the terms and conditions of an authorization (monitoring categories 1 through 4 and, in certain situations, monitoring category 5). Minor categories may require documentation of environmental and associated impacts in an environmental assessment.

Monitoring—Actions needed to ensure compliance with the terms and conditions in a special use authorization.

* * * * *

■ 3. Add § 251.58 to read as follows:

§ 251.58 Cost recovery.

(a) *Assessment of fees to recover agency processing and monitoring costs.* The Forest Service shall assess fees to recover the agency's processing costs for special use applications and monitoring costs for special use authorizations. Applicants and holders shall submit sufficient information for the authorized officer to estimate the number of hours required to process their applications or monitor their authorizations. Cost recovery fees are separate from any fees charged for the use and occupancy of National Forest System lands.

(b) *Special use applications and authorizations subject to cost recovery requirements.* Except as exempted in paragraphs (g)(1) through (g)(4) of this section, the cost recovery requirements of this section apply in the following situations to the processing of special use applications and monitoring of special use authorizations issued pursuant to this subpart:

(1) *Applications for use and occupancy that require a new special use authorization.* Fees for processing an application for a new special use authorization shall apply to any application formally accepted by the agency on or after March 23, 2006 and to any application formally accepted by the agency before March 23, 2006, which the agency has not commenced processing. Proposals accepted as applications which the agency has commenced processing prior to March 23, 2006 shall not be subject to processing fees. The cost recovery provisions of this section shall not apply to or supersede written agreements providing for recovery of processing costs executed by the agency and applicants prior to March 23, 2006.

(2) *Changes to existing authorizations.* Processing fees apply to proposals that require an application to amend or formally approve specific activities or facilities as identified in an existing authorization, operating plan, or master development plan. Processing fees also apply to agency actions to amend a special use authorization.

(3) *Agency actions to issue a special use authorization and applications for issuance of a new special use authorization due to termination of an existing authorization, including termination caused by expiration, a change in ownership or control of the authorized facilities, or a change in ownership or control of the holder of the authorization.* Upon termination of an existing authorization, a holder shall be subject to a processing fee for issuance of a new authorization, even if the holder's existing authorization does not require submission of an application for a new authorization.

(4) Monitoring of authorizations issued or amended on or after March 23, 2006.

(c) *Processing fee requirements.* A processing fee is required for each application for or agency action to issue a special use authorization as identified in paragraphs (b)(1) through (b)(3) of this section. Processing fees do not include costs incurred by the applicant in providing information, data, and documentation necessary for the authorized officer to make a decision on the proposed use or occupancy pursuant to the provisions at § 251.54.

(1) *Basis for processing fees.* The processing fee categories 1 through 6 set out in paragraphs (c)(2)(i) through (c)(2)(vi) of this section are based upon the costs that the Forest Service incurs in reviewing the application, conducting environmental analyses of the effects of the proposed use, reviewing any applicant-generated environmental documents and studies, conducting site visits, evaluating an applicant's technical and financial qualifications, making a decision on whether to issue the authorization, and preparing documentation of analyses, decisions, and authorizations for each application. The processing fee for an application shall be based only on costs necessary for processing that application. ''Necessary for'' means that but for the application, the costs would not have been incurred and that the costs cover only those activities without which the application cannot be processed. The processing fee shall not include costs for studies for programmatic planning or analysis or other agency management objectives, unless they are necessary for the application being processed. For example, the processing fee shall not include costs for capacity studies, use allocation decisions, corridor or communications site planning, and biological studies that address species diversity, unless they are necessary for the application. Proportional costs for analyses, such as capacity studies, that are necessary for an application may be included in the processing fee for that application. The costs incurred for processing an application, and thus the processing fee, depend on the complexity of the project; the amount of information that is necessary for the authorized officer's decision in response to the proposed use and occupancy; and

the degree to which the applicant can provide this information to the agency. Processing work conducted by the applicant or a third party contracted by the applicant minimizes the costs the Forest Service will incur to process the application, and thus reduces the processing fee. The total processing time is the total time estimated for all Forest Service personnel involved in processing an application and is estimated case by case to determine the fee category.

(i) *Processing fee determinations.* The applicable fee rate for processing applications in minor categories 1 through 4 (paragraphs (c)(2)(i) through (c)(2)(iv) of this section) shall be assessed from a schedule. The processing fee for applications in category 5, which may be either minor or major, shall be established in the master agreement (paragraph (c)(2)(v) of this section). For major category 5 (paragraph (c)(2)(v) of this section) and category 6 (paragraph (c)(2)(vi) of this section) cases, the authorized officer shall estimate the agency's full actual processing costs. The estimated processing costs for category 5 and category 6 cases shall be reconciled as provided in paragraphs (c)(5)(ii) and (iii) and (c)(6)(ii) and (iii) of this section.

(ii) *Reduction in processing fees for certain category 6 applications.* For category 6 applications submitted under authorities other than the Mineral Leasing Act, the applicant:

(A) May request a reduction of the processing fee based upon the applicant's written analysis of actual costs, the monetary value of the rights and privileges sought, that portion of the costs incurred for the benefit of the general public interest, the public service provided, the efficiency of the agency processing involved, and other factors relevant to determining the reasonableness of the costs. The agency will determine whether the estimate of full actual costs should be reduced based upon this analysis and will notify the applicant in writing of this determination; or

(B) May agree in writing to waive payment of reasonable costs and pay the actual costs incurred in processing the application.

(2) *Processing fee categories.* No fee is charged for applications taking 1 hour or less for the Forest Service to process. Applications requiring more than 1 hour for the agency to process are covered by the fee categories 1 through 6 set out in the following paragraphs i through vi.

(i) *Category 1: Minimal Impact: More than 1 hour and up to and including 8 hours.* The total estimated time in this minor category is more than 1 hour and up to and including 8 hours for Forest Service personnel to process an application.

(ii) *Category 2: More than 8 and up to and including 24 hours.* The total estimated time in this minor category is more than 8 and up to and including 24 hours for Forest Service personnel to process an application.

(iii) *Category 3: More than 24 and up to and including 36 hours.* The total estimated time in this minor category is more than 24 and up to and including 36 hours for Forest Service personnel to process an application.

(iv) *Category 4: More than 36 and up to and including 50 hours.* The total estimated time in this minor category is more than 36 and up to and including 50 hours for Forest Service personnel to process an application.

(v) *Category 5: Master agreements.* The Forest Service and the applicant may enter into master agreements for the agency to recover processing costs associated with a particular application, a group of applications, or similar applications for a specified geographic area. This category is minor if 50 hours or less are needed for Forest Service personnel to process an application and major if more than 50 hours are needed. In signing a master agreement for a major category application submitted under authorities other than the Mineral Leasing Act, an applicant waives the right to request a reduction of the processing fee based upon the reasonableness factors enumerated in paragraph (c)(1)(ii)(A) of this section. A master agreement shall at a minimum include:

(A) The fee category or estimated processing costs;

(B) A description of the method for periodic billing, payment, and auditing;

(C) A description of the geographic area covered by the agreement;

(D) A work plan and provisions for updating the work plan;

(E) Provisions for reconciling differences between estimated and final processing costs; and

(F) Provisions for terminating the agreement.

(vi) *Category 6: More than 50 hours.* In this major category more than 50 hours are needed for Forest Service personnel to process an application. The authorized officer shall determine the issues to be addressed and shall develop preliminary work and financial plans for estimating recoverable costs.

(3) *Multiple applications other than those covered by master agreements (category 5). (i) Unsolicited applications where there is no competitive interest.* Processing costs that are incurred in processing more than one of these applications (such as the cost of environmental analysis or printing an environmental impact statement that relates to all of the applications) must be paid in equal shares or on a prorated basis, as deemed appropriate by the authorized officer, by each applicant, including applicants for recreation special uses that are otherwise exempt under paragraph (g)(3) of this section when the Forest Service requires more than 50 hours in the aggregate to process the applications submitted in response to the prospectus.

(ii) *Unsolicited proposals where competitive interest exists.* When there is one or more unsolicited proposals and the authorized officer determines that competitive interest exists, the agency shall issue a prospectus. All proposals accepted pursuant to that solicitation shall be processed as applications. The applicants are responsible for the costs of environmental analyses that are necessary for their applications and that are conducted prior to issuance of the prospectus. Processing fees for these cases shall be determined pursuant to the procedures for establishing a category 6 processing fee and shall include costs such as those incurred in printing and mailing the prospectus; having parties other than the Forest Service review and evaluate applications; establishing a case file; recording data; conducting financial reviews; and, for selected applicants, any additional environmental analysis required in connection with their applications. Processing fees shall be paid in equal shares or on a prorated basis, as deemed appropriate by the authorized officer, by all parties who submitted proposals that were processed as applications pursuant to the solicitation, including applicants for recreation special uses that are otherwise exempt under paragraph (g)(3) of this section when the Forest Service requires more than 50 hours in the aggregate to process the applications submitted in response to the prospectus.

(iii) *Solicited applications.* When the Forest Service solicits applications through the issuance of a prospectus on its own initiative, rather than in response to an unsolicited proposal or proposals, the agency is responsible for the cost of environmental analyses conducted prior to issuance of the prospectus. All proposals accepted pursuant to that solicitation shall be processed as applications. Processing fees for these cases shall be determined pursuant to the procedures for establishing a category 6 processing fee and shall include costs such as those incurred in printing and mailing the

prospectus; having parties other than the Forest Service review and evaluate applications; establishing a case file; recording data; conducting financial reviews; and, for selected applicants, any additional environmental analysis required in connection with their applications. Processing fees shall be paid in equal shares or on a prorated basis, as deemed appropriate by the authorized officer, by all parties who submitted proposals that were processed as applications pursuant to the solicitation, including applicants for recreation special uses that are otherwise exempt under paragraph (g)(3) of this section when the Forest Service requires more than 50 hours in the aggregate to process the applications submitted in response to the prospectus.

(4) *Billing and revision of processing fees.* (i) *Billing.* When the Forest Service accepts a special use application, the authorized officer shall provide written notice to the applicant that the application has been formally accepted. The authorized officer shall not bill the applicant a processing fee until the agency is prepared to process the application.

(ii) *Revision of processing fees.* Minor category processing fees shall not be reclassified into a higher minor category once the processing fee category has been determined. However, if the authorized officer discovers previously undisclosed information that necessitates changing a minor category processing fee to a major category processing fee, the authorized officer shall notify the applicant or holder of the conditions prompting a change in the processing fee category in writing before continuing with processing the application. The applicant or holder may accept the revised processing fee category and pay the difference between the previous and revised processing categories; withdraw the application; revise the project to lower the processing costs; or request review of the disputed fee as provided in paragraphs (e)(1) through (e)(4) of this section.

(5) *Payment of processing fees.* (i) Payment of a processing fee shall be due within 30 days of issuance of a bill for the fee, pursuant to paragraph (c)(4) of this section. The processing fee must be paid before the Forest Service can initiate or, in the case of a revised fee, continue with processing an application. Payment of the processing fee by the applicant does not obligate the Forest Service to authorize the applicant's proposed use and occupancy.

(ii) For category 5 cases, when the estimated processing costs are lower than the final processing costs for applications covered by a master agreement, the applicant shall pay the difference between the estimated and final processing costs.

(iii) For category 6 cases, when the estimated processing fee is lower than the full actual costs of processing an application submitted under the Mineral Leasing Act, or lower than the full reasonable costs (when the applicant has not waived payment of reasonable costs) of processing an application submitted under other authorities, the applicant shall pay the difference between the estimated and full actual or reasonable processing costs.

(6) *Refunds of processing fees.* (i) Processing fees in minor categories 1 through 4 are nonrefundable and shall not be reconciled.

(ii) For category 5 cases, if payment of the processing fee exceeds the agency's final processing costs for the applications covered by a master agreement, the authorized officer either shall refund the excess payment to the applicant or, at the applicant's request, shall credit it towards monitoring fees due.

(iii) For category 6 cases, if payment of the processing fee exceeds the full actual costs of processing an application submitted under the Mineral Leasing Act, or the full reasonable costs (when the applicant has not waived payment of reasonable costs) of processing an application submitted under other authorities, the authorized officer either shall refund the excess payment to the applicant or, at the applicant's request, shall credit it towards monitoring fees due.

(iv) For major category 5 and category 6 applications, an applicant whose application is denied or withdrawn in writing is responsible for costs incurred by the Forest Service in processing the application up to and including the date the agency denies the application or receives written notice of the applicant's withdrawal. When an applicant withdraws a major category 5 or category 6 application, the applicant also is responsible for any costs subsequently incurred by the Forest Service in terminating consideration of the application.

(7) *Customer service standards.* The Forest Service shall endeavor to make a decision on an application that falls into minor processing category 1, 2, 3, or 4, and that is subject to a categorical exclusion pursuant to the National Environmental Policy Act, within 60 calendar days from the date of receipt of the processing fee. If the application cannot be processed within the 60-day period, then prior to the 30th calendar day of the 60-day period, the authorized officer shall notify the applicant in writing of the reason why the application cannot be processed within the 60-day period and shall provide the applicant with a projected date when the agency plans to complete processing the application. For all other applications, including all applications that require an environmental assessment or an environmental impact statement, the authorized officer shall, within 60 calendar days of acceptance of the application, notify the applicant in writing of the anticipated steps that will be needed to process the application. These customer service standards do not apply to applications that are subject to a waiver of or exempt from cost recovery fees under §§ 251.58(f) or (g).

(d) *Monitoring fee requirements.* The monitoring fee for an authorization shall be assessed independently of any fee charged for processing the application for that authorization pursuant to paragraph (c) of this section. Payment of the monitoring fee is due upon issuance of the authorization.

(1) *Basis for monitoring fees.* Monitoring is defined at § 251.51. For monitoring fees in minor categories 1 through 4, authorization holders are assessed fees based upon the estimated time needed for Forest Service monitoring to ensure compliance with the authorization during the construction or reconstruction of temporary or permanent facilities and rehabilitation of the construction or reconstruction site. Major category 5 and category 6 monitoring fees shall be based upon the agency's estimated costs to ensure compliance with the terms and conditions of the authorization during all phases of its term, including but not limited to monitoring to ensure compliance with the authorization during the construction or reconstruction of temporary or permanent facilities and rehabilitation of the construction or reconstruction site. Monitoring for all categories does not include billings, maintenance of case files, annual performance evaluations, or scheduled inspections to determine compliance generally with the terms and conditions of an authorization.

(i) *Monitoring fee determinations.* The applicable fee rate for monitoring compliance with authorizations in minor categories 1 through 4 (paragraphs (d)(2)(i) through (d)(2)(iv) of this section) shall be assessed from a schedule. The monitoring fee for authorizations in category 5, which may be minor or major, shall be established

in the master agreement (paragraph (d)(2)(v) of this section). For major category 5 (paragraph (d)(2)(v) of this section) and category 6 (paragraph (d)(2)(vi) of this section) cases, the authorized officer shall estimate the agency's full actual monitoring costs. The estimated monitoring costs for category 5 and category 6 cases shall be reconciled as provided in paragraphs (d)(3)(ii) and (iii) and (d)(4)(ii) and (iii) of this section.

(ii) *Reductions in monitoring fees for certain category 6 authorizations.* For category 6 authorizations issued under authorities other than the Mineral Leasing Act, the holder:

(A) May request a reduction of the monitoring fee based upon the holder's written analysis of actual costs, the monetary value of the rights or privileges granted, that portion of the costs incurred for the benefit of the general public interest, the public service provided, the efficiency of the agency monitoring involved, and other factors relevant to determining the reasonableness of the costs. The agency will determine whether the estimate of full actual costs should be reduced based upon this analysis and will notify the holder in writing of this determination; or

(B) May agree in writing to waive payment of reasonable costs and pay the actual costs incurred in monitoring the authorization.

(2) *Monitoring fee categories.* No monitoring fee is charged for authorizations requiring 1 hour or less for the Forest Service to monitor. Authorizations requiring more than1 hour for the agency to monitor are covered by fee categories 1 through 6 set out in the following paragraphs (d)(2)(i) through (vi) of this section.

(i) *Category 1: Minimal Impact: More than 1 hour and up to and including 8 hours.* This minor category requires more than1 hour and up to and including 8 hours for Forest Service personnel to monitor compliance with a special use authorization during construction or reconstruction of temporary or permanent facilities and rehabilitation of the construction or reconstruction site.

(ii) *Category 2: More than 8 and up to and including 24 hours.* This minor category requires more than 8 and up to and including 24 hours for Forest Service personnel to monitor compliance with a special use authorization during construction or reconstruction of temporary or permanent facilities and rehabilitation of the construction or reconstruction site.

(iii) *Category 3: More than 24 and up to and including 36 hours.* This minor category requires more than 24 and up to and including 36 hours for Forest Service personnel to monitor compliance with a special use authorization during construction or reconstruction of temporary or permanent facilities and rehabilitation of the construction or reconstruction site.

(iv) *Category 4: More than 36 and up to and including 50 hours.* This minor category requires more than 36 and up to and including 50 hours for Forest Service personnel to monitor compliance with a special use authorization during construction or reconstruction of temporary or permanent facilities and rehabilitation of the construction or reconstruction site.

(v) *Category 5: Master agreements.* The Forest Service and the holder of an authorization may enter into a master agreement for the agency to recover monitoring costs associated with a particular authorization or by a group of authorizations for a specified geographic area. This category is minor if 50 hours or less are needed for Forest Service personnel to monitor compliance with an authorization and major if more than 50 hours are needed. In signing a master agreement for a major category authorization issued under authorities other than the Mineral Leasing Act, a holder waives the right to request a reduction of the monitoring fee based upon the reasonableness factors enumerated in paragraph (d)(1)(ii)(A) of this section. A master agreement shall at a minimum include:

(A) The fee category or estimated monitoring costs;

(B) A description of the method for periodic billing, payment, and auditing of monitoring fees;

(C) A description of the geographic area covered by the agreement;

(D) A monitoring work plan and provisions for updating the work plan;

(E) Provisions for reconciling differences between estimated and final monitoring costs; and

(F) Provisions for terminating the agreement.

(vi) *Category 6: More than 50 hours.* This major category requires more than 50 hours for Forest Service personnel to monitor compliance with the terms and conditions of the authorization during all phases of its term, including, but not limited, to monitoring compliance with the authorization during the construction or reconstruction of temporary or permanent facilities and rehabilitation of the construction or reconstruction site.

(3) *Billing and payment of monitoring fees.* (i) The authorized officer shall estimate the monitoring costs and shall notify the holder of the required fee. Monitoring fees in minor categories 1 through 4 must be paid in full before or at the same time the authorization is issued. For authorizations in major category 5 and category 6, the estimated monitoring fees must be paid in full before or at the same time the authorization is issued, unless the authorized officer and the applicant or holder agree in writing to periodic payments.

(ii) For category 5 cases, when the estimated monitoring costs are lower than the final monitoring costs for authorizations covered by a master agreement, the holder shall pay the difference between the estimated and final monitoring costs.

(iii) For category 6 cases, when the estimated monitoring fee is lower than the full actual costs of monitoring an authorization issued under the Mineral Leasing Act, or lower than the full reasonable costs (when the holder has not waived payment of reasonable costs) of monitoring an authorization issued under other authorities, the holder shall pay the difference in the next periodic payment or the authorized officer shall bill the holder for the difference between the estimated and full actual or reasonable monitoring costs. Payment shall be due within 30 days of receipt of the bill.

(4) *Refunds of monitoring fees.* (i) Monitoring fees in minor categories 1 through 4 are nonrefundable and shall not be reconciled.

(ii) For category 5 cases, if payment of the monitoring fee exceeds the agency's final monitoring costs for the authorizations covered by a master agreement, the authorized officer shall either adjust the next periodic payment to reflect the overpayment or refund the excess payment to the holder.

(iii) For category 6 cases, if payment of the monitoring fee exceeds the full actual costs of monitoring an authorization issued under the Mineral Leasing Act, or the full reasonable costs (when the holder has not waived payment of reasonable costs) of monitoring an authorization issued under other authorities, the authorized officer shall either adjust the next periodic payment to reflect the overpayment or refund the excess payment to the holder.

(e) *Applicant and holder disputes concerning processing or monitoring fee assessments; requests for changes in fee categories or estimated costs.* (1) If an applicant or holder disagrees with the processing or monitoring fee category

assigned by the authorized officer for a minor category or, in the case of a major processing or monitoring category, with the estimated dollar amount of the processing or monitoring costs, the applicant or holder may submit a written request before the disputed fee is due for substitution of an alternative fee category or alternative estimated costs to the immediate supervisor of the authorized officer who determined the fee category or estimated costs. The applicant or holder must provide documentation that supports the alternative fee category or estimated costs.

(2) In the case of a disputed processing fee:

(i) If the applicant pays the full disputed processing fee, the authorized officer shall continue to process the application during the supervisory officer's review of the disputed fee, unless the applicant requests that the processing cease.

(ii) If the applicant fails to pay the full disputed processing fee, the authorized officer shall suspend further processing of the application pending the supervisory officer's determination of an appropriate processing fee and the applicant's payment of that fee.

(3) In the case of a disputed monitoring fee:

(i) If the applicant or holder pays the full disputed monitoring fee, the authorized officer shall issue the authorization or allow the use and occupancy to continue during the supervisory officer's review of the disputed fee, unless the applicant or holder elects not to exercise the authorized use and occupancy of National Forest System lands during the review period.

(ii) If the applicant or holder fails to pay the full disputed monitoring fee, the authorized officer shall not issue the applicant a new authorization or shall suspend the holder's existing authorization in whole or in part pending the supervisory officer's determination of an appropriate monitoring fee and the applicant's or holder's payment of that fee.

(4) The authorized officer's immediate supervisor shall render a decision on a disputed processing or monitoring fee within 30 calendar days of receipt of the written request from the applicant or holder. The supervisory officer's decision is the final level of administrative review. The dispute shall be decided in favor of the applicant or holder if the supervisory officer does not respond to the written request within 30 days of receipt.

(f) *Waivers of processing and monitoring fees.* (1) All or part of a processing or monitoring fee may be waived, at the sole discretion of the authorized officer, when one or more of the following criteria are met:

(i) The applicant or holder is a local, State, or Federal governmental entity that does not or would not charge processing or monitoring fees for comparable services the applicant or holder provides or would provide to the Forest Service;

(ii) A major portion of the processing costs results from issues not related to the project being proposed;

(iii) The application is for a project intended to prevent or mitigate damage to real property, or to mitigate hazards or dangers to public health and safety resulting from an act of God, an act of war, or negligence of the United States;

(iv) The application is for a new authorization to relocate facilities or activities to comply with public health and safety or environmental laws and regulations that were not in effect at the time the authorization was issued;

(v) The application is for a new authorization to relocate facilities or activities because the land is needed by a Federal agency or for a Federally funded project for an alternative public purpose; or

(vi) The proposed facility, project, or use will provide, without user or customer charges, a valuable benefit to the general public or to the programs of the Secretary of Agriculture.

(2) An applicant's or holder's request for a full or partial waiver of a processing or monitoring fee must be in writing and must include an analysis that demonstrates how one or more of the criteria in paragraphs (f)(1)(i) through (f)(1)(vi) of this section apply.

(g) *Exemptions from processing or monitoring fees.* No processing or monitoring fees shall be charged when the application or authorization is for a:

(1) Noncommercial group use as defined in § 251.51, or when the application or authorization is to exempt a noncommercial activity from a closure order, except for an application or authorization for access to non-Federal lands within the boundaries of the National Forest System granted pursuant to section 1323(a) of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3210(a)).

(2) Water systems authorized by section 501(c) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761(c)).

(3) A use or activity conducted by a Federal agency that is not authorized under Title V of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761–1771); the Mineral Leasing Act of 1920 (30 U.S.C. 185); the National Historic Preservation Act of 1966 (16 U.S.C. 470h–2); or the Act of May 26, 2000 (16 U.S.C. 460*l*–6d).

(4) Recreation special use as defined in the Forest Service's directive system and requires 50 hours or less for Forest Service personnel to process, except for situations involving multiple recreation special use applications provided for in paragraph (c)(3) of this section. No monitoring fees shall be charged for a recreation special use authorization that requires 50 hours or less for Forest Service personnel to monitor.

(h) *Appeal of decisions.* (1) A decision by the authorized officer to assess a processing or monitoring fee or to determine the fee category or estimated costs is not subject to administrative appeal.

(2) A decision by an authorized officer's immediate supervisor in response to a request for substitution of an alternative fee category or alternative estimated costs likewise is not subject to administrative appeal.

(i) *Processing and monitoring fee schedules.* (1) The Forest Service shall maintain schedules for processing and monitoring fees in its directive system (36 CFR 200.4). The rates in the schedules shall be updated annually by using the annual rate of change, second quarter to second quarter, in the Implicit Price Deflator-Gross Domestic Product (IPD–GDP) index. The Forest Service shall round the changes in the rates either up or down to the nearest dollar.

(2) Within 5 years of the effective date of this rule, March 23, 2006, the Forest Service shall review these rates:

(i) To determine whether they are commensurate with the actual costs incurred by the agency in conducting the processing and monitoring activities covered by this rule and

(ii) To assess consistency with processing and monitoring fee schedules established by the United States Department of the Interior, Bureau of Land Management.

Dated: November 9, 2005.

David P. Tenny,

Deputy Under Secretary, Natural Resources and Environment.

Note: The following table will not appear in 36 CFR part 251, subpart B.

7. Summary and Comparison of Provisions in the Proposed and Final Rules

Provision	Proposed Rule	Final Rule
§ 251.51—Definitions	(1) The definition for monitoring was based on the total number of hours required to ensure compliance with the terms and conditions of an authorization during construction or reconstruction activities and the time needed to monitor the operational phase of the authorized use for 1 year.	(1) Revises the definition for monitoring to reflect that this action occurs in administration of special uses generally. Narrows the scope of monitoring fees in § 251.58(d)(1) (see below).
	(2) Definitions were included for different types of processing and monitoring categories.	(2) Adds definitions for major and minor processing and monitoring fee categories.
§ 251.58(a)—Assessment of fees to recover agency processing and monitoring costs.	Provided an overview of cost recovery	No change.
§ 251.58(b)—Special use applications and authorizations subject to cost recovery requirements.	(1) § 251.58(b)(1) through (b)(3) described situations in which the processing fee would be applied.	(1) Clarifies that existing cost recovery agreements between the Forest Service and applicants and holders will not be affected by this rule and that no cost recovery fees will be assessed for proposals accepted as applications which the agency has commenced processing prior to adoption of the final rule.
	(2) § 251.58(b)(4) specified that monitoring fees would be applied to special use authorizations issued or amended on or after the date of adoption of the final rule.	(2) No change.
§ 251.58(c)—Processing fee requirements	(1) § 251.58(c)(1) described agency actions that would require applicants to pay processing fees.	(1) More clearly enumerates those actions that are the applicant's responsibility to fund under NEPA and provides examples to illustrate the costs for which the applicant is responsible and costs for which the agency is responsible.
		(2) § 251.58(c)(2) provided for a schedule of 6 processing fee categories
		(2) Retains all categories in the final rule, except that the final rule enumerates fee categories with Arabic numbers instead of alpha-Roman numerals; adds catgory 1, minimal impact (> 1 and < 8 hours) for applications processed under the MLA; renumbers the previous processing fee category B–IV (> 50 hours) as processing fee category 6; and redesignates the previous processing fee category C, Master Agreements, as category 5, master agreements.
	(3) § 251.58(c)(3) addressed how processing costs would be assessed when two or more applicants apply and compete for one use.	(3) Changes the paragraph heading to ''Multiple applications other than those covered by master agreements (category 5)'' and provides clearer direction involving situations in which multiple applications are being processed for the same or similar uses and occupancies.
	(4) § 251.58(c)(4) described determination, billing, and revision of processing fees.	(4) Modifies this provision to state that minor category processing fees will not be reclassified into a higher minor category after the processing fee category has been determined.
	(5) § 251.58(c)(5) described the procedures for paying processing fees.	(5) Inserts a provision, paragraph (c)(54)(ii), to address underpayment of category 5 processing fees.
	(6) § 251.58(c)(6) described the procedures for refunding processing fees.	(6) Inserts a provision, paragraph (c)(6)(ii), to address overpayment of category 5 processing fees.
§ s251.58(d)—Monitoring fee requirements	(1) § 251.58(d)(1) described the basis for monitoring fees.	(1) Limits the basis for assessment of monitoring fees for minor categories to the agency's time to monitor construction or reconstruction of facilities and rehabilitation of the construction or reconstruction site. For major categories, authorizes monitoring fees to be charged for the agency's time required to ensure compliance with the terms and conditions of an authorization during all phases of its term.

Provision	Proposed Rule	Final Rule
	(2) § 251.58(d)(2) provided for a schedule of 5 monitoring fee categories for non-MLA authorizations and 4 monitoring fee categories for MLA authorizations.	(2) Like the processing fee schedules, provides for 6 monitoring fee categories. Adds a category 1, minimal impact (> 1 and ≤ 8 hours), and adjusts the hourly range for monitoring fee category 2 to > 8 and ≤ 24 hours for both monitoring fee schedules. The final rule enumerates fee categories with Arabic numbers instead of alpha-Roman numerals; adds a master agreement monitoring fee category 5 for all uses; and redesignates the former category B–IV (> 50 hours) as category 6.
	(3) § 251.58(d)(3) allowed the holder to pay the monitoring fee in installments.	(3) Inserts a provision, paragraph (d)(3)(ii), to address underpayment of category 5 monitoring fees.
	(4) § 251.58(d)(4) specified that monitoring fees in categories B–1 through B–III are nonrefundable and enumerated the conditions under which monitoring category B–IV fees would be refunded.	(4) Inserts a provision, paragraph (d)(4)(ii), to address overpayment of category 5 monitoring fees. Redesignates the category references.
§ 251.58(e)—Applicant and holder disputes concerning processing and monitoring fee assessments; requests for changes in fee categories or estimated costs.	(1) § 251.58(e)(1) provided that the applicant or holder may submit a written request to the authorized officer to change the fee category or estimated costs.	(1) Allows the applicant or holder to submit a written request before the disputed fee is due for substitution of an alternative fee category or alternative estimated costs to the immediate supervisor of the authorized officer who determined the fee category or estimated costs.
	(2) § 251.58(e)(2) and (e)(3) suspended processing of the application or the authorized use and occupancy when a processing or monitoring fee is disputed.	(2) Revises these paragraphs to provide that the supervisory officer must make a decision on the disputed fee within 30 calendar days of receipt of the written request from the applicant or holder. The dispute will be decided in favor of the applicant or holder if the supervisory officer does not respond to the written request within 30 days of receipt. In addition, provides that authorizations and processing of applications will not be suspended pending review if the holder or applicant pays the disputed fee in full.
§ 251.58(f)—Waivers of processing and monitoring fees.	(1) § 251.58(f)(1)(i) provided waiver to local, State, or Federal governmental entities that waive fees for comparable services provided to the Forest Service.	(1) Clarifies when waivers to governmental entities are appropriate.
	(2) § 251.58(f)(1)(ii) authorized a waiver when a major portion of the processing costs results from issues not related to the project being proposed.	(2) No change.
	(3) § 251.58(f)(1)(iii) authorized a waiver of processing fees for proposals to mitigate damage to real property or hazards to public health and safety resulting from an act of God, an act of war, or negligence of the United States.	(3) No change.
	(4) § 251.58(f)(1)(iv)–(v) authorized a waiver of processing fees for applications for new authorizations to relocate facilities or activities to comply with public health and safety or environmental laws and regulations that were not in effect at the time the authorization was issued, or because the land is needed by a Federal agency or a Federally funded project for an alternative public purpose.	(4) No change.
	(5) § 251.58(f)(1)(vi)(A) and (B) authorized waivers to nonprofit entities in processing their applications when the studies undertaken had a public benefit or the proposed facility or project provided a free service to the public or supported a program of the Secretary of Agriculture.	(5) Removes nonprofit status as a criterion for waivers of processing fees under this provision. Removes § 251.58(f)(vi)(A), redesignates § 251.58(f)(vi)(B) as § 251.58(f)(vi), and clarifies its text.
	(6) § 251.58(f)(2) required that requests for waivers be made in writing.	(6) No change.

Provision	Proposed Rule	Final Rule
§ 251.58(g)—Exemptions from processing or monitoring fees.	§ 251.58(g) provided a processing and monitoring fee exemption for noncommercial group uses and activities otherwise prohibited by a closure order, other than access to non-Federal lands within the boundaries of the National Forest System granted pursuant to section 1323(a) of ANILCA.	Add an exemption from processing and monitoring fees for applications and authorizations for water systems authorized by 43 U.S.C. 1761(c). Adds an exemption from processing and monitoring fees for applications and authorizations for recreation special uses, as defined in FSM 2700, that require 50 hours or less to process or monitor.
§ 251.58(h)—Appeal of decisions	§ 251.58(h) provided that assessment of processing and monitoring fees is not subject to the Forest Service's administrative appeal process for special uses.	No change.
§ 251.58(i)—Processing and monitoring fee schedules.	(1) § 251.58(i)(1) provided that processing and monitoring fee schedules will be maintained in the Forest Service's directive system and will be updated annually using the IPD–GDP.	(1) No change.
	(2) § 251.58(i)(2) provided for a review of the cost recovery rates on the 5-year anniversary of the effective date of the final rule.	(2) Amends this paragraph to provide for a review of the rates within 5 years of the effective date of the final rule.

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