No. 13-35770

In the United States Court of Appeals for the Ninth Circuit

FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiff-Appellant,

v.

CHIP WEBER and UNITED STATES FOREST SERVICE,

Defendant-Appellees,

and

WILLIAM GLIDDEN, RAYMOND LEOPOLD, NORMAN DEFOREST, EUGENE THOMAS, and the KNIGHTS OF COLUMBUS (Kalispell Council No. 1328),

Intervenor-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

RESPONSE BRIEF OF INTERVENOR-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The Knights of Columbus (Kalispell Council No. 1328) makes this disclosure statement pursuant to Federal Rule of Civil Procedure 26.1. It does not have any parent entities and does not issue stock.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

Regulations

INTRODUCTION

This case is about whether the government violates the Establishment Clause when it allows a privately-owned historic monument to remain on public land. Appellant Freedom From Religion Foundation (FFRF) claims that it does because the monument includes a statue of Jesus and was erected by the Knights of Columbus. But private religious speech does not violate the Establishment Clause just because it takes place on public land. Rather, it is "as fully protected . . . as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Moreover, the statue has a large plaque explaining that it is owned and maintained by the Knights and was erected to honor soldiers from World War II who fought and died in ski patrols on the slopes of Italy. The plaque thus removes any possibility that the statue could reasonably be construed as conveying a religious message from the government. Nor is there other context for confusion. The monument stands in the middle of a privately-owned ski resort, such that anyone who passes by is more likely to associate it with the resort than the government. For nearly sixty years it has stood without controversy, primarily a source of amusement for the skiers who do happen upon it, with undisputed evidence showing that it is widely perceived as nothing more than a quirky element of the resort's culture and character. Its use has always overwhelmingly been for secular purposes.

Like the surrounding lifts and other resort accoutrements, the statue is permitted on public land pursuant to neutral regulations that open the national forests to a

wide range of private uses. The government cannot discriminate against the Knights' use just because they are a religious organization. And by allowing their private speech, the government is not promoting religion any more than it is promoting skiing. The government's decision not to force the statue's removal from Big Mountain—after it has stood there for nearly sixty years without controversy—in no way constitutes an establishment of religion in violation of the First Amendment.

The Court, however, need not reach the merits of the case, because FFRF lacks standing to invoke the Court's jurisdiction. The only named plaintiff, FFRF has not sought standing in its own right. Rather, it seeks standing on behalf of three of its members recruited specifically to support this lawsuit. But none of them have alleged injuries sufficient to justify the Court's assertion of authority. Their grievances are aesthetic and political in nature, not religious. And their general concern about the Forest Service's compliance with the Establishment Clause is insufficient to give them standing individually. Thus, FFRF's associational standing must likewise fail.

For these reasons, the Court should dismiss for lack of jurisdiction. Alternatively, the Court should affirm the district court's ruling that the Forest Service's decision allowing the Knight's private monument to remain in place is not a violation of the Establishment Clause.

JURISDICTIONAL STATEMENT

The district court asserted federal question jurisdiction because the complaint alleges a violation of the Establishment Clause. 28 U.S.C. § 1331; ER 557. The Knights, however, dispute FFRF's standing to support the court's assertion of its authority. On June 24, 2013, the district court entered a final judgment upholding FFRF's standing, but ruling against it on the merits. ER 1-2. FFRF timely perfected its notice of appeal on August 23, 2013. Fed. R. App. P. 4(a)(1)(B(ii)-(iii); ER 60-63. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. FFRF's members have alleged no cognizable religious injury resulting from the Knights' private monument and have only generalized aesthetic and political grievances against its presence on Big Mountain. One of them joined FFRF after the lawsuit was filed, and another has no expectation of ever seeing the monument again. Do these flaws preclude standing?

2. The monument is privately owned and maintained by the Knights in an obscure location amid a commercial ski resort that sits on public land. The Knights' responsibility for the monument is described on a large plaque, which relates the monument's purpose of honoring soldiers from the Army's Tenth Mountain Division who served in World War II. The Forest Service permits the monument under neutral regulations that authorize a wide range of private activity in the national forests. In this context, can the monument reasonably be perceived as an endorsement of religion by the Forest Service?

STATEMENT OF THE CASE

On January 31, 2012, the Forest Service renewed a ten-year permit authorizing the Knights to maintain a monument that has stood for nearly sixty years on public land amid the slopes of a privately owned and operated ski resort on Big Mountain near Whitefish, Montana. The monument was erected in memory of soldiers from the Army's Tenth Mountain Division, several of whom played instrumental roles in the resort's development following World War II. Wisconsin-based FFRF responded to the 2012 permit renewal by recruiting three Montana residents to join its organization and sue the Forest Service, supposedly for violating the Establishment Clause.

On summary judgment, the District Court accepted undisputed evidence that the monument—a six-foot statue of Jesus standing on a six-foot pedestal—is "eligible for listing on the National Register of Historic Places." ER 41. It is one of the only remaining pieces "of the early history of the ski area" and Big Mountain's "evol[ution] from a small, local ski area to a destination resort." ER 34, 41. It "serves as a historical reminder of those bygone days of sack lunches, ungroomed runs, rope tows, t-bars, leather ski boots, and 210 cm. skis." ER 34.

The district court cited at least three additional reasons supporting its decision that the monument does not violate the Establishment Clause. There is no evidence that the Forest Service had an unlawful purpose in renewing the permit for the monument. ER 42, 54. The monument stands far from any indicia of government, on a commercial ski resort, "off the main runs," and "largely obscured by trees," such that "it is possible to ski at Big Mountain day after day and never encounter

the statue" "without any diminishment of the skiing experience." ER 38, 55. Finally, a large plaque adjacent to the monument clarifies that it "was privately erected," and is privately maintained, to honor the Tenth Mountain Division. ER 54-55.

A. The monument's historical connection to the Tenth Mountain Division.

The Army's Tenth Mountain Division was formed during World War II with men recruited and trained by the National Ski Patrol to fight in the Alps of Italy.[1] Those who returned played a major role in the post-war growth of the ski industry in the United States, with thousands becoming ski instructors, founding ski schools, developing resorts, or simply becoming avid skiers and sharing their love of the sport with family and friends.[2] Bill Martin provided the only first-hand evidence concerning the monument's original connection to the Tenth Mountain Division. Mr. Martin was "once the manager of Big Mountain," served on its board of directors for fifty years, and "was a close friend of the founder . . . , Ed Schenck, who developed the ski area in the late 1940s." SER 48-49. Mr. Martin recalled that

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[1] This would be "the only time in our nation's history when a civilian sports organization recruits, screens, and approves volunteers for the military." Chronology of the Tenth Mountain Division in World War II, 6 January 1940 – 30 November 1945, at 3 (compiled by J. Imbrie, Vice President for Data Acquisition and Research, National Association of the Tenth Mountain Division, Inc. (June 2004)), *available at* http://www.10thmtndivassoc.org/chronology.pdf (last visited Apr. 30, 2014).

[2] *See* "The 10th Mountain's 50th Memorial Day," *Skiing Heritage Journal of the Internat'l Skiing History Assoc.* (New Hartford, Conn.) Vol. 7, No. 2, 1995, p.2, *available at* http://goo.gl/sWPdUu (last visited Apr. 30, 2014).

Mr. Schenck had been "an officer in the Army in WWII, and was stationed in Italy with the 10th Mountain Division." SER 49. Returning to Whitefish after the war, he "bought some property . . . where there was an existing ski area" and "eventually developed" the resort at Big Mountain. SER 49. Mr. Schenck wanted a statue erected similar to those he had seen on the slopes of Italy "in memory of the men who had lost their lives in WWII." ER 49. Mr. Schenck "contacted the local Knights of Columbus in Kalispell," who became "the workhorses who installed" the monument. ER 49.

Ed Schenck's son Karl added that "the people involved in putting it up there, the workers, a lot of them were [from] the Tenth Mountain [Division]," ER 462. He noted that "the Tenth Mountain Division was always really involved in the Big Mountain." ER 464. His uncle had served in the Division, as had his father initially. *Id*. Although his father ultimately "ended up in the Eighty-Second Airborne," Karl noted that "he knew a lot of the local people" that had been in the Tenth Mountain Division. *Id*.

The Tenth Mountain Division has used the monument "as a gathering place for some of their events." ER 424. And the unchallenged historical expert concluded that "it is historically accurate that several of the founders and leading figures at Big Mountain during its early years were veterans of World War II, some of whom

served in the Tenth Mountain Division." ER 387-88. No evidence contradicts the monument's connection to the Division.[3]

In 2010—before any controversy arose concerning the statue—the ski resort erected a "large plaque . . . adjacent to the statue" that reads as follows:

> When the troops started returning from WWII in Europe to their home in the Flathead Valley they brought with them many memories . . . some good, some bad. Some of these troops were members of the Knights of Columbus at St. Matthew's parish in Kalispell. A common memory of their time in Italy and along the French and Swiss border was of the many religious shrines and statues in the mountain communities. This started a dialogue with the U.S. Forest Service for leased land to place this statue of Jesus. On October 15, 1953, the U.S. Forest Service granted a permanent special use permit to the K of C Council # 1328 for a 25ft x 25ft square for placement of the statue. A commission for the statue construction was given to the St. Paul Statuary in St. Paul, Minnesota. The statue was installed in 1955 and has been maintained by the Knights of Columbus from St. Matthew's ever since. We thank those brave troops that brought this special shrine of Christ to the Big Mountain and hope that you enjoy and respect it.
>
> -Whitefish Mountain Resort, 2010

ER 385. Prior to that time, the monument's pedestal included a metal plaque with the words "Knights of Columbus 1954." SER 36.

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[3] The district court noted a 1954 news article citing "the then chairman of the Knights of Columbus Shrine Committee" as stating that the idea for the statue originated around 1949 and 1951, when the National Ski Championships were held at Big Mountain. The chairman stated that "[s]everal of the world's leading skiers are Catholics and they asked why a shrine had not been placed." ER 35, 71. This statement is fully consistent with accounts that the monument was erected to the Tenth Mountain Division, whose veterans were prominent in the skiing industry after WWII, including as athletes. ER 387; *see also supra* n.2 at p.2 ("The men of the 10th formed a small but determined self-selected elite that constituted a brotherhood in the sport during the late 1940s and early 1950s.").

B. Issuance of the original permit.

The Knights applied to the Forest Service for the initial permit in September 1953. ER 69. Regulations in effect at the time placed only limited restrictions on use of National Forest lands. Temporary use by individuals was "allowed without a special use permit." 36 C.F.R. § 251.1 (1944). The regulations governing most other use required only that applicants "comply with all State and Federal laws" and "conduct themselves in an orderly manner." *Id*. No fee was required for permits issued "for noncommercial purposes." § 251.2.

The original application requested use of a twenty-five foot square piece of land that was 400 feet from the upper terminal of the then-existing ski lift and 70 feet higher in elevation. ER 69. On the application, the Knights identified their purpose as "[e]recting a Shrine overlooking the Big Mountain Ski run." *Id*. The application was granted, and the permit issued on October 15, 1953. ER 73-74. The permit restated the purpose for which the Knights had sought it and contained no expiration date. *Id*.

Once the original permit was granted, the monument was commissioned by the Knights of Columbus and built by the St. Paul Statuary Company in Minnesota. SER 30. It was crafted with a narrow cavity in the feet so that a dowel extending from the center of the pedestal could be inserted and cemented, making "the statue and pedestal become like one piece." SER 30. The pedestal was poured on site, and the statue affixed to it in the fall of 1954. ER 85, 522.

C. The monument's obscure location and the community's longstanding perceptions of it.

"To view the statue during the early days of Big Mountain, one would have to walk uphill from the top of the T-bar lift." ER 38, 69. The first chairlift—Chair 1—was not installed until 1960. ER 39, 386. It provided "skier access to much higher and challenging terrain," but "in a different location on the mountain." ER 39, 386. "[I]ntrepid skiers" could then find their way to the statue if the wanted to, but only "[w]ith some effort." ER 39, 386. Only after Chair 2 was installed in 1968 did skiers have direct access "to ski down in the vicinity of the statue." ER 39, 386. But because "the statue was and remains largely obscured by trees, one would have to ski out of their way and off the main runs in order to 'directly encounter Big Mountain Jesus." ER 38, 386-87; SER 38, 42. "[U]nless one was specifically looking for it, it is possible to ski at Big Mountain day after day and never encounter the statue." ER 38, 386-87, SER 42-43. "And certainly, if one wished to ski at Big Mountain and entirely avoid the statue, it is readily possible to do so without any diminishment of the skiing experience." ER 38, 386-87, SER 42-43.

The evidence was also undisputed in showing that "[t]he statue's secular and irreverent uses far outweigh the few religious uses it has served." ER 57, 382, 388-94, 401-02. Indeed, it is "most frequently used as a meeting point for skiers or hikers and a site for photo opportunities, rather than a solemn place for religious reflection." ER 57, 382, 392, 394-98. The monument's secular meaning has been strengthened over time. ER 382. "To the extent Big Mountain Jesus may have had some religious significance at the time of its construction by the Knights of

Columbus, and may have provided from time to time spiritual inspiration or offense to some, over the course of the last 60 years the statue has become more of an historical landmark and a curiosity." ER 39, 382, 392, 394-98.

Based on the foregoing evidence, the district court surmised that "for most who happen to encounter Big Mountain Jesus, it neither offends nor inspires." ER 33. The district court's conclusions are consistent with the unchallenged findings of the Forest Service's historical expert, who identified a "long-standing tradition of playfulness surrounding the statue, with skiers sometimes decorating it with ski gear and Mardi Gras beads, or high-fiving it as they ski by—a practice that has led to the statue's hand being broken off on numerous occasions." ER 382. Indeed, one of the most well-known and heavily-documented aspects of the statue's history on the mountain is the frequency with which its hands and fingers have been broken off by skiers. ER 398. The Knights of Columbus visit the statue several times a year to maintain and repair this and other damage to the statue. The left hand and arm have been broken and repaired numerous times over the years. SER 25, 35-36.

The "playfulness and irreverence" associated with the monument does "not represent an anomaly in the history of the Jesus statue on Big Mountain, but rather something that has come to typify many people's interactions with and perceptions of the statue." ER 396-97. And there are other "perceptions and activities surrounding the statue that have little to do with religion"—specifically, its role as "a well-known landmark," a "meeting place for skiers on the mountain," and "a place where visitors have enjoyed having their photographs taken." ER 394-98. "[N]early all of the local people interviewed [for the expert report] said that they

perceived the statue as an important part of the ski area's history and as a landmark that has simply always been there." ER 382.

In contrast, "the historical record suggests that religious uses of the Jesus statue on Big Mountain have been sporadic and inconsistent over time." ER 394; *see also* ER 382 ("[We] found no evidence showing any systematic or consistent use of the statue for church services or prayer gatherings during the nearly sixty years it has stood on Big Mountain."); ER 388 ("My review of the historical records relating to the history and development of the Big Mountain ski area uncovered limited evidence of the statue being used as a site for church services or religious gatherings during the nearly sixty years it has stood on the mountain."); *see generally* ER 388-94. "[T]he vast majority of visitors to Big Mountain throughout the course of its sixty-five-year history have gone there to recreate and enjoy the outdoors, not to visit the Jesus statue." ER 401-02. And for those who do visit the statue, the "secular uses surrounding the statue have outweighed the religious ones." ER 382.

D. The first two renewals.

The Forest Service did not require renewal of the Knights' permit until 1990, when a new permit was issued for a ten year period. ER 80. Two years before that permit expired, substantial changes were made to the special use regulations, bringing them to their current form. *See* 63 Fed. Reg. 65950-01 (Nov. 30, 1998). The updated regulations impose substantial procedural requirements for *new* applications, including early notice to the Forest Service, an informal proposal that is subject to two preliminary screenings, and only then a "written formal

application," which is subject to additional scrutiny. 36 C.F.R. § 251.54. The two preliminary screenings include requirements that "[t]he proposed use is consistent" with "the applicable forest land and resource management plan" and that "[t]he proposed use will not create an exclusive or perpetual right of use or occupancy." 36 C.F.R. § 251.54(e)(ii), (iv).

These more detailed requirements for new applications were imposed because the previous regulations "lack[ed] specific direction," which made it "difficult to deny an application" even if didn't meet "certain minimum requirements." 63 Fed. Reg. at 65953. Renewal applications, however, were exempted from the more onerous requirements for new applications. *See id*. (responding to concerns "that the new procedures . . . could be interpreted to apply to reissuance of authorizations for existing uses" and confirming that § 251.54 "applies only to applications for new or substantially changed uses").

To avoid confusion, all requirements concerning renewal applications were consolidated in a separate provision, § 251.64. *See* 63 Fed. Reg. at 65953. This section gives the Forest Service discretion to renew a permit, "so long as [the] use remains consistent" with the terms of the original permit. § 251.64(a), (b). Under these new regulations, another ten-year renewal was issued in 2000 without incident. ER 522, 75-79. Through the entire time from the original permit in 1953 through the end of the second renewal permit in 2010 (and even into mid-2011), there is no evidence of any controversy regarding the statue. ER 382.

E. Misapplication of the regulations during the third renewal process.

In July 2010, the Forest Service notified the Knights that their permit would expire at the end of the year. SER 111. The Knights submitted their renewal application later that month and followed with payment of the $111 fee. SER 110. The Forest Service accepted the application, SER 107, but issued no response. Over nine months later, on May 26, 2011, FFRF—which is based in Madison, Wisconsin—served a FOIA request on the Forest Service, seeking information about the statue. ER 109. The FOIA request implicitly threatened a lawsuit, stating that it was "very inappropriate to have religious symbols on Federal property" and that "[b]y permitting a display of this nature, the Federal Forest Service appears to endorse religion over non-religion, and specifically prefers Christianity over all other faiths." ER 109.

Shortly after receiving the FOIA request, the Forest Service invited representatives of the Knights of Columbus and the Whitefish Resort to meet concerning the renewal. ER 225-26. The parties discussed several options for preserving the statue, including having it declared a historical monument. The Forest Service's initial thinking was that the statue did not have "historical significance." ER 226. It acknowledged, however, legitimate concerns that the statue would be seriously damaged or even destroyed if it had to be moved. ER 225; SER 37-38.

At the meeting's close, the Knights were informed that their permit "would not be reissued." ER 226. The Forest Service followed up with a formal letter from Forest Supervisor Chip Weber on August 24, 2011, stating, "I have determined that

the statue is an inappropriate use of [National Forest Service] lands and must be removed . . . ." ER 84. Mr. Weber concluded that allowing the statue to remain on Big Mountain would violate the Establishment Clause. ER 86. Referring to standards applicable to new applications, Mr. Weber further concluded that the monument could be "accommodated on adjacent private land." ER 86. The permit denial created substantial public uproar. *See, e.g.*, ER 41, 101-03, 229-30.

F. The Forest Service's analysis regarding historical significance.

Section 106 of the National Historic Preservation Act requires the Forest Service to consider the impact of its activity on any "object that is . . . eligible for inclusion" in the National Register of Historic Places. 16 U.S.C. § 470f; 36 C.F.R. § 800.16(f). As part of this consideration, the Forest Service must confer with the State Historic Preservation Officer for the State in which the object is located. 36 C.F.R. § 800.3(c)(3). Mr. Weber's denial letter, however, noted that this process had not been completed:

> Flathead National Forest Heritage Program Leader Tim Light is currently assessing the historical significance of the statue in accordance with the National Historic Preservation Act (NHPA), including consultation with the Montana State Historic Preservation Office (SHPO).

ER 85. After the permit was initially denied, the Forest Service continued determining the monument's eligibility for listing on the National Register of Historic Places.

On September 1, 2011, just eight days after the denial, Forest Archeologist Timothy Light wrote to the Montana SHPO, detailing his conclusion that, although the statue was not eligible for listing solely as a war memorial or religious

monument, it probably would be eligible due to its "associat[ion] with events important to local history," namely, the area's "transition . . . from a town heavily dependent on the lumber industry to a community built around tourism, skiing, and outdoor recreation." ER 91-92. Mr. Light noted that, "[i]ndividually [the statue] represents a small part of the history of the ski area but since so little remains intact of that early history, the statue of Jesus is probably eligible for listing on the National Register of Historic Places under criteria 'a' – associated with events important to local history." *Id*. Mr. Light concluded that, in his opinion, "[m]oving the statue would be an adverse effect to the integrity of the setting and location[,] and the setting, with its grand views of the valley and proximity to Chair 2, is an important aspect to the site's historic integrity." *Id.* Mr. Light concluded—as required by the National Historic Preservation Act—by requesting the SHPO's independent "concurrence in this determination of eligibility." *Id.*

By letter dated September 19, 2011, the SHPO "agree[d] that the commemorative marker is eligible" for listing, because it was "placed in its current location a few years after the resort was upgraded after World War II" and "has long been a part of the historic identity of the area." ER 93. The SHPO also noted that the statue was "a local land mark that skiers recognize" and "a historic part of the resort." *Id*. Based on this, the Historic Preservation Office concluded that the monument was "close enough to the third example of an Eligible property description presented in National Register Bulletin # 15 on page 40." *Id.* The SHPO concluded that the statue was eligible for listing not only under criteria A, but also under criteria "F" because of its commemorative aspect. *Id*.

G. Reconsideration of the permit under the correct standards.

Having complied with its regulatory obligations and confirmed the statue's listing eligibility, on October 21, 2011, the Forest Service withdrew its earlier decision and announced that it would "formally seek public comment on a proposed action for reissuing the permit." ER 83. A thirty-day period for public comment was announced on November 3, 2011. SER 104-05. Approximately 95,000 comments were received, overwhelmingly in favor of the permit being renewed. ER 98.

Following the notice-and-comment period, the Forest Service issued a final "Decision Memo" reauthorizing the Knights' special use permit for a period of ten years. ER 94-100. The memo observed that renewal was warranted because "[t]he statue has been a long standing object in the community since 1953 and is important to the community for its historical heritage" based on its association with the early development of the ski area on Big Mountain. ER 94. It also noted that moving the monument would destroy its historical integrity, and that transferring it to private land was thus not a reasonable option. ER 99. The renewed permit was issued on January 31, 2012, with an expiration date of December 31, 2020. ER 94; SER 2.

H. FFRF's search for litigants.

In its initial FOIA letter of May 26, 2011, FFRF purported to be "writing on behalf of a concerned area resident and taxpayer, and other Montana members of the Freedom From Religion Foundation." ER 109. Shortly before and even long after filing the complaint, however, FFRF was still recruiting members to

participate in the lawsuit to support its legal standing. SER 53-75. One week after the complaint was filed, FFRF told one potential plaintiff that "one angle we'd like to have covered in this lawsuit is a plaintiff who is a veteran. Can you remind me if you are a veteran, or if you know someone who is that would be interested in participating in this case?" SER 56. William Cox, the first FFRF member whose name was put forward to support standing was not recruited as a plaintiff until June 5, 2012, nearly four months after the complaint was filed. SER 53.

FFRF ultimately relied upon the allegations of three new members: William Cox, Doug Bonham, and Pamela Morris. Mr. Cox was not a member of FFRF when the lawsuit was filed. SER 53. The district court declined to consider his standing, finding "no authority permitting the Court to consider the affidavit of a member who joined the organization after the complaint was filed." ER 45-46. Similarly, Mr. Bonham was recruited and joined FFRF just five days before the lawsuit was filed. ER 300. The district court did not consider his standing, relying instead on the standing of Ms. Morris. She also joined FFRF five days before the complaint was filed. ER 301. The court held that she had standing because she was "offended by what she considers a religious icon on federal property and intends to avoid the offending area until Big Mountain Jesus is removed." ER 48.

I. FFRF's filing of the complaint.

FFRF filed its complaint against the United States Forest Service and Flathead National Forest Supervisor Chip Weber on February 8, 2012. FFRF was the only named plaintiff. ER 556, 579. A motion to intervene by Knights of Columbus

(Kalispell Council No. 1328) and four of its members was granted on May 31, 2012. ER 582 [Dkt. 17]. At a scheduling conference on June 5, 2012, the district court noted that FFRF hadn't named any of its individual members, which raised questions about FFRF's standing. SER 100-01. Counsel for FFRF "apologize[d]" in response, stating: "I usually do identify specific members and for some reason we didn't in this particular complaint. So when that was drawn to my attention, I went back . . . and have compiled the list of specific members who have had access and exposure that we'll be relying on." ER 101.

By June 29, 2012, the deadline for amending pleadings, FFRF still had not named any members as plaintiffs. *See* ER 584. The Knights moved to dismiss for lack of standing on July 31, 2012. ER 585 [Dkt. 37]. In response to the motion to dismiss, FFRF submitted a declaration from William Cox. ER 585-86 [Dkt. 41, 46]. It also filed, in the alternative, a motion for leave to amend its complaint and name additional plaintiffs. ER 586 [Dkt. 43, 44]. The court denied the motion for leave to amend as untimely, but concluded that the Cox declaration was sufficient to support standing. ER 587 [Dkt. 55]

Following discovery, both the Forest Service and Knights moved for summary judgment. ER 588 [Dkt. 60, 64]. Based on information learned in discovery that Mr. Cox was not an FFRF member when the complaint was filed and is more politically than religiously opposed to religious displays on public land, the Knights' motion for summary judgment renewed their challenge to FFRF's standing. *See* ER 589 [Dkt. 65]. FFRF responded to the motions on February 13, 2013. ER 592-93 [Dkt. 79, 86]. Its response included declarations from two

additional members, Pamela Morris and Doug Bonham, purporting to shore up FFRF's standing. ER 591 [Dkt. 74, 75].

On June 24, 2013, the district court denied the Knights' motion for summary judgment on the issue of standing, concluding that Ms. Morris's declaration alone was sufficient to sustain the court's jurisdiction. The court then proceeded, however, to grant both the Forest Service's and the Knights' motions for summary judgment, upholding the Forest Service's decision to reissue the permit. ER 596 [Dkt. 104]. FFRF's Co-President told the press that she "couldn't be more disappointed in an Obama appointee . . . . He might as well be a Bush appointee."[4] FFRF timely filed its notice of appeal on August 23, 2013. ER 597 [Dkt. 109].

SUMMARY OF ARGUMENT

FFRF is the only named plaintiff in this lawsuit. It does not claim a right to sue on its own, but seeks to sue on behalf of three of its members. Article III of the United States Constitution, however, allows courts to exercise jurisdiction only to resolve actual "Cases" or "Controversies." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). This requires plaintiffs seeking judicial relief to demonstrate an injury that is "actual" or "imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury must be particularized to them; a "generalized grievance[]" that claims only harm to an "interest in proper application of the Constitution" is insufficient. *Lexmark*

[4] Vince Devlin, *Atheists 'shocked' by judge's decision allowing Big Mountain Jesus*, THE MISSOULIAN, June 26, 2013, *available at* http://goo.gl/tHxKRK (last visited Apr. 30, 2014).

Internat'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.3 (2014). Here, FFRF's members have failed to allege an adequate injury. Ms. Morris alleges only an aesthetic injury, in that she finds that monument "intrusive" on the mountain. She acknowledges that—on the one occasion when she skied on Big Mountain fifty years ago—the monument did not impede her "spiritual" enjoyment. ER 361; *see Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1049-52 (9th Cir. 2010) (requiring "exclusion or denigration on a religious basis"). Mr. Cox alleges only a political injury. He finds the monument "absurd" on the mountain, but approves other religious displays on public land. SER 88, 91; ER 134-35, 140-45. The distinction for him is whether they are constitutional by his own judgment. ER 142. And Mr. Bonham has "aging knees" that prevent him from returning to the mountain. ER 357; *Lujan*, 504 U.S. at 564 (no injury without "concrete plans" to visit site). But even assuming that each had suffered a religious injury, that injury is too general to invoke Article III jurisdiction. *Valley Forge*, 454 U.S. at 485-86 (no standing based on belief that government has violated the Establishment Clause); *but see Catholic League*, 624 F.3d at 1049-52 (giving broad scope to jurisdiction for adverse "psychological consequence" of "exclusion or denigration on a religious basis"). Moreover, both the substance of and remedies for FFRF's "offended observer" claims would require the participation of individual members, thereby negating FFRF's associational standing.

Even if the Court were to uphold FFRF's standing, it should deny it relief on the merits. The monument is private speech by the Knights in a forum open to a

broad range of private activity. A large plaque explains that the Knights own and maintain the monument, removing any possibility for confusion that the monument belongs to the government. Under precedent from the Supreme Court and this Court, those facts should be dispositive that the monument is not an endorsement of religion by the Forest Service. *Capitol Square*, 515 U.S. at 780; *Kreisner v. City of San Diego*, 1 F.3d 775, 776 (9th Cir. 1993). The monument's predominantly secular message and use for nearly six decades without controversy further shows that the monument does not have the effect of conveying an endorsement of religion. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005). Under all the facts and circumstances of the case, no reasonable observer could believe that the monument is the Forest Service's attempt at an establishment of religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

ARGUMENT

Grants of summary judgment are reviewed by this Court *de novo*. *Card v. City of Everett*, 520 F.3d 1009, 1013 (9th Cir. 2008) (citation omitted). Viewing the evidence in the light most favorable to the non-moving party—here, FFRF—the Court must determine "whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Id*. (citation omitted). Questions of standing are also reviewed *de novo*. *Buono v. Norton*, 371 F.3d 543, 546 (9th Cir. 2004).

I. FFRF lacks standing.

FFRF has not claimed a direct injury from the monument. Thus, it can only have standing if it can prove both that "its members would otherwise have standing to sue in their own right" and that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Because none of FFRF's named members have standing, and because the nature of offended observer standing requires the participation of individual members, FFRF lacks associational standing.

A. None of FFRF's identified members have standing.

In attempting to meet its burden to demonstrate standing, FFRF identified only three members by which it could claim organizational standing. None of the three would have standing to sue in their own right.

1. Pamela Morris lacks standing.

The district court erred in finding that Pamela Morris would have standing sufficient to invoke the jurisdiction of the federal courts.

First, Ms. Morris lacks standing because her allegations "constitute no more than the generalized grievances of one who observes government conduct with which she disagrees." *Caldwell v. Caldwell*, 545 F.3d 1126, 1130 (9th Cir. 2008). In *Caldwell*, a parent with children in public school challenged a state education website that she said favored religious organizations that "have no conflict with the theory of evolution." *Id*. at 1129-30. The Ninth Circuit held she lacked standing, in

significant part because "[a]ccessing and leaving a website is quick and easy, and the alleged offense from the content of one page out of 840 that one need not read or tarry over is fleeting at best." *Id*. at 1134.

The same principle applies here. There is no dispute that the memorial is visible only from a small portion of the resort. SER 38, 42; ER 38. It is visible only to skiers who have purchased lift tickets to recreate at a privately owned and operated resort. In such circumstances, there is no reasonable expectation of not encountering disagreeable religious speech. And any alleged offense from the memorial would be "fleeting at best." *Caldwell*, at 1134. Such *de minimis* exposure cannot bestow standing on Ms. Morris or anyone else. *Id*.; *but see Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1077-78 (9th Cir. 2012) (granting standing where plaintiff had "personal interest in the land at issue").

Second, Ms. Morris has failed to allege that she has suffered any "spiritual" injury. "[T]he Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature." *Catholic League*, 624 F.3d at 1049 (quoting *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1250 (9th Cir. 2007)). Yet Ms. Morris admits that on her single visit to Big Mountain more than fifty years ago at age fifteen, she "felt the natural, grand, glorious (yes, spiritual) beauty." ER 361. Her only stated objection to the statue is aesthetic "as it is both artificial [and] not environmentally beneficial." ER 360. Her aim is to preserve Montana's "natural beauty" and "protect our public lands from the intrusion of partisan artificial icons." *Id*. at 361. She finds the statue "startlingly out of place: intrusive," but nowhere alleges that she is "aggrieved" by any

religious message the monument conveys. *See Vasquez*, 487 F.3d at 1251; *see also Catholic League*, 624 F.3d at 1050 (indicating that core of Establishment Clause standing is injury to "religious or irreligious sentiments of the plaintiff").

Under these circumstances, the district court erred in finding that Ms. Morris would have standing to sue in her own right. *See also Valley Forge*, 454 U.S. at 485 ("psychological consequence . . . produced by observation of conduct with which [plaintiff] disagrees" insufficient to warrant standing); *Capitol Square*, 515 U.S. at 780 ("A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.").

2. William Cox lacks standing.

The district court properly held that William Cox lacked standing because he was not a member of FFRF at the time the complaint was filed. ER 45-46 (citing *D'lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008)). The court thus did not address whether Mr. Cox's declaration would otherwise support standing. It does not. The declaration shows that Mr. Cox has not suffered a true injury, but is merely asserting a right to "have the Government act in accordance with *[his] views* of the Constitution." *Valley Forge*, 454 U.S. at 483 (emphasis added). His objection to the statue is based more on a "personal judgment" about where a religious statue should be sited and how religious it is. ER 139. For example, Mr. Cox takes no offense at a statue at the local depot that he concedes depicts a "spiritual moment." ER 134-35. The city depot statue is of a

soldier in a praying position, "kneeling with his head bowed before the upright rifle and the helmet on top of his fallen comrade." *Id*. In Mr. Cox's estimation, this statue is a "fitting war memorial." *Id*. Nor is Mr. Cox offended by a plaque of the Ten Commandments at the city courthouse because "the Ten Commandments do have something to do with the law" and because it is "a nice little monument the size of a large gravestone." ER 145. Mr. Cox would object to the plaque only if it were larger or put up in "neon lights." *Id*. And he is similarly comfortable with religious art in public museums because "[i]t's been there a long time, and as far as [he] know[s], if nobody has objected . . . it's regarded as cultural history."

Ultimately, then, whether Mr. Cox is offended by religious displays depends on his personal conceptions of whether they "have historical significance" and "[i]f they're in an appropriate place"—"appropriate placement" being defined as whether, in his understanding, "it's in violation of the Constitution or not." ER 142. And he is not offended by religious symbols that have been in place for a long time and to which "nobody has objected." ER 140-41. Yet, he claims offense by the monument at issue here despite admitting its role as "part of the local culture," and despite it being undisputed that it has been around for over sixty years without objection. SER 92.

Mr. Cox makes no effort to avoid the monument. ER 141; SER 87; *cf. Barnes-Wallace*, 530 F.3d at 784 (plaintiffs avoided public park altogether because they were offended by Boy Scouts). Nor is he forced to confront it to get to a government job, to avail himself of government goods or services, or to participate in government programs. *Cf. Vasquez*, 487 F.3d at 1252 (plaintiff forced into

"unwelcome 'daily contact and exposure'"). As with Ms. Morris, he has alleged no concrete, particularized religion-based injury. For all these reasons, he lacks standing. *Valley Forge*, 454 U.S. at 485; *Capitol Square*, 515 U.S. at 780.

3. Doug Bonham lacks standing.

Because the district court found that Pamela Morris had standing, it did not reach the question of Mr. Bonham's individual standing. But even if it had, standing would be lacking.

FFRF concedes that Mr. Bonham has not been on Big Mountain for eight years and cannot ski because of his "aging knees." FFRF Br. at 24; ER 357. "'Past exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects.'" *Lujan*, 504 U.S. at 564 (citation omitted). Mr. Bonham cannot experience the "continuing, present adverse effects" of seeing the monument, thus failing the "requirement that threatened injury must be certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013); *see also Lujan* 504 U.S. at 564 ("'[S]ome day' intentions—without any description of concrete plans . . . do not support a finding of the 'actual or imminent' injury that our cases require.").[5]

[5] Bonham claims that his daughter skis on Big Mountain, FFRF Br. at 24, but FFRF cannot rely on her for standing because she is not a member of FFRF and has submitted no declaration. Also, FFRF's suggestion that Bonham is injured from the comfort of his home because the statue "literally . . . looms over the valley" is just false. There is no evidence even suggesting that the monument is generally visible from anywhere off the mountain. ER 38, 357; *see also* SER 39.

B. FFRF's claim for offended observer standing requires participation by individual members.

FFRF also does not satisfy the third prong of the *Hunt* associational standing test because it claims "offended observer" standing, which by its very nature requires individual participation by members. "If the involvement of individual members of an association is necessary, either because the substantive nature of the claim or the form of the relief sought requires their participation, we see no sound reason to allow the organization standing to press their claims . . . ." *Bano v. Union Carbide Corp.*, 361 F.3d 696, 715 (2d Cir. 2004). Here, both the substantive nature of the claim and the relief requested require individual participation. It is only individual members of FFRF that can claim the "direct" exposure to the monument, "frequent regular contact," membership in the community, or "spiritual harm" that constitute offended observer injury in the Ninth Circuit. *See Vasquez*, 487 F.3d at 1251-52. The remedy would also require individual participation because only the offended members know whether a particular injunction would remove the offense they feel, or the "spiritual harm" they experience; it makes no difference that FFRF seeks only injunctive relief. *See, e.g.*, *Bano*, 361 F.3d at 714.

Indeed, the Supreme Court has already held that an organization cannot satisfy *Hunt*'s third prong as to an analogous Free Exercise claim of coercion. *See Harris v. McRae*, 448 U.S. 297 (1980). If a Free Exercise coercion claim is too individualized to satisfy *Hunt*'s third prong, it is hard to see how an Establishment Clause offended observer claim would not be. *Cf. Assoc. of Christian Schools Int'l*

v. Stearns, 362 Fed. Appx. 640 (9th Cir. 2010); *Cornerstone Christian Schools v. UIL*, 563 F.3d 127, 134-5 (5th Cir. 2009).

II. The monument does not violate the Establishment Clause.

Even assuming FFRF has standing, its claims fail on the merits for three independent reasons. First, the monument is a form of private speech in a neutral government forum. As such, it is not only permissible under the Establishment Clause, but protected under the Free Speech Clause. Second, the monument is permissible under Justice Breyer's controlling opinion in *Van Orden*, because it communicates a secular message, appears in a secular context, and has stood unchallenged for sixty years. Finally, the monument is permissible under the *Lemon* test because it has a secular purpose and conveys a message of respect for history—not endorsement of religion.[6]

A. The monument is constitutionally permissible private speech in a neutral government forum.

The monument is undisputedly private speech—it is owned and maintained by a private organization within the bounds of a privately-operated ski resort. The government's only involvement with the monument is to permit it to be located on

[6] FFRF has offered no effects argument other than endorsement and has made no argument regarding *Lemon*'s third prong—excessive entanglement—so those arguments are waived. *Cf. Johnson v. Poway Unified School Dist.*, 658 F.3d 954, 972 (9th Cir. 2012) ("The Supreme Court essentially has collapsed [the effects and entanglement] prongs to ask whether the challenged governmental practice has the effect of endorsing religion.") (internal quotations omitted).

publicly-owned land. It is thus precisely the kind of private speech on public land that is protected under *Capitol Square*, 515 U.S. at 762.

FFRF does not contest any of this. Instead it tries to evade *Capitol Square* with an impassioned *cri de coeur* of "preferential treatment!" It repeats that accusation, or some variation of it, almost a dozen times in its brief. *See, e.g.*, FFRF Br. at 1, 2, 5, 9, 30, 32, 39, 41, 54. In fact, however, there has been no preferential treatment. The Forest Service has simply applied normal regulations allowing private speech in a neutral government forum.

The Supreme Court has long recognized that, when the government neutrally allows private speech in a government forum, it almost never violates the Establishment Clause. *Capitol Square*, 515 U.S. at 762. *Capitol Square* involved "large Latin cross" that stood "alone and unattended" on public property directly in front of Ohio's capitol building. 515 U.S. 753, 757 (1995); *see also id*. at 817 (Ginsburg, J., dissenting).

Seven of the justices agreed that the display was permissible because "[t]he [government] did not sponsor [the private party's] expression"; the property "had been opened to the public for speech"; and "permission was requested through the same application process and on the same terms required of other private groups." *Id*. at 763. This majority of seven divided only on whether the cross's proximity to the statehouse might cause a reasonable observer to "mistake private expression for officially endorsed religious expression." *Id*. A plurality of four justices declined to consider the question, adopting a *per se* rule that private religious expression "cannot violate the Establishment Clause where it (1) is purely private and (2)

occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Id*. at 770.

In her controlling three-Justice concurrence, Justice O'Connor insisted that—even in cases involving private speech—the fact-intensive "endorsement" test should still be applied to consider whether "a reasonable, informed observer" could possibly be misled by, for example, the nearby looming statehouse to believe that the government endorsed the speech. *Id*. at 772-73. But even there, Justice O'Connor emphasized that cases involving private speech in a public forum would almost always satisfy the "endorsement" inquiry: "None of this is to suggest that I would be likely to come to a different result from the plurality where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly." *Id*. at 775 (O'Connor, J., concurring).

Justice O'Connor added that she would give special consideration to "the presence of a sign disclaiming government sponsorship or endorsement . . . , which would make the State's role clear to the community." *Id*. at 776. "In context, a disclaimer helps remove doubt about state approval of [the private speaker's] religious message." *Id*. In a separate concurrence with the same three justices, Justice Souter agreed. *Id*. at 784. Even though the challenged cross did not actually have a disclaimer, he stated that he voted to uphold the display "in large part because of the *possibility* of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it." *Id*. (emphasis added).

This Court's precedent presumed no Establishment Clause violation for private speech in a public forum, even before *Capitol Square* was decided. In *Kreisner*, the

court upheld a religious Christmas display in Balboa Park—a vast, 1200-acre spread of public property. 1 F.3d at 776. The display consisted of eight life-size scenes from the Bible and was accompanied by "[o]ne or more disclaimer signs, stating that the Biblical display is privately sponsored and not allied with the City." *Id*. at 777-78.

The Court rejected the argument that granting a permit for the display violated the Establishment Clause, holding that "truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer." *Id*. at 785 (citation omitted). The court explained that a more restrictive policy prohibiting use of the forum by religious speakers simply because they are religious would constitute "government hostility to religion" instead of "the neutrality contemplated by the Establishment Clause." *Id*. at 785.

Together, *Capitol Square* and *Kreisner* create a strong presumption that the Establishment Clause is not implicated by private religious speech on public land, as long as the policies governing the forum are fairly administered. That presumption is dispositive here.

1. The monument is private speech.

It is undisputed that the Knights of Columbus own and maintain the monument. There is no evidence that the Forest Service has ever taken ownership or exercised control over it. The permits have all specified that, upon abandonment, revocation, or termination, the Knights are responsible to remove it. ER 74, 78, 81; SER 8. And the monument's plaque plainly states that it belongs to the Knights. ER 382.

There is no factual basis to dispute that the monument is the Knights' private speech.

Citing *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009), FFRF contends that any "permanent monument on public land is considered government speech"—essentially as a matter of law—"even if ownership of the display remains private." FFRF Br. at 53. FFRF is mistaken.

Summum discussed permanent monuments that had been donated to a city government for display in the town park. The Court held that monuments "accepted" by a government are "meant to convey and have the effect of conveying a government message." *Summum*, 555 U.S. at 472. Addressing the specific monuments in the city park, the Court deemed them government speech because "the City decided to accept those donations and to display them in the Park" and "ha[d] 'effectively controlled' the messages sent by the monuments . . . by exercising 'final approval authority' over their selection." *Id*. at 472-73 (citation omitted). In addition, "[a]ll rights previously possessed by" donors "ha[d] been relinquished." *Id*. at 474. The City had *not* "opened up the Park for the placement of whatever permanent monuments might be offered" to it. *Id*. at 473. Even in this context the Court held only that "[p]ermanent monuments displayed on public property *typically* represent government speech." *Id*. at 470 (emphasis added).

The context here is completely different. *Summum* was premised on the assumption that "property owners typically do not permit the construction of . . . monuments on their land." *Summum*, 555 U.S. at 471. Thus, "persons who observe donated monuments routinely—and reasonably—interpret them as conveying

some message on the property owner's behalf." *Id*. Here, in contrast, the government does exactly what *Summum* called atypical. The Forest Service's land use regulations are designed to open the national forests for a broad range of uses by private individuals. The Forest Service grants permits for recreational uses, including to build commercial boat docks, camps, recreation residences, hotels, restaurants, campgrounds, ski lifts, resorts, golf courses, and racetracks, to name a few. *See* Forest Service Manual (FSM), Chapter 2720 "Special Uses Administration" (Addendum (Add.) at 32, 33, 34, 42, 43, 45, 47, 53.) It grants permits for agricultural uses, including crop cultivation, fish hatcheries, barns, fences, and corrals. (Add. 55, 57.) It grants permits for community and public services, including religious facilities, markers and monuments, sanitary systems, residences, schools, and hospitals. (Add. 59-61.) It grants permits for historical, research, and training purposes; for manufacturing, mining, and industrial facilities; and for transportation, communication, and water services. (Add. 65-67, 72-73.)

Many of these authorizations last for decades. Permits for hotels, recreational facilities, industrial and commercial purposes, educational activities, and summer homes are authorized for up to thirty years. 36 C.F.R. § 251.53(d). Ski facilities are authorized for up to forty. § 251.53(n). And many such uses are eligible for automatic renewal. *See* §§ 251.56(b)(1), 251.64(a). Although for practical purposes these uses are essentially "permanent," they are not attributable to the government. As a legal matter, the Forest Service requires all permittees to "assume liability, and . . . indemnify the United States, for all injury, loss, or damage arising in

connection" with the permitted use. §§ 251.50, 251.56(d). And as a practical matter, an objective observer would not reasonably conclude that this broad range of commercial, recreational, and other use is all attributable to the government. *Capitol Square*, 515 U.S. at 780-81 (O'Connor, J., concurring) (stating a reasonable observer will know "the history and context of the . . . forum," including "how the public space in question has been used").

In this context, any message conveyed by the monument is no more the government's message than activity of a private hotel or mining company on public land is government activity. The Forest Service's regulations are specifically designed to accommodate *private* use. Any comparison to a city's selectively taking ownership of monuments to display in its parks is inapt. "[A]n individual's contribution to a government-created forum [is] not government speech." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (citation omitted). In the context of use under the Forest Service's regulations, the Knights' speech remains their own.

2. The National Forest land is a limited public forum.

The monument is also permissible because it stands in a limited public forum. "Limited public forums are forums that the government has reserved 'for certain groups or the discussion of certain topics.'" *Kaahumanu v. Hawaii*, 682 F.3d 789, 800 (9th Cir. 2012) (citation omitted). "National Forest System lands . . . have historically provided a public forum for expression." *Black v. Arthur*, 18 F. Supp. 2d 1127, 1133 (D. Or. 1998) (citing *Hague v. Comm. for Indus. Org.*, 307 U.S.

496, 515 (1939)), *aff'd on other grounds*, 201 F.3d 1120 (9th Cir. 2000). In several cases, this Court has assumed "that the National Forest System is a public forum." *See, e.g., United States v. Linick*, 195 F.3d 538, 543 n.5 (9th Cir. 1999); *United States v. Adams*, 388 F.3d 708, 710-11 (9th Cir. 2004).

More significantly, the governing regulations expressly acknowledge a public forum in the national parks. When the permit was first granted, the regulations imposed no permitting requirement for the "temporary use or occupancy of national forest lands by individuals" for recreational, social, and "similar purposes." 36 C.F.R. § 251.1. Permits for other uses required only that permittees "comply with all State and Federal laws" and "conduct themselves in an orderly manner." *Id*. The current regulations governing new uses are even more explicit in recognizing a public forum. No authorization is required for "noncommercial activities involving the expression of views, such as assemblies, meetings, demonstrations, and parades" for individuals or groups of less than seventy-five persons, 36 C.F.R. §§ 251.50(c)(1), 251.51, while other uses remain subject to more extensive, but still neutrally applicable, criteria. *See* § 251.54. And for renewals, the current regulations allow for existing use to continue as long as it "remains consistent with the decision that approved the expiring special use." 36 C.F.R. § 251.64(a), (b).

FFRF protests that these regulations do not really create a "public forum," but rather "regulated use land." FFRF Br. at 37 (citing no authority). But that is the very definition of a limited public forum. *See Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1134 (9th Cir. 2011) (stating that a limited

public forum is limited to certain groups or subjects under restrictions "that are reasonable and viewpoint-neutral").

In any case, the presumption that private speech does not violate the Establishment Clause is not dependent on the existence of a public forum. In *Capitol Square*, the Supreme Court suggested that the same principles apply even in non-public forums, if the property is "open to a wide variety of uses." 515 U.S. at 762; *see also Barnes-Wallace*, 704 F.3d at 1082 (holding presumptively that leasing public property to religious organization did not violate Establishment Clause where leasing program was open to broad range of nonprofit organizations and neutrally administered); *Kreisner*, 1 F.3d at 784 ("We reject Kreisner's contention that public forum doctrine does not apply here because the Organ Pavilion is not a public forum for large unattended displays."). Because the Forest Service regulations indisputably open the National Forest to a wide range of uses, the presumption protecting private religious speech should apply, so long as the regulations are neutrally applied. Undisputed evidence shows that, here, they were.

3. The Forest Service applied its regulations neutrally.

FFRF argues three ways in which the Forest Service supposedly showed preferential treatment toward the monument. First, it suggests that the Forest Service ignored its own rules to renew the permit. FFRF Br. at 5, 37. Second, it argues that the Forest Service "denied non-Christian groups permission to utilize public land for religious purposes." FFRF Br. at 38-39. And third, it insinuates that

the Forest Service impermissibly waived the permit fee. FFRF Br. at 10. No evidence supports these accusations.

a. The Forest Service did not violate its own regulations.

FFRF vaguely identifies two Forest Service policies that supposedly were violated in renewing the permit. First it cites language from the Forest Service's original decision that "renewing your permit would result in an inappropriate use of public land." FFRF Br. at 5 (citing ER 86). Although FFRF does not clarify, this language appears to refer to "Forest Service policy at FSM § 2703.2," which ostensibly "limits authorized use of NFS lands to those that '. . . *cannot be reasonably accommodated on non-National Forest System Lands*.'" ER 85 (emphasis in original). Second, and again without citing any legal standard, FFRF contends that "permitted uses do not allow for religious shrines to be constructed permanently in National Forests!" FFRF Br. at 37. This presumably refers to one of the regulatory screening criteria that "proposed use" should not "create an exclusive or perpetual right of use or occupancy." 36 C.F.R. § 251.54(e)(iv).

But both these restrictions apply only to *new* applications, not renewals. *See* 63 Fed. Reg. at 65953 (emphasizing that § 251.54 applies only to new applications); *see also* FSM 2700, § 2703.2(2)(b) (setting forth "first and second-level screening criteria" under § 251.54) (Add. 11). In contrast with new applications, the Forest Service has broad discretion to grant renewals, "so long as [the permitted] use remains consistent with the decision that approved the expiring special use." 36 C.F.R. § 251.64(a). Since neither restriction FFRF identifies applies to renewals,

the Forest Service could not have given preferential treatment by not applying them.

Moreover, even if the restrictions applied, FFRF has not adduced evidence sufficient to show that renewing the permit would violate them. Considering the policy against "creat[ing] an exclusive or perpetual right of use or occupancy," § 251.54(e)(iv), for example, the Knight's use is neither "exclusive" nor "perpetual." Since at least 2000, its permit has expressly stated that that its use shall be "not exclusive." ER 75; SER 3. And, in practice, the Knights have always shared use of their authorized 25-by-25 foot piece of land with the ski resort, whose permit covers the same parcel. SER 43.

The Knights' permit is not "perpetual" either since it is only good for ten years. SER 2. And certainly the Knights' use does not raise the same concerns about exclusivity or perpetuity that would be raised by permits covering commercial or industrial facilities, for example. Thus, even if § 251.54 applied to the Knights' renewal application—and it did not—FFRF has failed to adduce evidence sufficient to create a genuine dispute of material fact over whether renewing the application would violate the policy. Nor is there any evidence that others have been treated differently.

Similarly, with respect to the policy limiting authorized uses to those that "cannot reasonably be accommodated" on private land, FSM § 2703.2(2)(b), there is no evidence that other monument renewal applications have been denied for this reason. Moreover, the Forest Service determined that "the statue's historic value and eligibility for listing on the National Register of Historic Places is, in part,

directly linked to the current physical location on National Forest land." ER 99. Thus, preserving the statue's historical integrity "constitute[d] a reasonable limitation to placing this statue in a new location on private land." ER 99. And the Forest Service acknowledged that moving the statue would be an enormously expensive and potentially ruinous undertaking. ER 85 ("A structural engineer or other specialist may need to be consulted to determine what would be the safest way to accomplish the removal and/or relocation."); ER 225 ("There are real concerns that the statue will be seriously damaged or even destroyed if it has to be moved."). Thus, even if the policy at FSM § 2703.2 applied, it was well within the Forest Service's discretion to conclude that the monument could not "be *reasonably* accommodated" on private land.

b. The Forest Service did not favor the Knights over other applicants.

FFRF also contends that, while renewing the Knights' permit, the Forest Service denied permits to "non-Christian groups" seeking to use public land for "religious purposes." FFRF Br. at 38-39. Again, FFRF cites no evidence to back up this accusation. *See id*. Presumably it is referring to notes from the Forest Service's meeting with the Knights, which state that the Forest Service

> has rejected proposals from other groups to put monuments, grave markers, crosses, etc. on the Forest Service land (for instance grave markers in the Jewel Basin Hiking Area, war memorial crosses near the Desert Mountain Communication Site, memorial signs/plaques at various trailheads; spreading cremation ashes in the North Fork, air dropping cremation ashes in the Bob Marshall Wilderness, etc.).

ER 225-26; *see also* FFRF Br. at 9. The conclusions FFRF draws from this statement, however, are unfounded. First, there is no indication that these proposals for "crosses," among other things, came from "non-Christians." Moreover, as previously discussed, new applications fall under separate regulations with different standards than renewal applications. The regulations are clearly more restrictive against new uses than already existing uses. But there is no evidence to suggest that this somehow favors religion over nonreligion or one religion over another. Without more, there is nothing unconstitutional about favoring pre-existing uses over new proposals.

c. **The Forest Service did not inappropriately waive the Knights' fees.**

Finally, FFRF also makes vague insinuations that the Forest Service improperly waived the fees for the Knights' original and renewal applications. FFRF Br. at 10. Again, there is no evidence to support this theory. The original regulations allowed fees to be waived for any use that was "for noncommercial purposes." 36 C.F.R. § 251.2 (1944). The new regulations also permit waivers for "nonprofit association[s]" engaged in furthering "public health, safety, or welfare" if the waiver would be "equitable and in the public interest." 36 C.F.R. § 251.57(b)(2).

There is no record of whether the Knights owed any fee in 1953, but even if it was waived, the waiver was permitted by the regulations, and there is no evidence that the Knights were treated favorably, or that they were treated favorably for an improper reason. In 1990, the Forest Service expressly waived a fee of $45.00, as authorized by § 251.57. ER 80, 82. For 2000, there is again no record evidence of

whether the fee was paid or waived. And in 2010, the Knights paid an application fee of $110, SER 107, and are being charged an annual fee of $69, SER 7. FFRF has adduced no evidence that the Forest Service's treatment of the Knights was different than its treatment of anyone else.

FFRF cites a Forest Service employee's email asking "Do we reissue the permit? Even though it is a religious monument on FS land?" FFRF Br. at 10; ER 231. But this suggests only that the Forest Service was biased *against* the Knights on the basis of religion. The email continues to suggest that the Knights' permit "does not fit a category for fee waiver." *Id*. But, as a nonprofit association, the Knights in fact do fit a category for a fee waiver, § 251.57, as the Forest Service officially noted in the 1990 permit, ER 80, 82. The one employee's email query is not evidence of preferential treatment, except to suggest that non-religious entities may have been favored over religious entities.

B. The monument is constitutional under *Van Orden*.

Even assuming the monument is government speech, it does not violate the Establishment Clause. The controlling decision is *Van Orden v. Perry*. There, the Supreme Court considered a six-foot tall "monolith" standing on Texas's State Capitol grounds and inscribed with the Ten Commandments, two Stars of David, and "the superimposed Greek letters Chi and Rho, which represent Christ." 545 U.S. at 681. Van Orden was a lawyer who "encountered the Ten Commandments monument during his frequent visits to the Capitol grounds" for using the State Supreme Court library. *Id*. at 682 "Forty years after the monument's erection and

six years after Van Orden began to encounter the monument frequently, he sued numerous state officials," alleging a violation of the Establishment Clause. *Id*.

A plurality of four Justices concluded that the "passive use" of the Ten Commandments, which have both religious and historic significance, did not violate the Establishment Clause, particularly considering that the petitioner had "apparently walked by the monument for a number of years before bringing [his] lawsuit." *Id*. at 691.

In a concurring opinion, Justice Breyer provided the deciding vote to uphold the monument. His opinion is controlling. *Card*, 520 F.3d at 1017–18 n.10.

Justice Breyer focused on "the basic purposes" of the sometimes conflicting Free Exercise and Establishment Clauses:

> They seek to assure the fullest possible scope of religious liberty and tolerance for all. They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.

Van Orden, at 698 (Breyer, J., concurring) (citations omitted). In this spirit, Justice Breyer emphasized that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Id*. at 699 (citation omitted). "Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id*. (citations omitted).

Justice Breyer observed several factors confirming that the Ten Commandments posed little threat of establishing religion. The monument "communicate[d] not simply a religious message, but a secular message as well." *Id*. at 701. There was

"prominent[] acknowledge[ment]" that the monument had been donated to the State. *Id*. at 701-702. The monument's physical setting provided a "context of history and moral ideals." *Id*. at 702. These factors showed that the monument "convey[ed] a predominantly secular message." *Id*.

Still, Justice Breyer found "a further factor" that was even more determinative:

> As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). And I am not aware of any evidence suggesting that this was due to a climate of intimidation. Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, [or] primarily to promote religion over nonreligion . . . .

Id. at 702 (Breyer, J., concurring).

Unlike the government-owned monument in *Van Orden*, the privately-owned statue in this case does not present a "difficult borderline case[]." *See id*. at 700. Its private character already removes it from the core of the Establishment Clause, where government action is the concern. *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) (stating that "[a] law is not unconstitutional simply because it *allows* churches to advance religion"; rather, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence"). The monument's private nature serves to underscore Justice Breyer's concern that Establishment Clause "absolutism" not be permitted to stir up "social conflict." *Van Orden*, 545 U.S. at 699.

Like the monument in *Van Orden*, the monument here conveys a predominantly secular message. While the image of Jesus is indisputably religious, the adjacent signage conveys the clear message of honoring those who have sacrificed their lives defending our country. *See id*. at 701. The plaque includes a prominent statement that the statue is privately owned and maintained. *See id*. at 701-02. The physical setting, while undoubtedly striking, does not "readily lend itself to meditation or any other religious activity." *See id*. at 702; ER 388-94. Indeed, the statue is only accessible to persons who have paid to use the chairlift and skied part way down the slope. ER 38. And for many years, it has primarily been a site of playful irreverence. ER 394-99. The history of the statue strongly confirms that, in fact, the secular perception of the statue far outweighs any religious perception that might arise from the strictly private expression. ER 382, 403, 33 ("[T]he Court suspects that for most who happen to encounter Big Mountain Jesus it neither offends no inspires.").

Most significantly, as in *Van Orden*, the empirical evidence here is clear that—for sixty years— "few individuals . . . are likely to have understood the [statue] as amounting, *in any significantly detrimental way*" to an endorsement of religion. *See id*. at 702 (emphasis added). Mr. Cox, the lead complainant has skied at Big Mountain for more than twenty years, yet only joined FFRF and this litigation, after the complaint was filed. SER 53. Indeed, the litigation itself was stirred up only because of FFRF, an outside organization that aggressively litigates for the removal of *all* religious symbols from the public square, a position that is far afield from that espoused by the Supreme Court. *Compare e.g.*, ER 109 (suggesting it is

always "inappropriate to have religious symbols placed on Federal property"), *with Van Orden*, 545 U.S. 677 (upholding government display of Ten Commandments) *and Capitol Square*, 515 U.S. 753 (upholding private display of Latin cross on government property).[7] And even *after* it filed the complaint in this case, FFRF was still searching for a Montana resident to bolster its standing. SER 53-55. Rather than condone such litigious advocacy, the Establishment Clause should "seek to avoid that divisiveness based upon religion that promotes social conflict." *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring) (quoting A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282-283 (H. Mansfield & D. Winthrop transls. and eds. 2000) (1835)). The passage of sixty years more than adequately confirms that the statue poses no threat of a religious establishment. *Accord Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010) (plurality opinion) ("Time also has played its role. . . . It is reasonable to . . . giv[e] recognition to the historical meaning that the cross ha[s] attained."); ER 39 ("[O]ver the course of the last 60 years the statue has become more of an historical landmark and a curiosity.").

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[7] This Court's recent ruling in *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011), is not to the contrary. Although the Court in that case struck down the display of a forty-three foot Latin cross on government property, it expressly noted "[t]his result does not mean that . . . no cross can be part of this veterans' memorial." *Id*. at 1125. Moreover, the cross in *Trunk* constituted government, not private, speech, *id.* at 1102, 1104-05, and had a long history of religious use and perception that overwhelmed its secular message, *id*. at 1101-02, 1118. The cross's "sectarian effect" was also reinforced by a history of "long-standing, culturally entrenched anti-Semitism" in the city where the cross was displayed. *Id*. at 1121. No such factors are present in this case.

C. The monument is constitutional under *Lemon*.

For similar reasons, the Forest Service's decision to renew the permit does not violate the Establishment Clause under *Lemon*. Simply put, allowing a private party to erect a monument at a privately-run commercial ski resort has neither the purpose nor the effect of endorsing religion. *Trunk*, 629 F.3d at 1107, 1109.

1. The Forest Service had a secular purpose.

"Under *Lemon*'s first prong, governmental action is unconstitutional only if it has the 'ostensible and predominant purpose of advancing religion.'" *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1019 (9th Cir. 2010) (quoting *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005)). Analysis of the government's purposes is "not . . . fatal very often, presumably because government does not generally act unconstitutionally, with the predominant purpose of advancing religion." *McCreary*, 545 U.S. at 863. If the government articulates a legitimate secular purpose for its action, a court "must defer" to that articulation, as long as it is "not a sham." *Newdow*, 597 F.3d at 1019 (citing *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987)). Government action will be unconstitutional only if its "permeated" with a religious purpose. *McCreary*, 545 U.S. at 863. Here, there is no evidence that the Forest Service renewed the Knights' permit for the purpose of endorsing religion.

The Forest Service's stated purpose for renewing the permit was that "[t]he statue has been a long standing object in the community since 1953 and is important to the community for its historical heritage." ER 94. That conclusion was reinforced by the statutorily mandated analysis of Forest Archaeologist

Timothy Light, ER 91-92, and independently confirmed—as also required by law—by the Montana's State Historic Preservation Officer, ER 93. *See* 16 U.S.C. § 470f; 36 C.F.R. § 800.16(f).

Historic preservation is a legitimate secular purpose. *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1043 (9th Cir. 2007) ("Forest Service acted pursuant to a secular purpose" where it sought "preservation of a historic cultural area"); *Trunk*, 629 F.3d at 1108 (finding legitimate secular purpose where Congress sought "to preserve a historically significant war memorial"). FFRF has not produced any evidence contradicting the independent findings of historical significance. Thus, the Forest Service's articulation that it was renewing the permit because of the statue's historical importance, ER 94, must be given deference. *Trunk*, 629 F.3d at 1108 ("[W]e must defer to Congress's stated reasons if a 'plausible secular purpose . . . may be discerned from the face of the statute.'") (citation omitted).

FFRF claims the Forest Service acted with an improper purpose because the original permit states that it was granted for "erecting a religious shrine overlooking the Big Mountain ski run." FFRF Br. at 4; ER 73. But that was merely a restatement of the *Knights'* purpose for which *they* sought the permit, as stated in their application. *See* ER 69. Without more, the Knights' purpose cannot arbitrarily be attributed to the government. *McCreary*, 545 U.S. at 862 (prohibiting "judicial psychoanalysis" of government purpose). In fact, if the government were to *deny* the permit simply because the private speakers had a religious purpose in mind, that would run afoul of this Court's precedents forbidding such discrimination.

Good News Club v. Milford Central School, 533 U.S. 98 (2001); *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995).[8]

Finally, none of the internal Forest Service emails FFRF cites even suggest that the Forest Service endorsed the monument's religious aspect. FFRF Br. at 9-12. Rather, they all address public sentiment for the statue and the statue's historical significance, without any reference to its religious meaning. *See* ER 227-32. There is nothing in those communications suggesting that the Forest Service "meant to emphasize and celebrate the [monuments'] religious message." *McCreary*, 545 U.S. at 869. Rather, they make clear that the Forest Service was wary of the statue's religious aspect and deliberately sought to promote its secular message instead. *See, e.g.*, ER 235 ("Be clear about the historical value and National Register of Historic Places-eligibility of the statue"; "focus on historical values rather than religious ones"). FFRF has simply failed to identify any evidence that the Forest Service had the "ostensible and predominant purpose of advancing religion." *Newdow*, 597 F.3d at 1019 (citation omitted).

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[8] FFRF's complaint that the monument was dedicated with "assistance of a Catholic Priest," FFRF Br. at 36, is also unavailing. *Card*, 520 F.3d at 1019-20 (rejecting "assertion that the presence of clergy at [a] dedication ceremony" is indicative of improper purpose). And so is FFRF's listing of various individuals who made religious remarks in support of the monument. FFRF Br. at 13-19; *Trunk*, 629 F.3d at 1109 ("[E]vidence of the role of Christian advocacy organizations in the Act's passage [was] not probative of Congress's objective."); *Modrovich v. Allegheny Cnty., Pa.*, 385 F.3d 397, 412 (3d Cir. 2004) (letters from County residents supporting a Ten Commandments plaque were not "relevant to the *Lemon* purpose analysis").

2. The Forest Service's actions did not send a message of religious endorsement.

The Forest Service's regulations open the national forests to broad uses by the public, ranging from temporary use for expressive activities such as "assemblies, meetings, demonstrations, and parades," 36 C.F.R. § 251.50, to long-term uses for commercial and industrial purposes, § 251.53. In that context, no "informed and reasonable" observer who is "familiar with the history of the government practice," *Trunk*, 629 F.3d at 1110 (citation omitted), could reasonably perceive the permit renewal as an endorsement of religion. Nor are there government buildings or other trappings of government in close proximity that could confuse the reasonable observer. *Cf. Capitol Square*, 515 U.S. 753 (upholding private display of cross, even though adjacent courthouse raised possibility of confusion). Rather, the statue sits in an obscure location surrounded by trees in the midst of a commercial ski resort. It would be no more reasonable to attribute the monument to the Forest Service than it would be to assume that the prominent ski lift towers that run up and down the mountain belong to the government rather than the resort. *Cf. Card*, 520 F.3d at 1012 (upholding monument "shrouded by shrubberies and obscured from view unless one is standing close-by").

Moreover, the historical evidence is undisputed in showing that the statue is widely perceived as either a war memorial, ER 382, 385 387-88, 391, 402; SER 49, a quirky tourist attraction, ER 382, 396-98, or simply a historical and cultural landmark, ER 394-98. It stood for almost sixty years without controversy, ER 382, and has undisputed historic significance, ER 91-93, 400. *Cf. Card*, 520 F.3d at

1021 (history of seven complaints from "two citizens and one organization" that "did not surface . . . for over thirty years" was "determinitive"); *Glassroth v. Moore*, 335 F.3d 1282, 1300 (11th Cir. 2003) (age and "legitimate 'preservationist perspective'" made perception of religious endorsement unlikely). And there is no evidence that the Forest Service has ever promoted it in any way. *Cf. Freethought Soc'y of Greater Philadelphia v. Chester Cnty.*, 334 F.3d 247, 267 (3d Cir. 2003) (no religious endorsement where government had "not taken any action to highlight or celebrate" Ten Commandments plaque).

Any religious activity in connection with the statue has been "sporadic and inconsistent," far outweighed by the secular activity surrounding it. ER 382, 388-94, 401-02. And perhaps most significantly, there is a large plaque directly adjacent to the statue clearly explaining that it is the Knights' expression in memory of veterans from the Army's 10th Mountain Division. ER 385, 402-03; *Capitol Square*, 515 U.S. at 776 (O'Connor, J., concurring) (disclaimer "remove[s] doubt"); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1054 (9th Cir. 2003) ("even less danger of a perception of 'endorsement' for materials containing an express disclaimer"). Under all the relevant circumstances, no reasonable observer could conclude that the Forest Service's decision to renew the permit—for a private display in an open forum, far removed from the seat of government—is a government endorsement of religion.

CONCLUSION

For all these reasons, the Knights of Columbus respectfully urges the Court to dismiss for lack of standing or, in the alternative, to affirm the district court's ruling that renewing the Knights' permit did not violate the Establishment Clause.

Respectfully submitted this 30th day of April 2014,

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STATEMENT OF RELATED CASES

The Knights of Columbus are unaware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13754 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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9th Circuit Case Number(s) 13-35770

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ADDENDUM

FOREST SERVICE MANUAL
NATIONAL HEADQUARTERS (WO)
WASHINGTON, DC

FSM 2700 – SPECIAL USES MANAGEMENT

CHAPTER 2700 – ZERO CODE

Amendment No.: 2700-2011-1

Effective Date: January 10, 2011

Duration: This amendment is effective until superseded or removed.

Approved: GLORIA MANNING
Associate Deputy Chief, NFS

Date Approved: 11/15/2010

Posting Instructions: Amendments are numbered consecutively by title and calendar year. Post by document; remove the entire document and replace it with this amendment. Retain this transmittal as the first page(s) of this document. The last amendment to this title was 2700-2009-1 to 2700_zero_code.

New Document	2700_zero_code	18 Pages
Superseded Document(s) by Issuance Number and Effective Date	2700_zero_code (Amendment 2700-2009-1,11/25/2009)	17 Pages

Digest:

2702 - Makes minor changes for clarification.

2703.1 - Changes caption from "Review of Proposed Use" to "Evaluation of Proposed Use," removes obsolete criteria that do not conform to 36 CFR 251.54, and replaces these with a cross reference to 36 CFR 251.54 and FSH 2709.11, sections 11 and 12.

2703.2 - Changes caption from "Denial of Use" to "Use of National Forest System lands." Removes obsolete criteria that are inconsistent with 36 CFR 251.54. Adds a cross reference to FSM 2720 for the types of special uses that may be authorized. Clarifies when to apply the considerations in this section. Adds a consideration for consistency with the Energy Policy Act

Digest--Continued:

of 2005 to cooperate with other federal agencies in locating electric transmission and distribution facilities and in processing those applications, and for the mission of the Forest Service for consistency with the Federal Land Policy and Management Act of 1976. Adds a cross reference to FSM 2340.3 for considering recreation special uses. Renumbers other existing considerations and makes minor changes for clarification.

FSM 2700 - SPECIAL USES MANAGEMENT
CHAPTER 2700 - ZERO CODE

Table of Contents

2701 - AUTHORITY

2701.1 - Current Statutory Authorities

The following statutory authorities govern the issuance and administration of special-use authorizations on National Forest System lands.

1. Organic Administration Act of June 4, 1897, (16 U.S.C. 477-482, 551). This act authorizes the Secretary of Agriculture to issue rules and regulations for the occupancy and use of the National Forests. This is the basic authority for authorizing use of National Forest System lands for other than rights-of-way.

2. Preservation of American Antiquities Act of June 8, 1906, (16 U.S.C. 431 et seq.). This act authorizes permits for archeological and paleontological exploration involving excavation, removal, and storage of objects of antiquity or permits necessary for investigative work requiring site disturbance or sampling which results in the collection of such objects.

3. The Act of March 4, 1915, as amended July 28, 1956, (16 U.S.C. 497). This act authorizes term permits for structures or facilities on National Forest System land, and sets maximum limits of 80 acres and 30 years.

4. The Mineral Leasing Act of 1920, as amended on November 16, 1973, (30 U.S.C. 185(1)). This act authorizes the issuance of permits and easements for oil and gas pipelines. It requires annual payments in advance which represent fair market rental value and provides for reimbursement to the Government for administrative and other costs incurred in monitoring, construction (including costs for preparing required environmental analysis and documentation), operation, maintenance, and termination of oil and gas pipelines.

5. Bankhead-Jones Farm Tenant Act of July 22, 1937, as amended (7 U.S.C. 1010-1012). Title III of this act directs and authorizes the Secretary of Agriculture to develop programs of land conservation and use to protect, improve, develop, and administer the land acquired and to construct structures thereon needed to adapt the land to beneficial use. Under the act, the Department of Agriculture may issue leases, licenses, permits, term permits, or easements for most uses, except rights-of-way.

6. Alaska Term Permit Act of March 30, 1948, (48 U.S.C. 341). The act authorizes term permits in Alaska on lands planned for indefinite Government ownership, limited to a maximum of 80 acres and 30 years.

7. Section 7 of the Granger-Thye Act of April 24, 1950, (16 U.S.C. 490, 504, 504a, 555, 557, 571c, 572, 579a, 580c-5801, 581i-1). This act authorizes special-use permits not to exceed 30 years duration for the use of structures or improvements under the administrative control of the Forest Service and for the use of land in connection therewith, without acreage limitation.

8. Independent Offices Appropriation Act of 1952, as amended (31 U.S.C. 9701). This act provides authority for agency heads to charge fees for services or benefits provided by the agency that are fair and based on fair market value and cost to the Government. Office of Management and Budget (OMB) Circular No. A-25 further defines this authority and requires agencies to establish user fees based on sound business management principles.

9. Act of September 3, 1954, (68 Stat. 1146; 43 U.S.C. 931c, 931d). This act authorizes permits, term permits, leases, or easements at the fair market value, not to exceed 30-years duration, to States, counties, cities, municipalities, or other public agencies without acreage limitation for the construction and operation of public buildings or other public works, exclusive of rights-of-way.

10. Highway Act of August 27, 1958, (23 U.S.C. 317), supplemented by the Act of October 15, 1966 (49 U.S.C. 1651). This act authorizes the Federal Highway Administration to grant easements to States for highways that are part of the Federal-aid system or that are constructed under the provision of Chapter 2 of the Highway Act.

The Forest Service consents to the grant of these easements in a form agreed upon by the two agencies and upon the State highway agency's execution of stipulations. This is the only authority for granting rights-of-way for projects on the Federal-aid system or projects constructed under the provisions of Chapter 2 of the Highway Act (FSM 2731).

11. Wilderness Act of September 3, 1964 (16 U.S.C. 1131-1136). This act establishes requirements for special-use authorizations in designated wilderness areas for temporary structures, commercial public services and access to valid mining claims and non-Federal lands. Under this act, Presidential approval is necessary for the establishment of new water facilities, power projects, and transmission lines.

Except for the Alaska National Interest Lands Conservation Act of December 2, 1980, this act is the exclusive authority for rights-of-way occurring within designated wilderness areas.

12. Land and Water Conservation Fund Act of September 3, 1964, as amended (16 U.S.C. 4601-6a(c)). Section 4(c) of this act authorizes permits for recreation, such as group activities, organized events, motorized recreational vehicle use, and other specialized recreation activities of limited duration.

13. National Forest Roads and Trails Act of October 13, 1964, (16 U.S.C. 532-38). This act authorizes the Secretary of Agriculture to grant temporary or permanent easements to landowners who join the Forest Service in providing a permanent road system that serves lands administered by the Forest Service and lands or resources of the landowner. It also authorizes the grant of easements to public road agencies for public roads that are not a part of the Federal-aid system (FSM 2732).

14. The Act of November 16, 1973, (30 U.S.C. 185). This act, amending Section 28 of the 1920 Mineral Leasing Act, authorizes the Forest Service to issue authorizations for oil and gas pipelines and related facilities located wholly on National Forest System land. When the lands are under the jurisdiction of two or more Federal agencies, authority for issuance is reserved to the Department of the Interior, Bureau of Land Management, subject to approval by the agencies involved.

15. Title V, Federal Land Policy and Management Act of October 21, 1976, (43 U.S.C. 1761-1771). Title V of the Federal Land Policy and Management Act (FLPMA) authorizes the Secretary of Agriculture to issue permits, leases, or easements to occupy, use, or traverse National Forest System lands. FLPMA directs the United States to receive fair market value unless otherwise provided for by statute and provides for reimbursement of administrative costs in addition to the collection of land use fees (43 U.S.C. 1764(g)).

a. Except in designated Wilderness Areas, Alaska, and specifically excepted situations, FLPMA is the only authority for all forms of use involving:

(1) Transportation, distribution, or storage of water.

(2) Transportation, distribution, or storage of liquids or gases other than water and other than oil, natural gas, synthetic liquid, or gas fuels, or their refined products.

(3) Transportation of solid materials and associated facilities for storing such materials.

(4) Generation, transmission, and distribution of electrical energy.

(5) Transmission or reception of electronic signals and other means of communication.

(6) Transportation facilities outside of wilderness, except those rights issued in connection with commercial recreation facilities, authorized by the Federal Highway Act (FSM 2731), or the National Forest Road and Trail Act (FRTA) of October 13, 1964 (FSM 2732). The FLPMA is also used for granting rights-of-way

to those otherwise qualified for FRTA easements, but who elect to pay a road-use fee at the time of commercial hauling instead of paying their share of road costs at the time the easement is issued. For further direction of FLPMA road rights-of-ways see FSM 2733.

(7) Other transportation systems or facilities that are in the public interest, including those that would arise from future technological advances.

b. Section 504g of Title V (Public Law 98-300) exempts facilities financed through the Rural Electrification Administration from Federal land use fees. This section also provides for recovery of administrative costs from those uses.

c. Section 501(b)(3) of Title V (Act of October 27, 1986; 100 Stat. 3047; commonly referred to as "Colorado Ditch Bill") expanded the authority of the Secretary of Agriculture to:

(1) Issue free conditional easements for certain water conveyance systems crossing National Forest System lands;

(2) Authorize lump-sum payments for uses on National Forest System lands; and

(3) Administer uses on National Forest System lands authorized under previous acts that were granted or issued by the Secretary of the Interior.

16. American Indian Religious Freedom Act of August 11, 1978 (42 U.S.C. 1996). This act states the policy of the United States to preserve and protect the rights of Native Americans to reasonable access and use National Forest System lands for exercising their traditional cultural religious beliefs and practices. This act does not grant authority to issue authorizations.

17. Archeological Resources Protection Act of October 31, 1979, (16 U.S.C. 470aa). This act authorizes the Secretary of Agriculture to issue permits for archeological research, investigations, studies, and excavations.

18. Alaska National Interest Lands Conservation Act of 1980, (16 U.S.C 3210).

a. The Alaska National Interest Lands Conservation Act (ANILCA) provides numerous authorities related to access that are specific to National Forests in Alaska (except for sec. 1323(a), which applies to all National Forest System lands; see the following paragraph b). The Regional Forester, Region 10, shall prepare Manual supplements providing necessary direction for Alaska.

b. The provisions of section 1323(a) (16 U.S.C. 3210) apply to all National Forest System lands. This section provides that, subject to terms and conditions established by the Secretary of Agriculture, the owners of non-Federal land within the National Forest System shall be provided adequate access to their land. Regulations implementing section 1323(a) are set forth at Title 36, Code of Federal Regulations, Part 251, Subpart D - Access to Non-Federal Lands. See FSM 2701.3, paragraph 3, for the summary of the provisions of 36 CFR 251, Subpart D.

19. Federal Timber Contract Payment Modification Act of 1984, (16 U.S.C. 618). Section 3 of this act authorizes a waiver of all or part of a land use fee for an organizational camp operated by the Boy Scouts of America or other nonprofit organizations when they provide services the authorized officer determines are a valuable benefit to the public or programs of the Secretary of Agriculture.

20. National Forest Ski Area Permit Act of 1986, (16 U.S.C. 497b). This act authorizes use for up to 40 years and acreage size deemed appropriate by the authorized officer for nordic and alpine ski areas and facilities.

21. Omnibus Parks and Public Lands Management Act of 1996, (16 U.S.C. 497c). Section 701 of this act:

a. Establishes a system to calculate fees for ski area permits issued under the National Forest Ski Area Permit Act of 1986, (16 U.S.C. 497b),

b. Provides for holders of ski area permits issued under other authorities to elect this permit fee system (FSH 2709.11, sec. 38.03a),

c. Includes provisions concerning compliance with the National Environmental Policy Act when issuing permits for existing ski areas (FSM 2721.61f and FSH 2709.11, sec. 41.61b), and

d. Withdraws leasable and locatable minerals, subject to valid existing rights (FSH 2709.11, sec. 41.61c).

22. Act of May 26, 2000, (16 U.S.C. 406l-6d). This act supplements the authority of the Secretary of Agriculture to regulate commercial filming and still photography on National Forest System lands. It also authorizes the Secretary to retain and spend land use fees collected for commercial filming and still photography without further appropriation, and provides for recovery of administrative and personnel costs in addition to the collection of the land use fee.

23. Cabin User Fee Fairness Act of 2000, (16 U.S.C. 6201-6213) as set out in title VI of the appropriations act for the Department of the Interior and Related Agencies for Fiscal Year 2001 (Pub. L. 106-291). This act establishes procedures for appraising recreation residence lots and determining fees for recreation residence lots located on National Forest System lands.

24. National Forest Organizational Camp Fee Improvement Act of 2003, (16 U.S.C. 6231 et seq.). This act establishes a land use fee system for organizational camps located on National Forest System lands and authorizes the Secretary to retain and spend these fees without further appropriation. The act also exempts certain ministerial actions from the provisions of the National Environmental Policy Act.

2701.2 - Repealed Statutory Authorities That Remain Applicable

The following acts which authorized the use of Federal land have been repealed. However, uses on National Forest System lands which were authorized under these authorities must continue to be administered in accordance with their terms and conditions. Refer to FSM 5520 for management direction.

1. The Act of July 26, 1866, (14 Stat. 254; 30 U.S.C. 51). This act granted rights-of-way for the construction of ditches and canals for water to be used for mining, agriculture, manufacturing, or other purposes.

2. The Act of March 3, 1875, as amended by the Act of March 3, 1899 (43 U.S.C. 934-939; 16 U.S.C. 525). This act granted rights-of-way to railroads for 100 feet on each side of the center line of the road; use of land for associated facilities, not to exceed 20 acres; and the right to take earth, stone, and timber necessary for railroad construction.

3. The Act of March 3, 1891, (26 Stat. 1096; codified in scattered sections of 43 U.S.C.). This act granted rights-of-way for irrigation to any canal or ditch company organized under the State or Territory law. It requires that the survey of the canal location be filed with the land office and construction be completed within 5 years.

4. The Act of February 15, 1901, (31 Stat. 790; codified in scattered sections of 16 and 43 U.S.C.). This act authorized the Secretary of the Interior to permit the use of rights-of-way through the public lands, forests, and other reserves of the United States for electrical plants and power and telephone transmission lines; and for canals, and ditches to promote irrigation, mining, manufacturing, or the supplying of water for domestic, public, or any other beneficial uses.

5. The Act of February 1, 1905, (16 U.S.C. 524). This act granted rights-of-way for the storage and transportation of water for municipal and mining purposes and for milling and reduction of ores.

6. The Act of March 4, 1911, (36 Stat. 1253; 43 U.S.C. 961). This act grants rights-of-way over, across, and upon public lands and reservations for electrical poles and lines for the transmissions and distribution of electrical power and communications purposes.

2701.3 - Regulations

The following regulations provide direction for special uses management on National Forest System lands:

1. Title 36, Code of Federal Regulations, Part 251, Subpart B. This subpart provides direction for special uses management on National Forest System lands, including guidance pertaining to the special-use application process; terms and conditions of use; rental fees; fee waivers; termination, revocation, suspension, and modification of existing authorizations; and permit administration.

2. Title 36, Code of Federal Regulations, Part 251, Subpart C. This subpart provides a process for appeals of decisions related to administration of special use authorizations on National Forest System lands.

3. Title 36, Code of Federal Regulations, Part 251, Subpart D. This subpart governs procedures by which landowners may apply for access across National Forest System lands, the terms and conditions that govern any special use authorization that is issued by the Forest Service to permit such access, and the criteria that authorized officers must consider in evaluating such applications. The rules provide that, subject to the terms and conditions set out in the rules, "landowners shall be authorized such access as the authorized officer deems to be adequate to secure them the reasonable use and enjoyment of their land."

4. Title 36, Code of Federal Regulations, Part 251, Subpart E. This subpart implements section 1307 of the Alaska National Interest Lands Conservation Act with regard to the continuation of visitor services offered as of January 1, 1979, and the granting of a preference to local residents and certain Native Corporations to obtain special use authorizations for visitor services provided on National Forest System lands within Conservation System Units of the Tongass and Chugach National Forests in Alaska.

2702 - OBJECTIVES

The objectives of the special-uses program are to:

1. Authorize and manage special uses of National Forest System lands in a manner which protects natural resources and public health and safety, consistent with National Forest System Land and Resource Management Plans;

2. Administer special uses based on resource management objectives and sound business management principles;

3. Develop and maintain a well-trained workforce to properly manage and administer special uses; and

4. Facilitate the delivery of recreational opportunities on National Forest System lands for services not provided by the Forest Service.

2703 - POLICY

2703.1 - Evaluation of Proposed Use

Apply the first and second-level screening criteria per 36 CFR 251.54 and FSH 2709.11, sections 11 and 12, to proposals for the use of National Forest System lands.

2703.2 - Use of National Forest System Lands

See FSM 2720 for the types of uses that may be authorized.

In applying the second-level screening criterion regarding the public interest (36 CFR 251.54(e)(5)(ii)), consider the following:

1. Section 368(c) of the Energy Policy Act of 2005 provides that the Forest Service has an ongoing responsibility to establish procedures for identifying and designating additional energy transmission corridors on federal lands and to expedite applications for electric transmission and distribution facilities within those corridors. Cooperate and coordinate with other federal agencies to optimize siting of rights-of-way for energy transmission corridors (30 U.S.C. 185(p); 43 U.S.C. 1763), and endeavor to expedite applications for electric transmission and distribution facilities on National Forest System lands through coordination with other affected federal agencies.

2. Authorize use of National Forest System lands other than noncommercial group uses only if:

a. The proposed use is consistent with the mission of the Forest Service to manage National Forest System lands and resources in a manner that will best meet the present and future needs of the American people, taking into account the needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values; and

b. The proposed use cannot reasonably be accommodated on non-National Forest System lands, and the application for electric transmission and distribution facilities does not conflict with paragraph 1.

3. Do not authorize the use of National Forest System lands solely because it affords the applicant a lower cost or less restrictive location when compared with non-National Forest System lands.

4. See FSM 2340.3 for specific policy related to proposals for recreation special uses.

2703.3 - Authorization of Use

Authorize the use of National Forest System lands under the proper statutory or regulatory authority with terms and conditions which protect the resource values and the interests of the Federal Government. Limit the use to the minimum area and period of time required to accommodate the use. Establish fees reflecting the fair market value prior to authorizing the use.

2703.4 - Administration

Administer all special-uses in accordance with the terms and conditions of the authorization. Conduct field inspections and audits to ensure compliance with permit provisions. Document observed breach of terms and conditions and follow through with corrective action. Provide timely billings for all fees due the Federal Government.

2703.5 - Information Systems

Maintain an accurate database using the Special Uses Data System (SUDS) for administering, budgeting, planning, and reporting activities associated with the special uses program (FSM 2704.22).

2703.6 - Training

Develop and maintain a well-trained workforce to manage and administer special uses properly.

2704 - RESPONSIBILITY

2704.1 - Washington Office

2704.11 - Deputy Chief for National Forest System

The Deputy Chief for the National Forest System has the responsibility to provide direction, leadership, and administration of servicewide special use programs, policies, and procedures, and to advise the Chief of current, national special-uses related issues.

2704.12 - Associate Deputy Chief for National Forest System

The Associate Deputy Chief for National Forest System with responsibility for special use management has the responsibility to serve as reviewing officer on appeals of special use issues appealed to the Chief (FSM 1570), unless a superior officer elects to serve as reviewing officer.

2704.13 - Washington Office, Director of Lands and Director of Recreation and Heritage Resources

It is the responsibility of these directors to:

1. Advise the Associate Deputy Chief and the Deputy Chief for National Forest System and the Chief on servicewide special-use activities, programs, policies, and issues within their jurisdiction.

2. Ensure coordination among regions for major special-use activities through national meetings, committees, correspondence, and staff advice.

3. Maintain relationships with the public, Members of Congress, and organizations that have concerns about the special-use program and its management on a national basis.

4. Recommend objectives and priorities for special-use management.

5. Provide leadership in national training programs and support and consistency to regional training efforts.

6. Conduct on-site and off-site monitoring and field reviews of special use activities to ensure program objectives are being met.

7. Maintain a National database system to monitor the special-uses program and to facilitate information requests, both within and outside of the agency. Establish minimum standards for agencywide data systems and management.

2704.2 - Field Units

2704.21 - Regional Forester

It is the responsibility of the regional forester to:

1. Establish management direction (objectives, standards, and policies) that ensure the integration of special use activities with other regional programs and the consistency of National Forest System land and resource management plans with National policy.

2. Provide for consistency and coordination in special-use management among forests and adjacent regions.

3. Provide training and technical assistance to forest supervisors and their employees to ensure that special-uses are managed within current guidelines, policy, regulations, and laws.

4. Maintain communication with individuals and organizations with regional concerns about management of the special-uses program.

5. Evaluate special-use applications under the regional forester's authority (FSM 2704.32) and complete appropriate environmental analysis and documentation prior to issuing authorizations.

6. Review, for adherence to policy, special use permits before they are issued when the capital investment exceeds or is expected to exceed $1,000,000 for winter sports resorts (FSM 2721.61) and $500,000 for other resorts (FSM 2721.33).

2704.22 - Forest Supervisor

It is the responsibility of the forest supervisor to:

1. Provide management direction that ensures integration of special use activities and objectives into programs and projects at the ranger district level.

2. Ensure integration of special use activities with other resources management in developing and implementing the National Forest System land and resource management plan.

3. Maintain communication with organizations and individuals with interests in special uses activities.

4. Identify needs and provide technical assistance and training to ranger districts to ensure proper administration of the special-uses program.

5. Use the Special Use Data System (SUDS) for special-uses administration, program planning, budgeting, resource coordination, and reporting. Maintain, update, and verify the accuracy of the SUDS data base.

6. Evaluate special-uses applications under the forest supervisor's authority and complete appropriate environmental documentation prior to issuing authorizations.

2704.23 - District Ranger

Each district ranger is responsible for all special use activities on the district. Except for those responsibilities specifically reserved by the forest supervisor, it is the responsibility of the district ranger to:

1. Assure high quality on-the-ground administration of the special-uses program.

2. Provide training in special-use administration to appropriate district personnel.

3. Maintain communication with local individuals and organizations with interest in the special-uses program.

4. Monitor and evaluate special-use activities to determine the effects on other resources and ensure compliance with the National Forest System land and resource management plan.

5. Evaluate special-uses applications under the district ranger's authority and complete appropriate environmental documentation prior to issuing authorizations.

2704.3 - Delegation of Authority for Issuance and Approval of Special Uses Authorizations

Pursuant to the delegations of authority by the Secretary at Title 7, Code of Federal Regulations, section 2.6(2) (FSM 1230), the Chief has full authority to act for the Secretary in the authorization and administration of special-uses on National Forest System lands. This section redelegates that authority to other Forest Service line officers.

2704.31 - Chief

The Chief retains the authority to issue authorizations for sanitariums or hotels at mineral springs having medicinal values as prescribed by the Act of February 28, 1899, (16 U.S.C. 495).

2704.32 - Regional Forester

Except as provided in section 2704.31, regional foresters have authority to approve and issue special use authorizations. This authority may be redelegated to forest supervisors, except for the following uses:

1. Rights-of-way for oil and gas pipelines 24 inches or more in diameter (sec. 28, Mineral Leasing Act of 1920; FSM 2701.1).

2. Easements for all uses except roads; the authority to issue easements for roads may be delegated to specific forest supervisors on a case-by-case basis.

3. Inter-Regional special-use authorizations. This authority may be redelegated to a forest supervisor on a case-by-case basis by formal agreement between regional foresters, using one region or forest as the lead.

4. Inter-Forest special-use authorizations. This authority may be redelegated on a case-by-case or type-of-use basis with one forest designated as the lead.

2704.33 - Forest Supervisor

Forest supervisors may approve and issue all special-use authorizations for which authority has been delegated by the regional forester, as stipulated in FSM 2704.32. Forest supervisors may redelegate to district rangers the authority to issue certain special-use authorizations, as provided in FSM 2704.34.

2704.34 - District Ranger

District rangers may issue special-use authorizations for the following types of uses or situations as delegated by the forest supervisor (FSM 2704.33):

1. Uses of a short-term nature (occupancy not to exceed 5 years).

2. Standardized authorizations for:

   a. Uses approved in the National Forest System land and resource management plan, including recreation residence authorizations where a determination has been made to continue that use.

   b. Communications uses on a designated site with an approved communications site plan.

   c. Ten-year permits for outfitting and guiding.

2704.35 - Station Director

Directors of research experiment stations and the Forest Products Laboratory may issue special-use authorizations for lands under their administration.

2705 - DEFINITIONS

The following special terms are used throughout FSM 2700. For additional terms related to special uses, refer to Title 36, Code of Federal Regulations, Part 251.

Annual Fee. The net fee charged to a special-use authorization holder, payable in advance, for use of the land for a period of one year or fraction thereof.

Base Fee. The minimum fee that the authorized officer may accept for a given authorization subject to the graduated rate fee system. It is the historic amount the previous holder paid in the year of ownership.

Construction Fee. A fixed fee generally based on land value and used during the construction period for uses that will later generate a fee based on percentage of income.

Exempted Fee. A fee for the use of National Forest System lands that is excused from payment by statute or regulation.

Fair Market Value. The amount or value for which in all probability a property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy.

Fee Schedule. A predetermined fee for a defined category of use. A schedule may be National, regional, or forest-wide in scope and may be adjusted at certain intervals based on an appropriate index.

Fee System. A set of procedures and techniques used to establish fees for a particular category of authorized use.

Fee Waiver. A reduction of all, or part, of the use fee in accordance with criteria provided in regulations.

Index. A means of measuring differences in the magnitude of a group of related variables in comparison with a base period. The most common types of indexes are those which show the change in prices of specific commodities or group averages over a period of time.

Minimum Fee. The lowest fee established for a particular use.

Negotiated Fee. A fee agreed to between the applicant or holder and the authorized officer for a specific use.

Reissuance. The issuance of a new special-use authorization for the same use upon the transfer of ownership of improvements.

Renewal. The issuance of a new special-use authorization for the same use to the same holder upon the expiration of the current authorization.

Temporary Permit. An authorization that is issued for 1 year or less.

Use Fee. The unadjusted fee for the use based on fair market value.

2709 - HANDBOOKS

2709.1 - Internal Servicewide Handbooks

2709.11 - Special Uses Handbook

This handbook contains detailed instructions and technical information related to special-use management activities, authorization preparation, and administration.

2709.12 - Road Rights-of-Way Grants Handbook

This handbook contains specific instructions for lands staffs and program managers in the selection, writing, format, and administration of road right-of-way authorizations and grants.

2709.14 - Recreation Special Uses Handbook

This handbook contains detailed instructions and technical information related to recreation special-use management activities, authorization preparation, and administration.

2709.15 - Hydroelectric Handbook

This handbook contains specific instructions for processing applications for hydropower licenses and permits, as well as direction regarding the Forest Service's relationship with the Federal Energy Regulatory Commission and Forest Service administration of hydropower permits.

FOREST SERVICE MANUAL
NATIONAL HEADQUARTERS (WO)
WASHINGTON, DC

FSM 2700 – SPECIAL USES MANAGEMENT

CHAPTER 2720 – SPECIAL USES ADMINISTRATION

Amendment No.: 2700-2011-3

Effective Date: August 4, 2011

Duration: This amendment is effective until superseded or removed.

Approved: JAMES M. PEÑA
Associate Deputy Chief, NFS

Date Approved: 08/02/2011

Posting Instructions: Amendments are numbered consecutively by title and calendar year. Post by document; remove the entire document and replace it with this amendment. Retain this transmittal as the first page(s) of this document. The last amendment to this title was 2700-2011-2 to FSM 2720.

New Document	2720	96 Pages
Superseded Document(s) by Issuance Number and Effective Date	2720 (Amendment 2700-2011-2, 04/15/2011)	96 Pages

Digest:

2726.01 – Establishes code and caption entitled "Authority."

2726.01a – Establishes code and caption entitled "Wind Energy Facilities" and sets forth direction identifying the authority for wind energy facilities.

2726.02 – Establishes code and caption entitled "Objectives."

2726.02a – Establishes code and caption titled "Wind Energy Facilities" and sets forth direction identifying the objectives of the wind energy program.

Digest--Continued:

2627.02b – Establishes code and caption titled "Power Plants Under the Authority of the Federal Energy Regulatory Commission" and adds "reserved" to the caption.

2726.04 – Establishes code and caption titled "Responsibility."

2726.04a – Establishes code and caption entitled "Chief" and sets forth responsibilities for the Chief of the Forest Service.

2726.04b – Establishes code and caption titled "Regional Forester" and sets forth responsibilities for Regional Foresters.

2726.04c – Establishes code and caption titled "Forest Supervisor" and sets forth responsibilities for Forest Supervisors.

2726.11 – Changes caption from "Hydroelectric Project, Federal Energy Regulatory Commission Licensed" to "Hydroelectric Facilities Licensed by the Federal Energy Regulatory Commission."

2726.12 – Changes caption from "Hydroelectric Project, Federal Energy Regulatory Commission Exempted" to "Hydroelectric Facilities That Are Not Licensed by the Federal Energy Regulatory Commission."

2726.2 – Changes caption from "Other Power Plants" to "Other Power-Generating Facilities."

2726.21 – Changes caption from "Wind Power Facility" to "Wind Energy Facilities."

2726.21a – Establishes code and caption titled "Proposals" and sets forth direction for processing proposals for wind energy permits.

2726.21b – Establishes code and caption titled "Land Use Fees" and sets forth direction for calculation of land use fees for wind energy permits.

2726.21c – Establishes code and caption titled "Ancillary Facilities" and sets forth direction regarding authorization of ancillary facilities.

2726.21d – Establishes code and caption titled "Monitoring Plan, Plans of Development, and Site Plans" and sets forth direction regarding those plans.

Table of Contents

2720.1 - Authority

For further direction on authorities, see FSM 2701.

1. Except as provided elsewhere in this chapter, cite the act of June 4, 1897 (16 U.S.C. 551), also known as the Organic Act, the Term Permit Act of 1915 (16 U.S.C. 497), and the act of September 3, 1954 (43 U.S.C. 931c and 931d) (for State and local governmental or public agency applicants requesting use of more than 80 acres) for special use authorizations involving the following types of special uses: recreation; agriculture; community and public information; feasibility, research, training, and cultural and historical resources (non-disturbing use and treasure hunting); industry; and water (non-power generating).

2. Cite the Federal Land Policy and Management Act (FLPMA) of 1976 (43 U.S.C. 1761-1771) for special use authorizations involving the following types of special uses: energy generation and transmission, transportation, communications, and water.

3. Cite the Antiquities Act of June 8, 1906 (16 U.S.C. 431) or Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa) for cultural resource or historic special use authorizations.

4. Cite the Granger-Thye Act of April 24, 1950 (16 U.S.C. 580d) for authorizations involving the use of a Government-owned structure.

5. Cite the National Ski Area Permit Act of 1986 (16 U.S.C. 497b) as the exclusive authority to approve nordic and alpine ski areas except as provided for in FSM 2721.61e.

6. Cite the Act of May 26, 2000 (16 U.S.C. 460l-6d) for all authorizations issued for still photography or commercial filming (FSH 2709.11, sec. 45.5).

2720.3 - Policy

Base fees for special uses on an analysis of the market rental values for similar uses in the area. Use individual appraisals, fee schedules based on market evidence, and competitive bidding as appropriate to determine fair market value (FSH 2709.11, ch. 30).

See FSM 2710.03 and FSM 2723.7 for the policy on temporary encroachment use.

2720.31- Permittee Housing [Reserved]

2720.5 - Definitions

For additional definitions, see 36 CFR 251.51 and FSM 2705.

Indian. A member of an Indian tribe.

Indian Tribe. Any Indian or Alaska Native tribe, band, nation, pueblo, village, or other community that is included on a list published by the Secretary of the Interior under section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a–1).

Special Uses Organization:

a. Special Use Class. The first division in the arrangement of special uses by topics into broad classes, which are further divided into categories and designations.

b. Special Use Category. The first subdivision of a special use class. All uses within a particular category are generally similar in purpose. These categories are further broken down into designations.

c. Special Use Designation. The basic type unit for special uses. Each designation carries an individual code indicating the type of use.

Traditional and Cultural Purpose. With respect to a definable use, area, or practice, identified by an Indian tribe as traditional or cultural because of its long-established significance or ceremonial nature for the Indian tribe.

2721 - RECREATION SPECIAL USES

2721.01 - Authority

See FSM 2701 and FSM 2720.1 for the primary laws relating to special uses of National Forest System lands for recreation purposes.

2721.02 - Objective

To issue and to administer special use permits for recreation uses that serve the public, promote public health and safety, and protect the environment.

2721.03 - Policy

1. Manage recreation special uses of National Forest System lands in accordance with the direction in this chapter and FSM 2340.

2. Issue special use permits for recreation special uses of National Forest System lands in accordance with direction in this section and FSH 2709.11, chapter 10.

3. Determine fees for recreation special use permits based on the market rental value of the use. Calculate the market rental value by direct rental comparisons, by application of an appropriate percentage to the fair market value of the land, or by other prescribed fee rate systems described in FSH 2709.11, chapter 30.

2721.04 - Responsibility

See FSM 2704 for responsibilities relating to issuance and administration of special use permits for recreation facilities, activities, and services.

2721.1 - Privately Owned Improvements Authorized for Groups

Normally, restrict permittees to organized groups such as youth groups, service clubs, churches, private clubs, and associations of permittees. Permits may also be issued to semipublic or public agencies.

2721.11 - Boat Dock and Wharf

This designation covers recreation improvements that serve groups of boaters, such as boathouses, docks, wharfs, slips, launching ramps, or piers.

See FSM 2347.4 for direction relating to management of boat docks and wharfs for recreational purposes. For installations that include commercial services, such as dockage, boat repair, fuel, food, and lodging, see FSM 2721.38. See FSM 2727.22 when such improvements are nonrecreational in character.

The minimum annual fee is $30. When this use is included in another permit, make the charge a part of the total fee due.

2721.12 - Club

This designation covers those recreation improvements that are developed and operated to serve the membership of a private organization.

See FSM 2347.2 for direction relating to management of permits for club use.

The minimum annual fee for club use is $150. If private lodging arrangements are permitted, as discussed in FSM 2347.1, paragraph 5, make an additional charge equal to the rental value of cabin sites in that vicinity for each private unit.

2721.13 - Organizational Camp

This designation includes camps of a public or semipublic nature that are developed by the special use authorization holder, by the Federal Government, or jointly by both.

Normally, only nonprofit organizations or governmental agencies qualify for special use authorizations in this category.

Classify as "clubs" camps developed exclusively for members of an organization (FSM 2721.12). Classify as "private camps" private entrepreneur youth camps (FSM 2721.15). Classify as "education centers" camps that primarily provide educational opportunities (FSM 2724.32).

For additional direction on organizational camps, see FSH 2709.11, sections 36.5 and FSH 2709.14, section 13.

2721.14 - Shelter

This designation includes trail shelters, waiting sheds, and similar structures of a recreational nature. See FSM 2723.64 for policy on nonrecreational shelters.

See FSM 2347.5 for direction relating to management of recreation shelter permits.

The minimum fee for shelters is $30 per year.

2721.15 - Private Camp

This designation includes youth camps operated privately for profit. It does not include camps developed to provide exclusive use to members of an organization. Such camps are designated as clubs (FSM 2721.12 and FSM 2347.2).

See FSM 2343.3 for direction relating to management of private camps.

The minimum annual fee is $150.

2721.2 - Noncommercial, Privately Owned Improvements Authorized to Individuals

This category includes privately owned recreation facilities permitted to individuals for their use.

Where auxiliary facilities, such as boat docks, are used in conjunction with another permitted use, such as a recreation residence, include the secondary use in the permit for the primary use.

2721.21 - Isolated Cabins

This designation includes isolated recreation cabins located on sites not planned or designated for recreational cabin purposes. Use of these cabins originated from situations other than occupancy trespasses or invalid mining claims. In most circumstances, these uses should be phased out. The period of continued occupancy may be flexible, but normally should not exceed 15 years. See FSM 2721.23 for direction on recreation residences and FSM 2723.71 for direction on resolving trespass and invalid mining claims problems.

The minimum permit fee is $150 per year.

2721.22 - Houseboats

This designation includes any craft that is used principally for recreation occupancy purposes as opposed to transportation.

See FSM 2347.3 for direction relating to management of houseboats.

In the absence of market rental data, calculate fees for privately owned and operated houseboats so that these fees equal or exceed the market rent for cabin sites in the adjacent or nearby area (FSH 2709.11).

The minimum permit fee is $150 per year.

2721.23 - Recreation Residences

The term "recreation residence" includes only those residences that occupy planned, approved tracts or those groups of tracts established for recreation residence use. See FSM 2347 for basic policy on recreation residence use.

2721.23a - Administration

The following direction relates specifically to issuance and administration of special use permits for recreation residence. For recreation residence permits in Alaska, follow the additional requirements in section 1303(d) of the Alaska National Interest Lands Conservation Act. Administer recreation residence permits in accordance with the direction in FSM 2721.23a through 2721.23i and within the broad governing recreation residences and permitted uses set forth in FSM 2347.1 and Title 36, Code of Federal Regulations, section 251.50 (36 CFR 251.50).

1. Issue special use permits for recreation residence in the name of one individual or to a husband and wife. Upon issuance of a new permit that continues the use or amendment, revise authorizations that are not issued to an individual or to a husband and wife, so that the responsible person is identified.

2. Issue no more than one recreation residence special use permit to a single family (husband, wife, and dependent children).

3. Do not issue special use permits for recreation residence use to entities such as commercial enterprises, nonprofit organizations, business associations, corporations, partnerships, or other similar enterprises, except that a tract association may own a caretaker residence.

4. To the extent possible, issue all recreation residence permits in a tract, or in logical groups of tracts, with the same expiration date.

5. To help defray costs and provide additional recreation opportunities, a holder may obtain permission for incidental rental for specific periods; ensure that rental use is solely for recreation purposes and does not change the character of the area or use to a commercial nature. Rental arrangements must be in writing and approved in advance by the authorized officer. The holder must remain responsible for compliance with the special use authorization.

6. Allow no more than one dwelling per lot to be built. In those cases where more than one dwelling (residence/sleeping cabin) currently occupies a single lot, allow the use to continue in accordance with the authorization. However, correct such deficiencies, if built without prior approval, upon transfer of ownership outside of the family (husband, wife, and dependent children).

7. When a recreation residence is included in the settlement of an estate, issue a new special use permit to the properly determined heir, if eligible, for the remainder of the original permit term, updated to reflect policy and procedural changes. Prior to estate settlement, issue an annual renewable permit to the executor or administrator to identify responsibility for the use pending final settlement of the estate. When a recreation residence is sold, issue a new term permit to the buyer, if eligible, for the remainder of the original permit term, updated to reflect policy and procedural changes.

8. Specify in the permit that the recreation residence must be occupied at least 15 days annually, the minimum acceptable period of occupancy.

9. Issue recreation residence term permits for a maximum of 20 years, except when the need for a shorter term has been determined by a project analysis in accordance with FSM 2721.23e and FSH 2709.14, chapter 20.

10. When a decision is made to convert the lot to an alternative use (FSM 2721.23e), take the following actions:

a. Notify the holder of the reasons and provide a copy of the decision documentation.

b. Allow at least 10 years of continued occupancy after notification.

c. Allow the current term permit to expire under its own terms and, if the holder is entitled to additional time to satisfy the 10-year notification period, issue a new term permit for the remaining period. Clearly specify any limited tenure by including the following statement in the permit:

"This permit will expire on (insert date) and a new permit will not be issued."

d. Issue term or annual permits for additional periods as needed to allow continuation of occupancy until conversion to the alternate public use is ready to begin.

11. Before the forest supervisor issues a decision to convert a lot to an alternative public use, submit the proposed decision, supporting documentation and summary of public comments, to the regional forester for review for adequacy of the documentation and analysis. If analysis and documentation are inadequate to support the proposed decision or there is some other deficiency in the proposed decision, the regional forester shall instruct the forest supervisor to remedy the deficiencies and reconsider the proposed decision prior to making the final decision.

12. As with any resource allocation made in a forest land and resource management plan, the forest supervisor may reconsider a decision to continue or convert recreation residence lots to an alternative public use at any time new or changed conditions merit such reconsideration.

13. In the event a recreation residence is destroyed or substantially damaged by a catastrophic event such as a flood, avalanche, or massive earth movement, conduct and document an environmental analysis to determine whether improvements on the lot can be safely occupied in the future under Federal and State laws before issuing a permit to rebuild or terminating the permit. Normally, an analysis should be completed within 6 months of such an event.

Allow rebuilding if the lot can be occupied safely and the use remains consistent with the forest plan. If the need for an alternative public use at the same location has been established prior to the catastrophic event, do not allow rebuilding if the improvements are more than 50 percent destroyed. If rebuilding is not authorized, in-lieu lots may be offered as provided by FSM 2347.1, paragraph 6, and FSH 2709.14, section 23.4.

14. At the time permits are issued, advise holders that the terms of the permit require that they notify the Forest Service if they intend to sell their improvements and that they must provide a copy of the permit to a prospective purchaser before finalizing a sale. Whenever possible, the authorized officer should advise a prospective purchaser of the terms and conditions of the permit before a sale is final.

15. Do not stay a fee increase pending completion of an appeal of the fee under the administrative appeal regulations. Make any adjustments resulting from the administrative review through credit, refund, or supplemental billing.

16. During the term of a permit, terminate or revoke the use only in accordance with regulations at 36 CFR 251.60 and the terms and conditions of the permit (FSM 2347.1, para. 5). Except for revocation for noncompliance of terms of the permit, the forest supervisor shall submit proposed revocations, with supporting documentation and a summary of the public comments, to the regional forester for review prior to the forest supervisor's issuance of a decision. If analysis and documentation are inadequate to support the proposed decision or there is some other deficiency in the proposed decision, the regional forester shall instruct the forest supervisor to remedy the deficiencies and reconsider the proposed revocation prior to making the final decision.

2721.23b - Applications

Insofar as practicable, notify a new or prospective owner that they must make application for the authorization to use existing improvements in accordance with 36 CFR 251.54.

2721.23c - Permit Preparation

1. Use the Term Special Use Permit for Recreation Residence, form FS-2700-5a, to authorize recreation residences, except as specified in paragraph 2 of this section.

2. Use the Special Use Permit, form FS-2700-4, when:

a. Conversion of the lot to an alternative public use is authorized, the conversion will be delayed, and a minimum term of continued use cannot be predicted.

b. Continuance of the recreation residence use is conditioned on the owner's complying with specific Forest Service requirements before a term permit is issued.

c. The improvements are managed by a third party pending settlement of an estate, bankruptcy proceedings, or other legal action.

d. Year-long occupancy is authorized by the forest supervisor, at which time the improvement ceases to be a recreation residence.

3. In either permit, identify all authorized improvements associated with recreation residence use. Do not authorize use of more than the statutory maximum of 5 acres under a term permit. Authorize community or association-owned improvements, such as water systems, by a separate permit (form FS-2700-4).

2721.23d - Fee Determination

For further direction, see FSH 2709.11, chapter 30.

1. Use market value as determined by appraisal in determining the base annual fees for recreation residence lots. Determine a new base fee at 10-year intervals.

2. Adjust the fee annually by the annual (second quarter to second quarter) change in the Implicit Price Deflator-Gross Domestic Product (IPD-GDP).

3. Use professional appraisal standards in appraising recreation residence lots for fee determination purposes (FSH 2709.11 and 5409.12).

4. Where practicable, contract with private fee appraisers to perform the appraisal.

5. Require appraisers to coordinate the assignment closely with affected holders by seeking advice, cooperation, and information from the holders and local holder associations.

6. Retain only qualified appraisers. To the extent feasible, use those appraisers most knowledgeable of market conditions within the local area.

7. Before accepting any appraisal, conduct a full review of the appraisal to ensure the instructions have been followed and the assigned values are supported properly.

2721.23e - Recreation Residence Continuance

See FSM 2347.1 for the general policy on recreation residence use. Follow the direction in this section and the procedures in FSH 2709.14, section 23.3, in determining whether recreation residence term permits may be issued for a new term at current lots. The permit continuance process is depicted in FSH 2709.14, section 23.3, exhibit 01.

The Forest land and resource management plan (forest plan) provides direction for continuance of the recreation residence use (FSM 1920). As forest plans are revised, availability for recreation residence use shall be explicitly addressed in the plan through delineation of management areas and associated management area prescriptions (FSM 1920).

Decisions to issue new recreation residence term permits following expiration of the current term permit require a determination of consistency with the current forest plan. Make this determination by evaluating the extent to which continued recreation residence use adheres to the standards and guidelines, which apply to the appropriate management area. Address continuation of recreation residence use on a tract or group of tracts basis, not on individual lots.

1. Use Is Consistent With Forest Plan. When recreation residence use is consistent with the forest plan, it shall continue. If the use has been analyzed sufficiently as part of a completed environmental assessment (EA) or environmental impact statement (EIS) completed within the 5 years prior to permit expiration, issue a new term permit upon expiration of the current term permit. Issue a record of decision or a decision notice and finding of no significant impact only if the use was not specifically approved in the appropriate decision document. If the use has changed and such change has not been analyzed sufficiently as part of a completed EA or EIS, complete the appropriate environmental analysis (FSH 1909.15). If the EA or EIS indicating the use is consistent with the forest plan was completed more than 5 years prior to permit expiration, additional environmental documentation is necessary (FSH 1909.15, sec. 18.03). Initiate action to issue a new term permit two (2) years prior to permit expiration.

2. Use May Not Be Consistent With Forest Plan. When the lands currently authorized for recreation residence use are allocated to alternative public uses through amendment or revision of the forest plan, and continued recreation residence use may be inconsistent with standards and guidelines, which apply to the appropriate management area, the forest supervisor shall conduct a project analysis of the alternative public use(s) (FSH 1909.15). This project analysis shall consider continuation of existing recreation residence use (through appropriate modification of the term permit provisions or amendment of the forest plan to accommodate the use) or discontinuation of the use (see FSM 2347.1 for direction on recreation residence use continuance). Decisions reached by the project analysis must comply with National Environmental Policy Act (NEPA) requirements and are subject to appeal under Department of Agriculture appeal regulations at 36 CFR part 217 and 36 CFR part 251, Subpart C.

a. If the project analysis results in a decision to amend the forest plan so that the recreation residence use may continue, modify the provisions of the current term permits as appropriate. New term permits may be issued following current permit expiration. Additional environmental documentation may be necessary (FSH 1909.15).

b. If the project analysis results in a decision to convert a lot to an alternative public use at some point in the future, grant the holder at least 10 years continued use from the date of the decision, unless the continued use conflicts with law and regulation, and identify the specific alternative public use(s) for which the land is being recovered. As provided by FSM 2347.1, the authorized officer may allow continued use of the lot until such time as conversion of the new use is ready to begin by issuing a new permit for the remaining period and amending the forest plan if needed.

c. Review the project analysis decision 2 years prior to permit expiration to determine if there have been any changes in resource conditions that require another look at the decision. If the decision was made less than 5 years prior to permit

expiration and the review shows that conditions have not changed, implement the project analysis-based decision. Affirmation of such decision is not appealable (36 CFR 251.83). If the decision was made more than 5 years from permit expiration and/or review indicates that resource conditions have changed, update the analysis to determine the proper action. Decisions arising from this new analysis are appealable.

2721.23f - In-Lieu Lots

When new permits will not be issued following expiration of the present permit, make a reasonable effort to provide an in-lieu lot, if available, at locations not needed in the foreseeable future (generally, the period covered by the forest plan) for alternative public uses in accordance with FSM 2347.1, paragraph 6, and FSH 2709.14, section 23.4.

2721.23g - Land Exchange

Proposals to convey recreation residence tracts into private ownership by land exchange may be considered at any time. Such proposals must be processed in accordance with the instructions in FSM 5430 applicable to all land exchanges.

2721.23h - Cooperation and Issue Resolution

Authorized officers shall strive to reduce conflict between holders and the Forest Service arising from permit administration. As necessary, specify a forest officer to work with the holders, their representatives, and other interested parties on specific issues.

1. Provide opportunity for holders and their representatives to participate in issue resolution. Where practicable, except where an imminent hazard or risk to health and safety or resources requires immediate action prior to issuing written decisions related to permit administration, consult and meet in person, or by telephone, with holders and their representatives to discuss any issues or concerns related to the permit and to reach a common understanding and agreement.

2. During forest plan amendment or revision and project analysis, seek full involvement of holders and their representatives in public involvement opportunities and activities. Encourage and solicit their input and comments.

Meet with holders and their representatives to discuss any issues or concerns arising in the planning and analysis processes and explores opportunities to resolve those issues prior to issuing a decision.

3. If a decision is appealed, utilize the opportunities provided in the appeal rules (36 CFR part 215, part 217, and part 251, subpart C) to discuss the appeal with the appellant(s), intervenor(s) and/or their representatives, together or separately, to explore opportunities to resolve the issues by means other than review and decision on the appeal.

2721.23i - Noncompliance

Give written notice and provide a reasonable opportunity for a holder to correct special use permit violations before terminating the use for noncompliance with the permit conditions (36 CFR 251.60(e)). Revocation for noncompliance shall be only for a breach of a permit provision(s) that continues after notice and a reasonable opportunity for correction has been given (FSM 2347.1, para. 5).

2721.23j - Lot Restoration

On expiration of a permit, which will not be reissued, or for revocation or termination prior to expiration (FSM 2721.23a, para. 10 and 16), except for revocation in the public interest, require the holder to restore the property to a condition acceptable to the forest supervisor (36 CFR 251.60(j)). The holder may relinquish the improvements to the Forest Service upon approval of the forest supervisor. Terms and conditions for lot restoration are given in the term permit issued for recreation residences.

2721.24 - Caretaker Residence

Refer to FSM 2347.12 for the policy on caretaker residence permits.

2721.3 - Concessions Involving Privately Owned Improvements

Lodging covers concessioner-operated facilities that provide overnight accommodations.

See FSM 2343.3 for direction relating to management of lodging and overnight accommodations. Lodging is normally permitted as an adjunct to a resort permit and not as a stand-alone business. Authorize and administer combinations of facilities and activities under a permit carrying the designation of the predominant facility or activity.

2721.31 - Private Lodging (Cooperative, Condominium, Cabin, or Trailer Court)

2731.31a - Cooperative, Condominium, Cabin, or Trailer Court

This designation includes condominium-financed facilities on National Forest System land originally authorized for private use or private privilege. A few improvements have been authorized where exclusive personal, private use has been allowed, or where the investor-owner has first-choice use privileges.

See FSM 2347.6 for direction relating to management of private lodging on National Forest System land.

Calculate fees for private lodging on the basis of charging for both private and public use. See FSH 2709.11, Special Uses Handbook, for instructions on calculating private lodging fees.

2721.31b - Trailer Court or Camp

This designation includes commercial trailer courts financed with private capital and located on National Forest System lands. Authorize trailer courts and camps when such use is necessary and desirable under guidelines described in FSM 2343.3 and 2343.7.

Conduct competitive bidding processes for sites when there is competitive interest.

Calculate fees for trailer courts and camps under the graduated rate fee system (FSH 2709.11, sec. 52.1). The minimum fee is $300 per year.

2721.32 - Hotel, Motel

This designation includes facilities limited primarily to the provision of overnight public accommodations. The permit may authorize certain other services or activities in addition; however, when these constitute more than just a minor adjunct to the hotel, motel, or cabin business, use the resort (FSM 2721.33), marina (FSM 2721.52), or winter recreation resort (FSM 2721.61) designation.

See FSM 2343.3 for direction relating to management of lodging and overnight accommodations, including hotels and motels.

Normally, authorize hotel and motel facilities by term permit under the Act of 1915 (FSM 2701).

Calculate fees for hotels and motels under the graduated rate fee system (FSH 2709.11, sec. 52.1). The minimum fee for this use is $300 per year.

2721.33 - Resort

Resorts are concessioner developments that include a complex of enterprises. They may include any of the activities or services covered in FSM 2721.4 or FSM 2721.58. In addition, winter recreation resorts include uphill transport systems and other specialized services covered in FSM 2721.6.

1. Determine the minimum public services to be provided by the permittee and those services that may be optional. Make these a condition of the permit. See FSM 2343 for direction relating to management of the various types of resorts permitted on National Forest System land. See also FSM 2344 for policy on permitting use of Government-owned resorts.

2. Except for ski areas authorized under the National Forest Ski Area Permit Act of 1986 (16 U.S.C. 497b) and those ski areas which elect to have their permit fees calculated under section 701 of the Omnibus Parks and Public Lands Management Act of 1996 (16 U.S.C. 497c; FSH 2709.11, sec. 38), calculate resort fees under the graduated rate fee system (FSH 2709.11 sec. 52.1). The minimum fee is $300 per year.

3. Ensure that the required review by the regional forester is completed prior to issuance of a permit where the capital investment to be authorized exceeds or is expected to exceed $500,000 for resorts.

2721.34 - Campground (Privately Owned) [Reserved]

2721.35 - Restaurant

This designation includes all uses that have as a principal purpose the serving of meals to the public. The service occurs most frequently as a part of a resort or as a part of another service or activity.

See FSM 2343.4 for direction relating to management of restaurants on National Forest System land.

Calculate fees for restaurants under the graduated rate fee system (FSH 2709.11, sec. 52.1).

2721.36 - Other Commercial Public Services

2721.36a - Store, Shop, Office

This designation includes use normally associated with other commercial public services found in a resort complex.

See FSM 2343.5 for policy relating to stores and shops and FSM 2341 for policy relating to offices.

Calculate fees for stores and shops under the graduated rate fee system and for offices on the basis of the value of the land for the use permitted (FSH 2709.11). The minimum fee is $300 per year.

2721.36b - Rental Service Facility

This designation includes rental services not otherwise covered in FSM 2721.5. Normally, needed rental services are encouraged as an adjunct to an existing permit.

See FSM 2343.7 for direction relating to management of rental services.

Calculate fees for rental service facility under the graduated rate fee system (FSH 2709.11, sec. 52.1).

2721.37 - Service Station

This designation includes commercial garages, gasoline stations, and related facilities such as car washes and parking lots.

See FSM 2343.6 for direction relating to the determination of need for a service station and the facilities and services that may be provided.

Calculate fees for service stations under the graduated rate fee system (FSH 2709.11, sec. 52.1).

2721.38 - Marina

This designation includes a combination of waterfront uses that are boating oriented. These uses may include a dock or basin providing secure moorings for all types of boats, launching ramps, the supplying of food, water, fuel, repair, and other facilities or services.

See FSM 2343.2 for direction relating to management of marinas on National Forest System lands and waters.

Calculate fees for marinas under the graduated rate fee system (FSH 2709.11, sec. 52.1). The minimum fee is $300 per year.

When a marina's business includes boat rental service, require compliance with State boat laws and the Federal Boating Act of 1958 (Pub. L. 89-911, 72 Stat. 1754) in the permit. Require the permittee to post rules for safe operation of boats at each boathouse, dock, or wharf.

2721.39 - Tramway (Aerial Tram, Ropeway, or Funicular)

This designation includes tramways, ropeways, or funiculars operated for recreation purposes, provided however that it does not include tramways, ski lifts, or tows at winter recreation sites which should be coded as 161 or 162 (FSM 2721.6). Tramways operated for other than recreation purposes should be coded as 771 (FSM 2727.7).

See FSM 2340.3 and FSM 2343.9 for direction relating to development and management of tramways ropeways, or funiculars on National Forest System land. See FSM 7320 for direction related to structural safety for the development and operation of tramways, ropeways, or funiculars.

Include provisions in the permit that require compliance with American National Standards Institutes (ANSI) B77 Standard for construction and operation of tramways, ropeways, or funiculars.

Calculate fees for tramways under the graduated rate fee system (FSH 2709.11). The minimum fee is $300.

2721.4 - Concessions Involving Government-Owned Improvements

This category involves recreation activities that utilize facilities and/or National Forest System land.

Authorize and administer combinations of activities or activities and services (FSM 2721.5) that are not a part of a resort facility under a permit carrying the designation of the predominant activity or service. Authorize the activity or service in the resort special use permit when it is a part of the opportunities offered by a resort. Policy relating to these concession operations is covered in FSM 2340.

2721.41 - Concession Campground

This designation includes camping and picnicking when these activities are the primary uses permitted. Camp and picnic areas developed by non-Federal public agencies, as well as permittee-operated sites, are included.

See FSM 2344.3 for direction relating to concessioner-operated camping facilities.

See FSH 2709.11, Special Uses Handbook, for direction on computing fees for use of National Forest System land for camping and picnicking.

2721.42 - Concession Day Use Site [Reserved]

2721.43 - Organizational Camp [Reserved]

2721.44 - Recreation Lodging in Government-Owned Buildings [Reserved]

2721.45 - Visitor Center [Reserved]

2721.46 - Resort [Reserved]

2721.5 - Concession Services

This category includes concessions without facilities on NFS land that provide service to the public taking part in recreation activities.

Do not authorize the construction of facilities under use codes 151, 152, or 153. For concessions involving privately owned improvements see 2721.3. Direction for these concession operations is covered in FSM 2343.

2721.51 - Rental Service (Without Facilities) [Reserved]

2721.52 - Transportation Service [Reserved]

Do not use this use code at this time.

2721.53 - Outfitting and Guiding Service

This designation includes all commercial outfitting operations involving services for accommodating guests, transporting persons, and providing equipment, supplies, and materials. It also includes commercial guiding activities wherein the guide furnishes personal services or serves as a leader or teacher.

See FSM 2343.8 and FSH 2709.11, Special Uses Handbook, for direction relating to management of outfitting and guiding services on National Forest System lands and waters. In addition:

1. Require all private parties conducting outfitting and guiding services on National Forest System lands to have a special use authorization.

2. Allow placement of temporary structures and improvements, such as corrals, tent frames, and shelters, on National Forest System land under special use authorization only when there is a demonstrated public need for such facilities.

3. Require outfitters and guides, whose facilities are located off National Forest System land, to obtain a special use authorization if they conduct any activities on National Forest System land.

4. Authorize permanent facilities of a substantial nature under a resort special use authorization even though the primary business of the holder may be outfitting and guiding.

Calculate outfitter and guide fees as defined and described in FSH 2709.11, Special Uses Handbook.

2721.6 - Winter Recreation

Winter recreation refers to all facilities, activities, and services related to a winter recreation operation. Developments may include a complete resort facility, portions or all of slopes or lifts for a facility located partially on private land, and snow-play (FSM 2721.65). Ski activities such as ski schools are also included.

2721.61 - Winter Recreation Resort

This designation includes resorts associated with various forms of winter outdoor recreation, though they often may be used for summer recreation purposes also. Make provision in the permit, as needed, to allow all-season uses. See FSH 2709.11 for general instructions on the prospectus, application for permit, permit preparation, permit issuance, and permit administration.

Review by the regional forester is required prior to issuance of a permit where the capital investment to be authorized exceeds or is expected to exceed $1 million for winter sports resorts.

2721.61a - Permit Conditions

Normally, authorize the more costly elements of the development, such as base lodge and related buildings and uphill equipment, under a term permit. Authorize by an annual special use permit ski trails and other land disturbances, for which the permittee should not be reimbursed in the event the permit is terminated prior to its expiration date. Ensure that all of the area necessary for the operation is covered by permit.

2721.61b - Permit Fees

Calculate fees for winter recreation permits under the ski area permit fee system established by 16 U.S.C. 497c (FSH 2709.11, sec. 38) or under the graduated rate fee system (GRFS) (FSM 2715.11) as follows:

1. Permit Fee System for Ski Areas Authorized Under National Forest Ski Area Permit Act of 1986. For ski areas authorized under the National Forest Ski Area Permit Act of 1986 (16 U.S.C. 497b), calculate permit fees under the permit fee system established by 16 U.S.C. 497c and set out in FSH 2709.11, section 38.

2. Permit Fee System for Ski Areas Authorized Under Organic Act of 1897 and Term Permit Act of 1915. For ski areas authorized under the Organic Act of 1897 (16 U.S.C. 551) or the Term Permit Act of 1915 (16 U.S.C. 497), provide holders the opportunity to elect the fee system in 16 U.S.C. 497c (FSH 2709.11, sec. 38). Do not require conversion of such authorizations to a permit issued under the National Forest Ski Area Permit Act of 1986.

If the holder does not elect to have permit fees calculated under the ski area permit fee system in 16 U.S.C. 497c, continue to calculate fees according to the method specified in the holder's permit (FSM 2715.11).

For nordic areas where primarily outfitting and guiding activities are conducted, continue to apply the permit fee system specified in the existing permit. Refer to FSM 2721.61e, paragraph 4, for direction on the characteristics of a nordic operation eligible for authorization under the National Forest Ski Area Permit Act of 1986 and for applicability of the permit fee system to such areas, as set out in FSH 2709.11, section 38.

3. Permit Fee System for Operations That Include Incidental Ski Activities or Facilities. For resorts that are primarily summer seasonal in nature and may include minor ski operations (such as a simple lift or minor nordic operations), continue to apply the permit fee system specified in the existing permit.

For activities that are authorized under the National Forest Ski Area Permit Act of 1986 but include only incidental ski operations, apply the permit fee system in 6 U.S.C. 497c (FSH 2709.11, sec. 38). Encourage authorization of those activities under a more appropriate authority listed in FSM 2701, with the appropriate fee system.

4. Permit Fee System for Ski Lifts and Tows. Use the following permit fee systems for ski lifts and tows:

a. If the use is authorized under the Term Permit Act of 1915 or the Organic Act of 1897, calculate permit fees for ski lifts and tows using a negotiated fair market value flat rate (FSH 2709.11, sec. 52) or the graduated rate fee system (FSM 2715.11).

b. If the use is authorized under the National Forest Ski Area Permit Act of 1986, apply the permit fee system established by 16 U.S.C. 497c (FSH 2709.11, sec. 38). Encourage authorization of ski lifts and tows under a more appropriate authority listed in FSM 2701, with the appropriate fee system. Refer to FSM 2721.62 for management direction regarding ski lifts and tows.

2721.61c - Winter Recreation Site Operation Plan

Require an operation plan (FSM 2343.12) for each permit covering winter recreation activities.

2721.61d - Permittee Inspection

Include in permits for winter recreation sites requirements that permittees provide for public safety as outlined in FSM 2343.1, FSM 7320, and American National Standards Institutes (ANSI) B77 Standard.

2721.61e - Ski Area Permit

1. The National Forest Ski Area Permit Act (16 U.S.C. 497b) is the exclusive authority for authorizing primarily or entirely privately owned Nordic and alpine ski areas on National Forest System (NFS) lands. Assign use code 161, and use only the National

Forest Ski Area Permit Act and form FS-2700-5b, Ski Area Term Special Use Permit, to authorize alpine ski areas and Nordic trail systems that have substantial capital improvements on NFS lands. Authorize ski areas operating entirely or primarily with federally owned facilities under Section 7 of the Granger-Thye Act (16 U.S.C. 580d). See 36 CFR 251.51 for a definition of "ski area."

2. The following uses do not constitute ski areas and therefore should be assigned a different use code and authorized under an authority other than the National Forest Ski Area Permit Act, using a permit form other than FS-2700-5b, Ski Area Term Special Use Permit:

a. Nordic skiing that:

(1) Is independent of an alpine ski resort;

(2) Is not conducted from a Nordic center located on NFS lands;

(3) Involves only grooming and temporary signing of federally owned trails; and

(4) Involves no privately owned improvements on NFS lands.

Assign use code 163, ski slope or ski trail, to these activities, and authorize them under section 803(h) of the Federal Lands Recreation Enhancement Act (REA) (16 U.S.C. 6802(h)) or the Organic Act (16 U.S.C. 551) using form FS-2700-4, generally with a term of up to 5 years.

b. Nordic and alpine skiing operations with only minor improvements on NFS lands, such as where:

(1) Use of NFS lands for Nordic skiing is limited to a partial trail system that extends less than 10 miles or that involves less than $1,000,000 in privately owned improvements and that is incidental to facilities on private land; or

(2) Use of NFS lands for Nordic or alpine skiing consists of minor portions of undeveloped terrain or a few cleared ski trails with no snow-making facilities, ski lifts, or other infrastructure.

Assign use code 163, ski slope or ski trail, to these activities, and authorize them under section 803(h) of REA or the Organic Act using form FS-2700-4, generally with a term of up to 10 years.

c. Nordic skiing that primarily involves outfitting and guiding (see 36 CFR 251.51 for definitions of "outfitting" and "guiding"), such as heliskiing or guided ski tours without groomed trails or support facilities. Assign use code 153, outfitter and guide service, to these uses, and authorize them under section 803(h) of REA using form FS-2700-4i or FS-2700-3f, as appropriate.

3. Consult with the Washington Office Director of the Recreation, Heritage, and Volunteer Resources staff before authorizing a term of more than 5 years for a federally owned Nordic trail system that does not constitute a ski area under FSM 2721.61e, paragraph 2a.

4. Assign a use code of 133, resort, to activities that are essentially summer season operations, such as those that involve a simple lift or minimal Nordic skiing, and authorize them under the Term Permit Act of 1915 (16 U.S.C. 497).

5. Winter and year-round recreational activities and services provided by the holder within the ski area permit boundary should be authorized under the ski area permit. In general, do not issue separate permits for non-skiing recreational activities that occur solely within the permit area, such as recreation events or outfitting and guiding.

6. With the exception of condominiums, normally all ski area facilities owned or under the control of the holder should be included in the ski area permit boundary. To the extent they exist on NFS lands, condominiums should be authorized under a separate term permit issued under the Term Permit Act.

2721.61f - Environmental Compliance

Ensure that issuance of permits for winter recreation resorts complies with the Council on Environmental Quality's regulations implementing the National Environmental Policy Act (NEPA), as well as the Forest Service's NEPA regulations and directives (36 CFR Part 220; FSH 1909.15). See FSH 1909.15 for direction on requirements related to permit issuance for new ski areas that are not currently authorized under a permit. See FSH 1909.15 and 2709.14, section 61.2, for direction on requirements related to permit issuance for ski areas that are currently authorized under a permit.

2721.62 - Ski Lift or Tow

This use code covers situations where a ski lift or tow constitutes the most significant development on NFS lands. A ski lift or tow may be assigned this use code if:

1. The base facility is located on adjacent private land;

2. A ski lift or tow connects a ski area with a private facility, such as a lodge, that is neither owned nor operated by the ski area permit holder; or

3. A community ski area does not provide any of the typical resort services, such as eating or sleeping facilities.

See FSM 2343.1 for direction relating to administration of permits for ski lifts and tows.

See FSM 2721.61b, paragraph 4, for direction on which land use fee system to use for ski lifts and tows.

2721.63 - Ski Slope or Ski Trail

This use code is appropriate where ski slopes and ski trails constitute the primary development on and use of NFS lands.

For alpine skiing, this use code generally involves use of NFS lands for downhill skiing without lifts on groomed or ungroomed trails. This use code should be used in those situations where the majority of a large ski area operates on adjacent private land and the capital investment on NFS lands is limited to a few ski trails with or without seasonal grooming. See FSM 2721.61e, para. 2b. More substantial developments on NFS lands should be authorized per FSM 2721.61e, paragraph 1.

For Nordic skiing, this use code involves trail grooming across NFS lands, with privately owned improvements on NFS lands limited to a partial trail system that extends less than 10 miles or that has a value of less than $1,000,000 and that is incidental to facilities on private land.

Normally, authorize this type of use on form FS-2700-4 for a term of up to 5 years for government-developed trails and up to 10 years for privately developed trails. See FSM 2343.1 for direction on administration of permits for ski slopes and ski trails.

Calculate land use fees for ski slopes and ski trails based on land value or, where mixed landownership is involved, based on the proportion of total revenue attributable to their use (FSH 2709.11, ch. 30). The minimum land use fee for this type of use is $150.

2721.64 - Ski Activity

This designation covers continuing minor ski activities, such as ski schools. Do not permit these activities as separate operations. Where there are existing permits, terminate them at the earliest opportunity and authorize future operation under a basic permit.

Temporary, short-time ski events, such as races, are designated recreation events. See FSM 2721.81 for direction on these events.

Calculate fees for ski activities under the graduated rate fee system, subject to a minimum fee of $30 per year (FSM 2715).

2721.65 - Snow Play

This designation covers activities and facilities for winter recreation, not associated directly with skiing. Examples are tobogganing, sledding, and ice skating. Allow uphill devices provided they are not in place to assist skiers. Use one of the other designations under FSM 2721.6 when skiers are served.

Calculate fees for snow play under the graduated rate fee system (FSM 2715).

2721.7 - Outdoor Recreation Improvements

2721.71 - Target Range

This designation includes pistol, rifle, shotgun, trap, skeet, sporting clay, and archery ranges.

If the proposal involves a military range, consult with the Office of the General Counsel (OGC), including OGC's Pollution Control Team, before issuing the authorization to ensure that issues associated with Department of Defense rules and policies regarding the cleanup of ranges, including future land use issues, are adequately addressed in the proposed authorization language.

See FSM 2335.4, 2340.3, and 2343.9, and FSH 2709.14, section 71 for further direction on requirements related to target ranges, including the process for special use authorizations, National Environmental Policy Act (NEPA) analysis and documentation, the environmental stewardship plan, and the safety plan.

The minimum annual land use fee is $30. Use the graduated rate fee system (FSH 2709.11) to calculate fees for commercial operations.

2721.72 - Park or Playground

This designation includes uses that are usually local community ventures. They are generally discouraged on National Forest System land.

See FSM 2340.3 and FSM 2341 for direction relating to development and management of parks and playgrounds on National Forest System land.

The minimum fee is $30 per year.

2721.73 - Golf Course

This designation involves golf courses developed at existing concession sites on National Forest System land, where there was a definite public need for such facilities.

See FSM 2341 for direction relating to development and management of golf courses on National Forest System land.

Calculate fees for golf courses under the graduated rate fee system (FSH 2709.11) unless National Forest System land is less than 10 percent of the land involved, in which case, use an annual fee based on rental data or land value.

The minimum fee is $30 per year. See FSH 2709.11, Special Uses Handbook, for instructions on fee calculations.

2721.74 - Cave or Cavern

This designation involves management to permit public viewing of caves and caverns.

Authorize concessioner operation of caves or caverns that have spectacular public viewing opportunities. Base the decision as to the type of permit to issue (term or annual) on the required investment by the private sector. Normally, issue a prospectus if the visitor-day potential warrants a permittee operation.

See FSM 2343.9 for policy relating to management of caves and caverns.

Calculate fees for concessioner operation of caves and caverns under the graduated rate fee system (FSH 2709.11).

See FSH 2709.11, Special Uses Handbook, for instructions relating to issuance of permits for noncommercial exploration of caves and caverns by individuals or groups.

2721.75 - Racetrack

This designation includes racing activities where continuing land occupancy by more or less permanent structures and facilities has been permitted. New tracks are not authorized.

See FSM 2341 for direction relating to development and management of existing racetracks on National Forest System land.

The minimum fee is $300 per year. See FSH 2709.11, Special Uses Handbook, for instructions on computing fees.

2721.76 - Day Use Facility (Picnic Area, Trailhead, Scenic Overlook, or Rest Area) [Reserved]

2721.77 - Visitor Center [Reserved]

2721.78 - Hunting Enhancement [Reserved]

2721.8 - Temporary Event [Reserved]

2721.81 - Recreation Event

This designation includes organized events of a temporary nature, such as animal, vehicle, or boat races; dog trials; fishing contests; rodeos; adventure games; and fairs. Authorize continuing occupancies entailing more or less permanent structures and facilities under other appropriate designations. Require, in all cases, that a specific legal entity be identified as the permittee. In the permits include provisions for protection of the environment and site cleanup and restoration. Require performance bonds (FSM 2713.1) when needed to ensure return of the site to a satisfactory condition. Require permittees to furnish or arrange for appropriate liability insurance (FSM 2713.3), law enforcement, crowd control, safety, and sanitation. Include concession stands, vendors, and so forth, in the parent permit. Provide for subleasing in the permit.

The fee is 5 percent of adjusted gross receipts (gross revenue less cost to holder of prizes awarded) for one-time events and 3 percent for multiple events under a single permit. The minimum fee is $30 per event.

Authorize events to be held at permitted commercial public service sites through the area permittee.

Authorize exclusive film, radio, or television coverage in the parent permit. In this circumstance, the film or broadcast company becomes a sublessee of the permittee.

2721.82 - Vendor or Peddler

This designation includes mobile concession operations that are allowed where store facilities are needed by the public, but are not economically feasible.

See FSM 2343.5 for direction relating to peddler permits on National Forest System land.

See FSH 2709.11, Special Uses Handbook, for instructions on calculation of fees for peddler permits.

2721.9 - Tribal and Noncommercial Group Use

2721.91 - Noncommercial Group Use

See 36 CFR 251.51 for the definitions of “noncommercial use or activity” and “group use.” Grant applications for noncommercial group use unless they meet one of the criteria listed in 36 CFR 251.54(g)(3)(ii)(A) through (g)(3)(ii)(H) for denial of this type of use. Authorize noncommercial group use on form FS-2700-3b. A special use permit is not required if the use involves fewer than 75 people.

Utilize use code 192 to authorize noncommercial use by Indians and Indian tribes for traditional and cultural use pursuant to section 8104 of the Food, Conservation, and Energy Act of 2008 (FCEA) (25 U.S.C. 3054).

Do not authorize permanent structures under a noncommercial group use permit.

See FSM 2721.81for direction on recreation events.

2721.92 - Traditional and Cultural Use by Indians and Indian Tribes [Reserved]

2722 - AGRICULTURE

2722.03 - Policy

Because agriculture uses usually serve individual, exclusive interests, as opposed to the general public, terminate existing permits when the agriculture use is incompatible with other adjacent uses on the land.

2722.1 - Crops

This category includes uses involving the production of crops or products of the land. Do not sell Government-owned forest products via a special use permit. Sales of miscellaneous forest products includes the sale of fruit, nuts, tree and grass seed, and jojoba beans from Government-owned plants; the harvesting of wild grasses; and the digging of plants, such as cacti or flowers. Policy for their sale or removal is covered in FSM 2467.

There is generally no prohibition against the growing of price-supported crops on National Forest System lands. This situation varies annually and with the particular crop grown. Contact the Farm Service Agency to ensure that there are no restrictions against a particular price-supported crop.

2722.11 - Cultivation

This designation covers planting and harvesting of traditional farm crops such as alfalfa, corn, soybeans, and others. Cultivation also includes native hay production, which differs from wild hay cutting (FSM 2467) in that it makes use of some minimal cultivation practices. These practices include fencing, irrigation, harrowing, dragging, leveling, fertilizing, and weed control.

Issue cultivation permits only for those lands where the best use is for growing agricultural products or as a temporary expedient following acquisition.

2722.12 - Nursery

This designation includes the planting and growing of horticultural products; for example, trees (including Christmas trees), flowers, and shrubs. Wildlings are the property of the United States. Do not issue special use permits for the sale, culture, or cultivation of wildlings. Refer to the timber and minor forest product sales policy (FSM 2460) for the administration of wild-grown products.

2722.13 - Orchard

This designation includes the use of lands for the growing of privately owned trees to produce fruit, nuts, or maple syrup. If the trees are Government-owned, apply the policy found in FSM 2467.

See FSM 2720.3 for fee policy. If policy allows the cultivation of an additional crop beneath or between the trees, the fee may include a charge for both the orchard and the cultivation uses. See FSM 2722.11 for direction on cultivation uses.

2722.14 - Apiary

This designation covers both the production of honey and the storage of hives. For both uses, comply with State and local ordinances governing beehives. Base the fees on the specific type of use.

2722.15 - Livestock Area

This designation includes areas that either do not provide any grazing or that are not logical to manage as part of a grazing allotment because of size, location, adjacent ownership, or topography. Review existing uses (formerly classified as pasture permits) and convert them to grazing permits as appropriate (FSM 2200).

2722.16 - Fish Hatchery

This designation involves the hatching and rearing of fish for commercial or game management purposes. See also FSM 2600 for coordination and cooperative programs with State fish and wildlife agencies.

2722.17 - Fur and Game Farm

This designation includes operations that produce game for live sale or the sale of animal products such as pelts or meat.

2722.18 - Worm Harvesting [Reserved]

2722.19 - Mariculture [Reserved]

2722.2 - Agricultural Improvements

This category includes improvements used either for agricultural purposes or in association with agriculture uses. Refer to FSM 2722.3 if the use involves range management facilities. If the Federal Government owns the improvements, the Granger-Thye Act policy found in FSM 2710 also applies.

2722.21 - Barn, Shed

Improvements under this designation include stables, chickenhouses, garages, storage buildings, and other utility-type buildings that do not qualify as range management facilities as described in FSM 2722.3. Forest officers also may include incidental land (such as feedlots, pastures, and watering places) and associated fencing adjacent to these structures in permits issued under this designation.

2722.22 - Fence

This is a limited designation. The designation applies only to privately owned fences not used in conjunction with some other use. Some examples include a wildlife driveway or a temporary authorization for an encroachment. Authorize fences for this or similar purposes under the Federal Land Policy and Management Act of October 21, 1976. Where a fence is used in conjunction with another use, include it as part of the permit for that use.

Require private landowners to either establish or move their boundary fences to the property line to eliminate the need for a permit. See also the direction on convenience enclosures in FSM 2722.4. Generally, Government-owned fences assist in the administration of National Forests System lands in conjunction with grazing permits (FSM 2240). Use either a grazing permit or an interagency agreement to authorize the use of and to assign maintenance responsibilities for Government fences.

2722.23 - Agriculture Residence

This designation covers principal places of residence related directly to agriculture. The permit may include small acreage incidental to the residence, such as garden plots or other cultivated land.

Do not issue residence permits under this designation for homes located within or adjacent to a town or established community; use the community residence designation. When issuing agriculture residence permits, follow the community residence policy found in FSM 2723.5. No authority exists for the Forest Service to issue term permits for full-time private residences. Therefore, convert any existing term permits to annual permits with the concurrence of the permit holder or when the permit expires of its own terms.

2722.3 - Range Facilities

The range facilities category includes range management improvements retained in private ownership and used in conjunction with a grazing permit. Review applications for compatibility with forest plans and FSM 2240 direction. New facilities shall be Government-owned; include them as part of a grazing permit rather than under a separate special use permit. Review existing permits and incorporate as part of a grazing permit as appropriate.

2722.31 - Building

This designation covers buildings such as cabins, residences, barns, and sheds. Residences in this designation differ from agriculture residences in that they are related to a grazing operation and permit. The special-use permits shall provide for termination in the event of transfer or cancellation of the grazing permit. Do not issue permits unless this is clearly the only method that benefits the administration of the range resource. See FSM 2240 for additional direction.

2722.32 - Corral, Pen, and Livestock Area

Follow the direction in FSM 2722.15 for range uses under this designation.

2722.33 - Dipping Vat

This designation consists of tanks or lined trenches for immersing livestock in a chemical bath as a disease and pest control method. Because of the typically heavy concentration of stock near such a facility, do not authorize this use if private land is available.

2722.4 - Enclosures

2722.41 - Convenience Enclosure

This designation covers permits for areas of National Forest System land fenced in with private land for the convenience of the permit holder. Examples include fencing on the easiest or most economically feasible location or as a temporary expedient following a land exchange or resurvey of a land line. In a true convenience enclosure, the use of the National Forest System land is incidental to the operation and management of the permit holder's property.

Include in permits for such uses provisions for other National Forest System users to occupy the area in order to accomplish Forest Service objectives, such as timber sales or recreation activities.

2723 - COMMUNITY AND PUBLIC INFORMATION

The community use permits provide services, notification, facilities, or housing for persons living in or adjacent to communities located in close proximity to or depending on National Forest System lands. The boundaries of such communities often are ill-defined and may occasionally involve the encroachments of residences onto National Forest System lands.

2723.03 - Community Use Policy

A town or community may propose acquisition of the National Forest System lands for development of urban community improvements rather than seeking a permit. Consider a land exchange under the appropriate authority or sale under the Townsite Act of July 31, 1958 (7 U.S.C. 1012a; 16 U.S.C. 478a). Consult FSM 5400 for methods of transferring ownership of National Forest System lands.

Except for appurtenant entrance roads and driveways included in community-use permits, do not issue permits exclusively for road or other linear rights-of-way in this class. Refer to FSM 2730 for road right-of-way authorizations.

Public information uses are for marking and preserving points of interest to the general public and for calling attention to such places by appropriate signs, markers, and monuments. Do not use National Forest System lands for commercial advertising signs. Signs or other of these uses along public highways must comply with the guidelines of EM-7100-15, Sign and Poster Guideline for the Forest Service and with formal agreements between the Forest Service and the State or local highway departments.

2723.1 - Meetings

2723.11 - Multi-Season Traditional and Cultural Use by Indians and Indian Tribes [Reserved]

2723.2 - Religious Facilities

2723.21 - Cemetery

This is essentially a permanent use of the land. Once a commitment of the land is made, there is little or no possibility to discontinue the use since this would involve disinterment. None of the existing special use authorities provides for permanent uses of National Forest System land. For this reason, deny applications for new uses.

Existing cemeteries pose a problem since their use is technically without proper authority. Consider exchange or sale under the Townsite act (7 U.S.C. 1012a) for cemeteries where possible. Revise existing permits to include provisions for perpetual care. Do not authorize any expansion of the facilities. Apply the regular fee policy found in FSM 2715.

Consider using land exchange or sale for cemetery uses. Combine this use with related church use as appropriate. See FSM 2723.32 for direction on individual grave monuments.

2723.22 - Church

Authorize new church uses only where suitable private land is not available. Consider land exchange or sale under the Townsite act (7 U.S.C. 1012a) as alternatives to a special use permit.

Existing uses may have a strong basis in law for their establishment. They derive their authority from the Organic Administration Act of 1897 (16 U.S.C. 479). Originally permits not exceeding one acre were issued free to actual settlers of the area. The term "actual settler" means a person claiming lands under the settlement or homestead laws. The homestead laws have not applied to National Forest System lands since their repeal in 1962. Therefore, persons are no longer entitled to free use for this use designation.

If appropriate, combine this use with a cemetery use.

2723.3 - Public Information

This category includes the use of National Forest System lands for marking and preserving points of interest to the general public and for calling attention to those places by appropriate signs.

Include sufficient area in the permits for the construction of turnouts or stopping points as needed. Do not authorize permits for commercial advertising signs unless public demand for such use is strong.

2723.31 - Marker

This designation includes roadside historical markers, mileage markers, summit markers, and other markers of similar nature that supply public information.

2723.32 - Monument

This designation includes grave monuments, memorial plaques, statues, and similar items of historic or informational interest. Grave monuments covered here are to mark individual graves of historical interest and are not for use in cemeteries. See FSM 2723.21 for cemetery direction.

2723.33 - Sign

This designation covers informational signs for the convenience of the public. Examples include concession identification, approach signs, and directional information. The responsible officer may incorporate an authorization for signs into permits for related uses such as resorts, ski areas, or marinas. The responsible officer shall approve the design and wording of all signs. Refer to FSM 7160 and EM-7100-15 for information on the design, and construction of signs.

2723.4 - Sanitary Systems

2723.41 - Solid Waste Disposal Site

This designation includes both disposal sites and transfer stations for garbage, trash, and other nonhazardous solid waste. See FSM 2725.2 for guidance concerning storage areas for scrap, junk, and other reusable products.

The responsible officer shall work with State or local government officials to locate these sites on non-Federal land and to have the local governments assume management responsibility for these sites. The Administrator of the Environmental Protection Agency is responsible for establishing guidelines for solid waste disposal. The responsible officer shall consult FSM 2130, FSM 7460, and FSH 7409.11 for these legal requirements and additional policy and standards for the storage and disposal of solid wastes and shall incorporate the direction into the permits as appropriate.

2723.42 - Liquid Waste Disposal Area

This designation covers nonhazardous liquid sewage and industrial waste collection and disposal facilities. These uses are rarely compatible with National Forest purposes.

Issue a permit or term permit when non-Federal sites are not reasonably available. Pipelines and other directly related right-of-way uses that are part of the immediate disposal system may be included in the permit for the disposal site use. Consult FSM 7430, FSM 7440, and FSH 7409.11 for the legal requirements, policy, and standards for the storage and disposal of liquid wastes and incorporate the direction into the permits as appropriate.

2723.43 - Sewage Transmission Line

This designation includes all pipelines used solely for the transmission of sewage or waste water. The authority to issue an authorization is the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761-1771). If a treatment plant is an integral part of the system, the responsible officer shall issue the use authorization under the liquid waste disposal designation (FSM 2723.42).

2723.44 - Hazardous and Toxic Waste Disposal Site

This designation includes both solid and liquid waste areas that also involve dangerous substances. Use of National Forest System lands is not appropriate. In addition, the Forest Service does not have the authority to issue special use permits for hazardous waste disposal or storage. This is the responsibility of the Environmental Protection Agency.

2723.45 - Transfer Station [Reserved]

2723.46 - Debris Disposal Area [Reserved]

2723.5 - Community Residences

This category covers yearlong residences that are part of a town or community, including mobile homes and mobile home parks. The improvements are, in most cases, privately owned. Some are Government-owned structures under the administrative control of the Forest Service. Residences are occupied by the owner or permit holder.

Included in this designation are isolated homes and other dwellings that serve as a primary place of residence but for which the specific designations of use in this chapter do not otherwise define.

2723.51 - Residence, Privately-Owned Building

Issue only permits for existing, privately-owned, owner-occupied residences. Do not authorize new uses.

2723.52 - Residence, Government-Owned Building

Authorize the use and occupancy of all or part of Government structures when the building would otherwise be unused; when the occupancy would afford protection to the structure; and when the Government has no further need for a building not yet scheduled for disposal. Do not authorize third party leases.

Follow the policy in FSM 6445 for Forest Service employee occupancy. Do not issue a permit for an employee residence.

2723.53 - Residence, Alaska Term Permit Act

This designation covers permits issued under the Alaska Term Permit Act of March 30, 1948 (48 U.S.C. 341) and other laws pertaining to Alaska that cover community residence permits.

The regional forester in Alaska issues directive supplements governing the policy under these additional authorities.

2723.6 - Service Uses

2723.61 - School

This designation covers all forms of educational institutions except observatories, training and demonstration areas, and education centers. These exceptions are covered in FSM 2724.

Consider a land exchange in lieu of special use permit. Along with the usual land exchange authorities (FSM 5430), the Sisk Act of December 4, 1967 (16 U.S.C. 484a) provides a mechanism for exchange if the school district or municipality has an insufficient land base to trade.

2723.62 - Service Building

This designation includes other community service facilities, such as police stations, jails, firehouses, dog pounds, fire towers, medical offices and centers, and others. See also the reference to the Sisk Act noted in FSM 2723.61. An interagency or collection agreement may cover the operation and staffing of Government-owned fire towers and other improvements if used in conjunction with fire management activities.

2723.63 - Hospital or Sanitarium

This designation includes rehabilitation and health treatment centers or camps.

2723.64 - Shelter

This type of use includes bus shelters, waiting sheds, fallout shelters, and others. It does not include shelters used for a variety of recreation activities. See FSM 2721 for direction on recreation shelters.

2723.65 - Mailbox

Use this designation only when the mailbox is not part of another community use.

2723.66 - Parking Lot [Reserved]

2723.67 - Visitor Center/Museum [Reserved]

2723.7 - Encroachments

This category of uses originates through unauthorized occupancy of National Forest System lands. See FSM 5330 for policy on violations and FSM 5450 and 36 CFR 254.3 if the use involves a title claim or possible sale under the Small Tracts Act (96 Stat. 2535). Special use authorizations do not substitute for judicial resolution of the encroachment. The only valid reasons for issuing permits for encroachment are to:

1. Provide a mechanism to authorize temporary use of the land in conjunction with the legal action on the encroachment or

2. Serve as a tool in tracking or managing encroachments.

The unauthorized use may involve improvements of substantial investment. If the authorized officer determines that the encroachment is not an appropriate use of National Forest System land, issue a nonrenewable, nontransferable permit of a duration sufficient only to allow the user to make arrangements to remove the improvements.

In the event that the use is acceptable and would have been authorized under normal circumstances, issue a permit under the normal category for that use after a legal settlement is reached (FSM 5330).

2723.71 - Cabin (Invalid Mining Claim)

These encroachments arise through the illegal use of buildings originally or ostensibly built for mining purposes under the 1872 Mining Law (30 U.S.C. 21-54). Phase out these uses. Authorize such use only as an interim measure to resolve the encroachment and ensure that permits are of the shortest possible duration. Do not allow reconstruction in the event fire or other catastrophic event destroys the structure.

2723.72 - Residence

Most of these encroachments occur through survey errors or improperly marked boundaries. Many may involve title claims. Quite often, only a portion of the structure encroaches on National Forest System land. If disposal of the land under the Small Tracts Act (96 Stat. 2535) is not appropriate, the responsible officer, after legal resolution of the claim, may authorize the use until the structure can be relocated. If relocation is not feasible, authorize a reasonable use period followed by demolition and removal.

2723.73 - Other Improvement

These improvements include a variety of uses ranging from home water supply pipelines and wells, to sheds, barns, and garages. Many of these may be inadvertent encroachments. In most situations, the legal settlement of the case provides for relocation of the use onto private land. The legal action may require the authorized officer to issue a permit for the temporary occupancy of the improvement until the owner can amortize the investment in the structure.

2723.74 - Cabin Predating Alaska National Interest Lands Conservation Act of 1980 (ANILCA) [Reserved]

2724 - FEASIBILITY, RESEARCH, TRAINING, CULTURAL RESOURCES, AND HISTORICAL

2724.1 - Feasibility

2724.11 - Site Survey and Testing

This category includes a variety of preliminary studies to determine if a particular area is suitable for an intended use, not merely for research purposes. It may include land survey, geological investigations, excavation and core drilling, and other activities.

Because of the different objectives involved, issue permits under this category rather than under the intended use. This avoids the need for superfluous permit conditions that apply only to the proposed use and not to the feasibility determination itself.

2724.12 - Resource Survey

A resource survey determines if a certain resource exists and, for some, has sufficient quality or quantity to be put to some use. The goal for most of these studies is not to obtain an eventual special use permit, but to obtain some other authorization to use the resource or merely determine its existence. Examples of resource surveys include wildlife or insect population measurements and sampling to determine quality and quantity of forest products, such as pitchwood (stumps) or pulpwood.

This type of feasibility designation includes operations to determine if a particular location is suitable for a proposed use. It may consist of surveying to verify elevations and boundaries or geological testing to check the subsurface area for strength in supporting foundations. A typical project may have, over a number of years, several feasibility tests that may lead up to a final permit for the construction and use of improvements on the land. Examples include dam and reservoir projects, major power line facilities, and electronic sites. Include non-intrusive surveys and testing for Formerly Used Defense Sites (FUDS) projects in this use designation.

2724.13 - Hydroelectric Investigation

Hydroelectric investigations use short-term occupancy of National Forest System lands to determine the feasibility of the site to produce hydroelectric energy. Authorization of temporary structures for several years, such as minor dams and weirs and water flow devices, may be appropriate to determine feasibility. Resource surveys to determine the quantity and quality of other resources which may be impacted can be issued under the same authorization if the activity is conducted by the same entity. The information gathered under this use designation would be used by a potential applicant for a hydroelectric power plant and by the authorized officer in conducting environmental analysis.

2724.14 - Wind Energy Testing

Wind energy testing would authorize the short-term occupancy of National Forest System lands to determine the feasibility of the site to produce wind energy. Authorization of temporary structures for several years, such as towers and anemometers may be appropriate, to determine feasibility. Resource surveys to determine the quantity and quality of other resources which may be impacted and soil and geological sampling for wind turbine foundations may be issued under the same authorization if the activity is conducted by the same entity. The information gathered under this use designation would be used by a potential applicant for a wind energy facility and by the authorized officer in conducting environmental analysis.

2724.15 - Solar Energy Testing

Solar energy testing would authorize the short-term occupancy of National Forest System lands to determine the feasibility of the site to produce solar energy. This use may not be as dependent upon National Forest System lands as other energy sources. Consider authorizing this use only when other lands are not available. Authorization of temporary structures for several years to measure and monitor cumulative solar energy may be appropriate to determine feasibility. Resource surveys to determine the quantity and quality of other resources which may be impacted may be issued under the same authorization if the activity is conducted by the same entity. The information gathered under this use designation would be used by a potential applicant for a solar energy facility and by the authorized officer in conducting environmental analysis.

2724.16 - Geothermal Energy Testing

Geothermal energy testing would authorize the short-term occupancy of National Forest System lands to determine the feasibility of the site to produce geothermal energy. Authorization of temporary structures for several years to measure and monitor geothermal characteristics and flow may be appropriate to determine feasibility. Resource surveys to determine the quantity and quality of other resources which may be impacted may be issued under the same

authorization if the activity is conducted by the same entity. The information gathered under this use designation would be used by a potential applicant for a geothermal collection structure for off-site production or on-site geothermal power facility by the authorized officer in conducting environmental analysis.

2724.17 - Biomass Testing [Reserved]

2724.2 - Research

This category includes experimental forest demonstration areas, locations for naval stores, observatories, laboratories, stream gages, weather stations, cloud seeding devices, and similar uses not intended to result in further development. If the use involves telemetry equipment, consider issuing the authorization as an electronic use rather than as a research use (FSM 2728.1).

2724.21 - Experimental and Demonstration

Uses under this designation generally consist of temporary or permanent sites for monitoring of or modifications to the area or to a particular resource. Activities are not related to Forest Service projects. The emphasis is on experimentation rather than on monitoring alone.

2724.22 - Research Study

These are nonspecific studies for a wide range of academic interests. Issue permits under this designation for uses inappropriate to other categories of this section.

2724.23 - Weather Station

This designation includes sites used to install equipment to monitor weather conditions. Typical equipment consists of anemometers, rain gauges, and thermographs.

2724.24 - Weather Modification Device

This designation covers only ground-based equipment, such as certain silver iodide generators used for cloud seeding. Aircraft projects or private land based facilities designed to modify weather over National Forest System lands do not require a special use permit. However, an agreement to protect the public interest is recommended (FSM 1580).

2724.25 - Observatory

This designation includes structures designed for studies of extraterrestrial phenomena. Usually sites are at high elevations and remote areas to allow for optimum collection of information. Remote locations are needed to avoid problems caused by smoke, smog, light, or electrical interference from population centers. This may tend to preclude other land uses in areas adjacent to the observatory. Consider authorizing radio telescope observatories as an electronic use rather than this type of use.

2724.3 - Training

2724.31 - Military Training Area

This designation is limited to Federal and State military training activities and sites. Private organizations or individuals shall not use National Forest System lands for military or para-military exercises. This type of use is often potentially damaging to National Forest System resources and may endanger other Forest users. See FSM 1530 for a list of agreements with defense agencies. Refer to these agreements for the coordination necessary with this type of use.

Adventure games (sometimes called war or survival games) may be permitted and should be classified as a recreation activity and authorized as a recreation event (FSM 2721.81).

2724.32 - Education Center

This designation covers educational facilities that are not physically part of a community school system. Refer to FSM 2723.6 for school permits. These institutions often need to carry out portions of their educational programs in a forested or wildland environment. Examples include centers that teach conservation subjects to students and training areas for foresters, engineers, geologists, and botanists. This designation does not include facilities primarily used for recreation activities and programs. See FSM 2721 for recreation uses. Issue permits for educational uses under this designation when suitable private land is unavailable.

2724.4 - Cultural Resource and Treasure Trove Uses

This category includes inventory, excavation, or removal of archaeological resources and treasure troves.

The Antiquities Act of June 8, 1906 (16 U.S.C. 431) authorizes most of the existing cultural resource special use permits issued prior to 1979 and all cultural and historic resources less than 100 years of age. The Archeological Resources Protection Act of 1979 (16 U.S.C. 470aa) authorizes all new permits involving land-disturbing cultural resource activity involving resources 100 years old and greater. The Act of June 4, 1897 (16 U.S.C. 551) authorizes nondisturbing activity and permits for treasure troves.

Allow qualified institutions and individuals to observe, excavate, or remove archaeological resources on National Forest System lands when in the public interest and within the constraints of the various laws and regulations governing the management of archaeological and other natural resources.

For treasure troves, allow persons to search for buried treasure on National Forest System lands, but protect the rights of the public regarding ownership of or claims on any recovered property.

Follow the basic policy for cultural resource activity on National Forest System land in FSM 2360 and additional coordinating requirements for historic preservation in 36 CFR 800.

Issue permits for all cultural resource activities except for those conducted under contract to the Forest Service or conducted by or under the direct supervision of Forest Service staff archeologists.

Review the need for requiring a cultural resource permit for activities that only incidentally result in the disturbance of archeological resources. Other exceptions to the requirement for a cultural resource permit are listed in 36 CFR 296.5.

The definitions of words and phrases used in this section are found in 36 CFR 296.3. Terminology related to cultural resources is also in FSM 2360. The following additional definitions relate specifically to permit policy:

1. Academic Activity. Cultural resource activity that is research-oriented and usually performed through an institution of higher learning.

2. Blanket Permits. Permits that authorize qualified applicants to conduct examinations of cultural resources on broad geographic areas, such as a National Forest or State. Such permits are an administrative convenience and may serve as a form of certification of the applicant's qualification.

3. Consulting Activity. Activity that is project-oriented, but not necessarily site-specific. Often, projects are related to non-Forest Service proposals for use of National Forest System lands.

4. Disturbing Examination. An activity that may alter or deplete the cultural resource under study. Individuals collect and remove archaeological or historical specimens. The ground may be disturbed.

5. Limited Testing. A preliminary survey or discovery technique, causing minimal ground disturbance, to determine the existence or significance of sites. Limited testing, as defined by the regional archeologist, may consist of shovel tests to determine if stratigraphy is present, minimal subsurface probe or auger sampling, or removal of vegetative cover and organic matter on a small area. For the purposes of the permitting process, consider limited testing as nondisturbing.

6. Nondisturbing Examination. Data collection activities that do not alter or deplete the cultural resource under study. There is no collection of archeological or historical specimens and little or no ground disturbance. These activities include architectural drawing or photography, applying remote sensing techniques to surface or subsurface examinations, locating, describing, and documenting cultural resources during field inventory, and limited testing.

7. Qualified Applicant. Any individual or organization, which meets the requirements for application as found at 36 CFR 296.6.

8. Treasure Trove. A valuable quantity of money, unmounted gems, or precious worked metal in the form of coins, plate, or bullion of unknown ownership, purposely hidden, that does not fall under any of the definitions in 36 CFR 296.3.

2724.41 - 1906 Act Permit

Regulations governing the administration of these permits are found at 43 CFR 3 and at 36 CFR 296. Do not issue new permits under this authority for activities concerning cultural resources that are 100 years old or greater. Reissue expired or terminated permits only under the authority of the Act of 1979 if the resource involved is 100 years old or greater. The responsible officer may amend or extend existing permits under the original permit authority.

2724.42 - Nondisturbing Use

Prior to issuing permits, the authorized officer shall consult with and obtain documented recommendations from a Forest Service cultural resource specialist with qualifications equivalent to the training and experience required of an applicant as specified in 36 CFR 296.8(a)(1). Issue permits under the authority of the Act of 1897 to qualified applicants. These permits shall authorize either consulting or academic activity, but not both, as part of the same permit. Non-site-specific or blanket activity for an entire National Forest or region is appropriate under this category for certifying an individual or institution for future operations over a large area. Regional foresters shall determine the extent to which the limited testing is used in particular geographic areas.

Do not authorize collection, excavation, or any other form of recovery beyond limited testing or recording of site location and characteristics.

2724.43 - Disturbing Use

Issue permits for land-disturbing cultural resource activities under the authority of the Act of 1979 if the cultural resources are 100 years or older. Regulations at 36 CFR 296 provide detailed information on permit application, issuance, and administration. These include but are not limited to instructions on Indian tribal notification, qualifications of applicants, reclamation, handling of artifacts, safeguarding of archaeological sites and resources, and penalties.

2724.44 - Treasure Hunting

This designation includes the search for and recovery of hidden treasure. It does not include:

1. Lost or abandoned property that falls under the General Services Administration authority in 40 U.S.C. 310.

2. Archaeological resources or specimens defined at 36 CFR 296.

3. Locatable minerals, as defined by the 1872 Mining Act (30 U.S.C. 21-54), or leasable minerals under either the Act of 1920 (30 U.S.C. 181) or the Act of 1947 (30 U.S.C. 351-359).

4. Recent vintage coins or other small objects of recent age often found with the aid of a metal detector. No significant excavation is involved. The search is a recreation pursuit confined to areas with no historic or prehistoric value.

2724.44a - Ownership of Treasure Trove

The permit does not establish any ownership of a trove; it only authorizes the search activity. In the event the permit holder makes a discovery, the ownership is adjudicated by process of law on a case-by-case basis. Several factors influence the ownership determination. These may include the following:

1. Archaeological resources remain the property of the United States.

2. The true owner of the trove may come forward.

3. The Forest Service cannot determine the tax aspects or interests of other Governmental agencies nor is it possible to determine these aspects in advance.

4. Resolution may include negotiation between the finder and the United States (as landowner) for any nonarchaeological portion of the trove.

Permits shall provide only for search and, if there is a discovery, for removal to a repository for safekeeping until determination of ownership. The recovered treasure shall remain in escrow for one year to allow all claimants to come forward and to arrive at legally acceptable settlements.

2724.44b - Relation to Mining Claims

Treasure trove search under the guise of prospecting or mining is trespass (FSM 5330). A trove found on an unpatented mining claim, even if the claim is prospectively valuable for minerals under the 1872 Mining Act (30 U.S.C. 21-54), does not automatically become the property of the mineral claimant. The United States owns the land, and determination of the treasure ownership is as set out in FSM 2724.44a.

2724.5 - Historic [Reserved]

2724.51 - Historic Building and Improvement [Reserved]

2724.52 - Historic Site [Reserved]

2725 - INDUSTRY

This class includes compatible uses of the National Forest System lands for a variety of generally forest-related industrial activities. Authorize permits for these uses only when suitable private land is not readily available.

2725.1 - Camps

2725.11 - Construction Camp and Residence

This designation includes camps, cabins, or residences to house personnel employed in road construction, logging, and other industries. The designation also includes prison camps. These uses range from seasonal or temporary to permanent; the occupation may be full or part time.

Include this type of use with that for the parent industrial use whenever possible. Do not authorize any facilities for summer homes, hunting lodges, or clubhouses for employees.

2725.12 - Temporary Construction Activities [Reserved]

2725.2 - Storage

This category covers the storage of timber and timber products, fuel, sand and gravel, ore, construction supplies, materials, equipment, highway department sheds and storage, and other items that are not an integral part of a use under another category. This category does not include unrefined oil and gas storage. See FSM 2726.33 for direction on this use.

Waive fees under 36 CFR 251.57 if the storage is connected with a Government contract that includes the use of National Forest System lands as an item in the bid or if it involves highway maintenance.

2725.21 - Warehouse and Storage Yard

This designation includes storage areas with some improvements constructed on them. The stored items usually consist of equipment and material goods.

2725.22 - Stockpile Site

Sites included in this designation do not have any significant improvements associated with the storage use. Stored items are usually of a bulk nature, such as sand and gravel.

2725.3 - Manufacturing

2725.31 - Processing Plant

This designation includes buildings and other structures needed for the manufacture or packaging of a product. Examples include canning and packing plants, factories, and sawmills.

2725.32 - Truck and Equipment Depot

This use includes facilities for loading, unloading, and maintenance of vehicles and equipment, not merely storage.

2725.33 - Batch and Mixing Plant

This designation includes facilities for preparation of road construction materials and usually they are project-related. Most are of a short-term nature.

2725.4 - Measurement

2725.41 - Weighing or Scaling Station

This designation includes sites used for the weighing of gravel, stone, timber products, and others. Also included are facilities used for the scaling of timber and timber products. The use may be temporary or permanent. Portable scaling platforms owned by the Forest Service and used by private scaling organizations also require a permit under this designation.

2725.5 - Arts

2725.51 - Still Photography

This designation includes commercial activities for capturing still images on film or in a digital format. This designation does not include the taking of photographic images by the general public for personal use or commercial filming activities (FSM 2725.52).

Direction on fee administration is found at FSH 2709.11, chapter 30, and direction on permit administration is found at FSH 2709.11, chapter 40.

2725.52 - Commercial Filming

This designation does not include still photography (FSM 2725.51).

This designation includes locations used by the motion picture and television media involving large film crews, actors, and sets. The designation also includes anticipated news-related uses, such as coverage of sports events, entertainment specials, or documentaries. Coordinate the permitting of these uses with the Washington Office, Office of Communication. See FSM 1650 for further direction.

Direction on fee administration is found at FSH 2709.11, chapter 30, and direction on permit administration is found in FSH 2709.11, chapter 40.

2725.6 - Mineral Exploration

For direction on mineral exploration, see FSH 2709.11, section 45.6.

2725.61 - Geological and Geophysical Exploration

For direction on geological and geophysical exploration, see FSH 2709.11, section 45.61.

2725.62 - Mineral Material Sale [Reserved]

2725.7 - Mineral Development [Reserved]

2725.71 - Occupancy Permit - Reserved Mineral Right [Reserved]

2725.72 - Occupancy Permit - Outstanding Mineral Right [Reserved]

2725.9 - Timber

This category covers temporary access across National Forest System lands to enable timber operators to log private land parcels. Consider possibilities for reciprocal use when issuing a permit.

2725.91- Tailhold

Use this designation for areas used to locate tailholds for cable or skyline logging systems. Authorize sufficient area to provide for access to the tailhold location.

2725.92 - Spar

Use this designation for areas used to locate spars or "deadmen" for cable or skyline logging systems. Authorize sufficient area to provide for access to the location.

2725.93 - Log Landing

This designation provides for locations for the temporary storage of recently cut timber at the area of timber harvest. Do not use this designation as a replacement for storage facilities found in FSM 2725.2. Log landings are integral requirements of timber harvest operations.

2725.94 - Yarding Corridor

This designation identifies those uses involved in timber harvesting that provide for moving logs from the cutting areas to log landing areas. They may consist of cableways or skid roads, depending on the type of operation.

2725.95 - Flume, Log Chute

Use this designation for devices used to move logs from harvest areas to landing or staging areas by means of water flow or gravity. This is not a transportation use in that it is primarily related to the harvest operation. Use of water as a carrying medium is incidental to the project.

2726 – ENERGY GENERATION AND TRANSMISSION

2726.01 – Authority

2726.01a – Wind Energy Facilities

Title V of the Federal Land Policy and Management Act, 43 U.S.C. 1761(a)(4) (see FSM 2701.1, para. 15).

2726.02 – Objectives

2726.02a – Wind Energy Facilities

The Forest Service's objectives for wind energy facilities include:

1. Authorizing wind energy facilities on National Forest System (NFS) lands to help meet the United States' energy needs.

2. Authorizing wind energy facilities on NFS lands so as to minimize detrimental social and environmental impacts, including direct, indirect and cumulative impacts.

3. Facilitating wind energy development when it is consistent with managing NFS lands to sustain the multiple uses of its renewable resources while maintaining the long-term productivity of the land.

4. Authorizing, to the extent practicable, wind energy facilities that do not preclude other land uses and associated benefits.

5. Considering, in siting wind energy facilities, unique local factors, such as differing landscapes, habitats, species of management concern, and public concerns. See FSH 2709.11, section 72.21, for further direction on siting wind energy facilities.

2726.02b – Power Plants Under the Authority of the Federal Energy Regulatory Commission [Reserved]

2726.02c – Other Power Plants

2726.04 – Responsibility

2726.04a – Chief

Wind Energy. See 36 CFR 251.52 for delegation of authority from the Chief to regional foresters, forest supervisors, and district rangers for issuance and administration of wind energy permits.

2726.04b – Regional Foresters

Regional foresters are responsible for:

Wind Energy.

1. Approving wind energy study plans, plans of development, site plans, and operating plans.

2. Issuing site testing and feasibility permits and permits for construction and operation of a wind energy facility in accordance with the provisions of the applicable study plan, plan of development, site plan, and operating plan.

3. Determining the appropriate environmental analysis for wind energy facilities.

4. Delegating these responsibilities to Forest Supervisors as provided in FSM 2704.33.

2726.04c – Forest Supervisors

Wind Energy. Forest supervisors may be delegated authority to issue site testing and feasibility permits and permits for construction and operation of wind energy facilities. This authority may not be redelegated.

2726.1 – Power Plants Under the Authority of the Federal Energy Regulatory Commission

2726.11 – Hydroelectric Facilities Licensed by the Federal Energy Regulatory Commission

This designation includes hydroelectric facilities licensed by the Federal Energy Regulatory Commission (FERC). See FSM 2770 for direction on these facilities.

2726.12 – Hydroelectric Facilities That Are Not Licensed by the Federal Energy Regulatory Commission

This designation includes hydroelectric facilities that are exempt from FERC licensing. See FSM 2770 for further direction on these facilities.

2726.2 – Other Power-Generating Facilities

2726.21 – Wind Energy Facilities

This designation includes only facilities using wind to generate electric power. For further direction on these facilities, see FSH 2709.11, chapter 70. Issue special use authorizations for other wind-driven facilities, such as pumps or mills, with use code 931 as applicable.

2726.21a – Proposals

1. Early in the planning process, require a proponent of a wind energy facility on NFS to coordinate with appropriate State and local agencies, Federal agencies, including the Departments of Defense and Homeland Security, National Weather Service, Federal Aviation Administration, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and tribal governments.

2. Proposals for site testing and feasibility and wind energy facilities must be evaluated and processed in accordance with 36 CFR 251.54 and cost recovery regulations at 36 CFR 251.58.

2726.21b – Land Use Fees

Calculate land use fees for wind energy permits in accordance with FSH 2709.11, section 76.

2726.21c – Ancillary Facilities

1. Authorize under a permit for the construction and operation of a wind energy facility any privately-owned access roads, transmission lines, and other ancillary improvements for the facility that are constructed and maintained by the permit holder.

2. Authorize under a separate special use authorization any privately-owned access roads, transmission lines, and other ancillary improvements for a wind energy facility that are not constructed and maintained by the wind energy permit holder.

2726.21d – Monitoring Plans, Plans of Development, and Site Plans

1. Ensure that proponents for a wind energy facility develop a monitoring plan in accordance with the requirements in FSH 2609.13, chapter 80, and FSH 2709.11, chapter 70, and that mitigation measures identified during environmental analysis and incorporated into the NEPA decision document for the wind energy facility are contained in the permit and annual operating plan for the facility.

2. Ensure that plans of development and site plans (FSH 2709.11, sec. 73.32 and 73.33) address site-specific and species-specific concerns to ensure that potential adverse impacts of wind energy development are prevented or minimized.

2726.22 - Fossil Fuel Powerplant

This designation includes coal-fired, oil and gas-fueled electric generating stations. These types of power producing facilities generally are not compatible with National Forest System lands. Issue permits under this designation only if private land is not available and providing that it is possible to minimize adverse impacts.

2726.23 - Solar Energy Power Facility

This designation includes only commercial facilities that generate electric power using solar energy. Solar energy power facilities generally are not dependent upon National Forest System lands. Issue permits under this designation only if non-National Forest System lands are not available and if adverse impacts can be minimized. Solar panels used to generate power for a primary use such as a communication facility, dwelling, or natural resource monitoring facility must be issued under the primary use designation with the solar panels as an ancillary feature.

2726.24 - Geothermal Energy Power Facility

This designation includes only commercial facilities that generate electric power using geothermal energy. These types of power-producing facilities may not be dependent upon National Forest System lands. Issue permits under this designation only if feasibility studies have determined that it is not feasible to transmit geothermal water to a power-generating facility on non-national Forest System Lands and if adverse impacts can be minimized.

2726.25 - Biomass Energy Power Facility [Reserved]

2726.3 - Oil and Gas Development

2726.31 - Oil and Gas Pipeline

See FSM 2726.34 for additional direction concerning interstate natural gas pipelines under the jurisdiction of the Federal Energy Regulatory Commission.

1. The authority for grants to non-Federal entities for oil and gas pipeline rights-of-way is section 28 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 185). If a Federal agency applies for this type of use, the proper authority for issuance is the Federal Land Policy and Management Act. The designation includes only pipelines and directly related facilities for the transportation of oil, natural gas, synthetic liquid or gaseous fuel, and any refined product produced there from.

2. New pipelines over 24 inches in diameter are subject to congressional oversight by the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources (30 U.S.C. 185(w)(2)).

a. Provide copies of applications for new 24-inch diameter or larger pipelines to the Washington Office, Lands staff for the Chief's review and forwarding to the committees.

b. Provide copies of proposed right-of-way authorizations for new 24-inch diameter or larger pipelines to the Washington Office, Lands staff for review and forwarding to the committees for their 60-day review.

c. Do not seek oversight for applications for renewal or amendment or for replacement of 24-inch diameter and larger pipelines unless the application involves significant modifications. A significant modification is any action that would result in a greater allocation of land or pipeline capacity beyond that already obligated by the existing pipeline.

3. Holders of valid Bureau of Land Management (BLM) oil and gas leases and designated operators of BLM unitized lease areas do not require a special use authorization for pipelines or directly related facilities associated with the lease and located within the boundaries of the lease or unit area, as long as the pipelines or facilities are used solely for the production or gathering of oil and gas. If the pipelines and related facilities are used for the transportation of oil and gas, whether on-lease or off-lease, the pipeline right-of-way must be issued under the authority of the Mineral Leasing Act.

The Mineral Leasing Act also provides for the issuance of supplemental temporary permits to use such lands in the vicinity of a pipeline and for such purposes deemed necessary for construction, operation, maintenance, or termination of the pipeline; for protection of the natural environment; or for public safety. These uses are in addition to the related facilities previously described in this section.

Whenever possible, use other established authorities for permits and related Forest Service Manual instructions for the particular use when the proposed use does not relate directly to the pipeline. When using the Mineral Leasing Act authority, enforce all additional requirements of that act.

2726.31a - Bureau of Land Management Coordination

An exception to Forest Service issuance of grants exists if the non-Federal pipeline crosses additional Federal lands under the jurisdiction of at least one other agency. In this instance, the Secretary of the Interior, Bureau of Land Management, grants the necessary authorization after concurrence of the Forest Service.

The Forest Service may require that the grant include those terms, conditions, or stipulations necessary to ensure that the grant will not be inconsistent with National Forest System purposes. It also may recommend inclusion of other appropriate terms, conditions, or stipulations. Pursuant to 43 CFR 2882.3(i), the Forest Service also may refuse to grant authorizations or to give the Secretary of the Interior its concurrence if the grant will be inconsistent with National Forest System purposes. If necessary, disputes between the two agencies shall be resolved through appropriate channels.

The Forest Service and the Bureau of Land Management may enter into an interagency agreement to provide additional mutual assignments of responsibilities, review, and decision-making. The Mineral Leasing Act at 30 U.S.C. 185(c)(2) allows for these agreements.

2726.31b - Applications

See 36 CFR 251.54 for a list of the general and special qualification requirements of applicants for pipelines. If the applicant is a member of a partnership, the information required of the business entities listed in this regulation also shall apply to that partnership. In addition, applicants shall submit and disclose all other information as stated within the amended Mineral Leasing Act.

The Mineral Leasing Act provides that the ratification or confirmation of any existing pipeline or related facility granted before November 16, 1973, shall not qualify as a major Federal action requiring an environmental impact statement.

Do not ratify or confirm any right-of-way or permit for an oil or gas pipeline or related facility granted under any provision of law before November 16, 1973, unless the parties mutually modify it to comply to the extent practicable with the terms and conditions described in this section.

2726.31c - Width of Pipeline Rights-of-Way

Pipeline rights-of-way shall be only wide enough for efficient operation and maintenance of the pipeline after construction. They shall not exceed 50 feet plus the ground occupied by the pipeline or its related facilities, unless the issuing officer records the reasons why a wider right-of-way is necessary for operation and maintenance after construction, or to protect the environment or public safety. Approve temporary additional widths as necessary during the construction phase of the pipeline.

2726.31d - Cost Reimbursement and Rental Fee

Section 28 of the Mineral Leasing Act (30 U.S.C. 185(1)) provides that an applicant for an oil or gas pipeline authorization shall reimburse the United States for the administrative and other costs incurred in the processing of such an application. The act further provides that the holder of an

authorization for an oil or gas pipeline shall reimburse the United States for costs incurred in monitoring the construction, operation, maintenance, and termination of the authorized pipeline and related facilities.

The Omnibus Appropriations Act of 1999 (Public Law (Pub. L.) 105-277) authorizes the Forest Service to use any money collected pursuant to section 28 of the Mineral Leasing Act, in advance or otherwise, to reimburse the applicable appropriation to which such costs were originally charged (FSM 6512.12a, para. 10).

Base the amount of funds to be collected in advance on an annual plan of operations. Issue billings at least quarterly. Unused advance payments are refundable or, at the consent of the holder, they may be applied to the next periodic advance payment or to the annual rental fee. Base the amount of reimbursements on actual expenditures to date.

The holder is required to pay in advance the market rental value fee for the rights and privileges granted pursuant to each authorization.

2726.31e - Suspension or Termination

Suspension or termination of pipeline authorizations under the Mineral Leasing Act requires an administrative proceeding pursuant to 5 U.S.C. 554 and 7 CFR part 1, Subpart H.

2726.31f - Common Carrier Provisions

Pipelines and related facilities authorized by the terms of the Mineral Leasing Act are subject to its common carrier provisions and, if domestically produced crude oil is transported, except as otherwise noted, to the export limitations of the Export Administration Act of 1979 (Act of September 29, 1979; Pub. L. 96-72; 93 Stat. 503; 50 U.S.C. Appendix 2401). The common carrier provisions of the Mineral Leasing Act (30 U.S.C. 185(r)(3)(A)) do not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act (15 U.S.C. 717(w)) or operated by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas (FSM 2726.34).

2726.32 - Oil and Gas Pipeline Related Facility

Related facilities may include valves, pumping stations, supporting structures, bridges, monitoring and communication devices, surge and storage tanks, terminals, roads, airstrips, and campsites. Related facilities need not connect with or be adjacent to the pipeline and may be the subject of separate authorizations.

2726.33 - Oil and Gas Production and Storage Area

Authorize oil and gas storage facilities not related to a pipeline under either the Organic Act of 1897 (16 U.S.C. 551) or the Term Permit Act of March 4, 1915 (16 U.S.C. 497). If the storage use involves a Government-owned structure, the Granger-Thye Act of April 24, 1950 (16 U.S.C. 580d) also applies.

Oil and gas storage tank batteries in this designation usually relate to the operation of production wells. When these are located on National Forest System land leased to the applicant by the Bureau of Land Management, a special use authorization is not necessary.

2726.34 - Natural Gas Pipeline - Federal Energy Regulatory Commission

1. The Natural Gas Act of June 21, 1938 (15 U.S.C. 717) calls for the Federal Energy Regulatory Commission (FERC) to regulate interstate natural gas pipelines and ensure that the price of gas carried in these pipelines is just and reasonable.

   a. A natural gas transporter (applicant) must obtain from FERC a certificate of public convenience and necessity (15 U.S.C. 717f(c)) to be authorized to build or extend an interstate natural gas pipeline. Such a certificate gives the certificate-holder the power of eminent domain (15 U.S.C. 717f(h)) to obtain the right-of-way over non-Federal lands.

   b. In addition to such a certificate, if the natural gas pipeline is to cross National Forest System lands, the natural gas company also must obtain a right-of-way authorization from the Forest Service or Bureau of Land Management (BLM) if another Federal agency's land is involved (FSM 2726.31a). Such authorizations are issued under the authority of the Mineral Leasing Act of 1920 (FSM 2726.31).

   Before issuing a natural gas pipeline right-of-way authorization, ensure that the applicant has obtained a certificate of public convenience and necessity from FERC if the pipeline is under the jurisdiction of FERC in accordance with the Natural Gas Act. If there is any question as to FERC's jurisdiction over a natural gas pipeline, suggest that the applicant petition FERC for a jurisdictional ruling (18 CFR 385.207).

2. If FERC is involved in a natural gas pipeline, FERC usually assumes the lead Federal agency role in preparing the appropriate Federal environmental document, because FERC has the responsibility to determine if the pipeline is in the public interest and because FERC's authorization gives the natural gas company certain rights on non-Federal lands.

   a. Request cooperating agency status in FERC's process.

   b. Cooperate with FERC early in the process in the planning, environmental analysis, and documentation for the proposal.

c. Ensure the process and documentation are adequate (FSM 1950 and FSH 1909.15) for Forest Service use in issuing a decision.

d. Actively coordinate the environmental analysis and decision with FERC with the goal of having the Forest Service right-of-way decision consistent with the FERC decision.

3. For natural gas pipelines under the jurisdiction of FERC the following applies:

a. The oil and gas pipeline procedures of FSM 2726.31 apply to natural gas pipelines. Inasmuch as the Congressional oversight process (30 U.S.C. 185(w)(2)) applies to the right-of-way authorization issued under the Mineral Leasing Act, the Forest Service or BLM, as appropriate, not FERC, ensures such oversight contacts.

b. The coordination with BLM is the same as set out in FSM 2726.31a.

c. The applicable direction concerning pipeline authorizations is in FSM 2726.31b through 2726.31e, 2726.32, and 2726.33.

d. As noted in FSM 2726.31f, a pipeline under the jurisdiction of FERC is already regulated as a common carrier, so the common carrier provisions of the Mineral Leasing Act do not apply (30 U.S.C. 185(r)(3)(A)).

2726.34a - Interagency Agreement for Processing Interstate Natural Gas Pipeline Proposals

The Department of Agriculture is one of 10 Federal departments or agencies that is a signatory to the May 2002 "Interagency Agreement on Early Coordination of Required Environmental and Historic Preservation Reviews Conducted in Conjunction with the Issuance of Authorizations to Construct and Operate Interstate Natural Gas Pipelines Certificated by the Federal Energy Regulatory Commission" (Agreement) (FSM 1537.11). Follow the provisions of the Agreement and administrative procedures in this section when a proposal is submitted to construct an interstate natural gas pipeline facility on National Forest System (NFS) lands that is subject to the Federal Energy Regulatory Commission's (FERC) siting authority under the Natural Gas Act of 1938 (15 U.S.C. 717 et seq.).

1. Objective. The objective of the Agreement is to encourage concurrent reviews, minimize duplicative processes, and shorten the cumulative processing time in evaluating applications and making decisions for interstate natural gas pipeline projects.

2. Federal Energy Regulatory Commission Filing Procedures. The FERC has prepared a reference paper (ex. 01) describing the FERC's "Traditional Filing Process" and the "NEPA Pre-Filing Process" as procedures to follow when responding to proposals for interstate natural gas pipeline projects. Proponents may use either of these two

procedures for a project. However, the FERC is encouraging proponents to use the NEPA Pre-Filing Process which they must request and have approved in advance by the FERC. The appropriate Forest Service officer should, during early discussions about a proposed project, ask the proponent which of these two processes they intend to pursue when they file their application with the FERC. This information is useful to the Forest Service in determining when in the process the agency will become involved and for allocating time and resources needed to fulfill the Forest Service's role as a cooperating agency, as defined in the Council on Environmental Quality's regulations implementing the National Environmental Policy Act of 1968 (NEPA) (42 U.S.C. 4321 et. seq.).

Additional information about the FERC's Pre-Filing Process is found at the FERC's World Wide Web/Internet site at *http://www.ferc.gov/help/processes/flow/lng-1-text.asp*.

3. Proponent Contacts. A proponent for an interstate natural gas pipeline project may make contact with landowners, Forest Service officers, and other Federal, State, and local governmental officials about a proposed project before FERC's staff involvement or knowledge of the proposal. To affect the processing efficiencies of the Agreement, Forest Service officers shall work closely with a proponent during these initial inquiries and be responsive to requests for available information that might benefit the proponent in shaping their proposal. The information produced may include landownership and status maps, Forest land and resource management plan information (maps, prescriptions, standards, and so forth), existing and designated utility corridors, special management area designations or prescriptions, public uses, and other existing special uses that might be affected by the project. As provided for in paragraph 2, the Forest Service officer should ask the proponent which of the two filing procedures the proponent intends to use in filing their application with the FERC.

4. Federal Energy Regulatory Commission as Lead Agency. The FERC shall be the lead Federal agency responsible for complying with the provisions of NEPA and other applicable laws and regulations for most projects subject to the provisions of the Agreement. When a proponent chooses the FERC's Traditional Filing Process, the FERC assigns an environmental project manager after the proponent files their application. When a proponent chooses the NEPA Pre-Filing Process, the FERC assigns an environmental project manager before the application is filed.

Under both the Traditional Filing and the NEPA Pre-Filing processes, the FERC is responsible for:

a. Coordinating cooperating agencies' efforts during consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service for compliance with the Endangered Species Act of 1973 (16 U.S.C. 1531-1536, 1538-1540) and the Magnuson-Stevens Fishery Conservation and Management Act of 1996.

b. Coordinating cooperating agencies' efforts during actions to ensure project compliance with Section 106 of the National Historic Preservation Act (NHPA) of 1966 (16 U.S.C. 470 et. seq.), including consultation with the appropriate State Historic Preservation Officer, Tribal Historic Preservation Officer if applicable, Indian Tribes, and so forth.

c. Identifying the environmental project manager assigned to the case who will act as the FERC's primary contact.

d. Identifying which of the FERC's filing procedures are being followed for the project.

e. Requesting the appropriate Federal agency(ies) to participate in processing the case as a cooperating agency(ies).

f. Scheduling a coordination meeting during which the FERC, in consultation with the cooperating agency(ies), shall develop and commit to a schedule for processing the case.

5. Jurisdiction and Issuance of Authorizations. As the location and specifications of a proposed project become more certain, the Forest Service officer shall identify and inform the proponent and the FERC as to which Federal land management agency has the responsibility to issue the right-of-way grant to use and occupy affected NFS lands, and the name of the authorized officer who has the authority to issue the grant. This notification is required under both of the FERC's filing procedures.

a. Proposals Involving Lands Managed by More Than One Federal Agency. The Department of the Interior is responsible for issuing the right-of-way grant for projects that occupy Federal lands administered by more than one Federal agency. In most cases, this authority has been delegated to the Bureau of Land Management (BLM).

When the Department of the Interior or the BLM is the entity responsible for issuing the right-of-way grant, the Forest Service shall identify the Forest Service officer from the lead Forest Service unit who is responsible during the early coordination stage to work with the appropriate Department of the Interior or BLM office, to review the project and to designate a project manager.

b. Proposals Involving National Forest System Lands as the Only Federal Land. The Forest Service is responsible for issuing the right-of-way authorization when the only Federal land that will be occupied is NFS land. In this situation, the Forest Service shall identify to the proponent the Forest Service authorized officer with the delegated authority to issue the authorization for the proposed project. For projects that cross more than one National Forest in the same Region, the authorized officer shall be

either the regional forester, or delegated to the forest supervisor of a designated lead Forest. For inter-Regional projects, the authorized officer shall be either the regional forester of the designated lead region, or delegated to a forest supervisor agreed upon among the regional foresters consistent with the direction in FSM 2704.32.

It is the responsibility of the authorized officer to request the proponent to submit their proposal in writing and to work with the proponent to ensure that the proposal is developed so that it may be accepted as an application.

6. Forest Service Role as a Cooperating Agency. When contacted by the FERC that a proposed project will use and occupy NFS land, the Forest Service officer acting either as a deciding officer (para. 5b) or as the line officer representing the lead Forest Service unit (para. 5a) shall respond in a letter to the FERC that the Forest Service shall:

a. Coordinate and cooperate with the FERC and other cooperating Federal agencies involved in the project.

b. Assist in the development of a single environmental analysis adequate in scope to address issues and concerns associated with NFS lands and resources.

c. Assist in the development of a detailed schedule that provides sufficient time to:

(1) Collect information and complete initial surveys and studies.

(2) Solicit and evaluate internal and external comments.

(3) Conduct an environmental analysis of the impacts associated with the construction, operation, maintenance, and termination of all proposed right-of-way facilities, including the location of temporary use areas and ancillary facilities.

(4) Review and write reports.

(5) Amend or revise a forest land and resource management plan if necessary to accommodate the proposed project.

(6) Respond to and process administrative appeals of a Forest Service decision (if applicable).

(7) Prepare authorizations, certificates, plans of development, and so forth.

d. Provide the name, title, address, and telephone number of the authorized officer who is the deciding officer (para. 5b) or the line officer of the lead Forest Service unit (para. 5b) and the project manager or primary point of contact for processing the proposal or application.

e. State the Forest Service's intent to recover from the proponent the agency's costs to process the proposal through either a Cost Recovery Agreement (CRA) between the Forest Service and the proponent or as part of a CRA between the BLM and the proponent.

f. Identify readily available land and resource information relative to the proposed project, if not previously provided, including, but not limited to:

(1) The current Forest land and resource management plan's management direction that may affect the proposed project including land use allocations, corridor designations in proximity to the proposed route, and standards and guides or management prescriptions, and other existing studies, data, and information concerning the lands and resources along the proposed route.

(2) The disclosure of existing uses that could be impacted by the proposed project such as the owners and authorization holders of facilities along the proposed routes.

(3) The disclosure of known or anticipated concerns of the agency, landowners, the public, and so forth regarding the proposed project and ways to mitigate those concerns.

2726.34a - Exhibit 01

PROCESS FOR THE ENVIRONMENTAL AND HISTORIC PRESERVATION REVIEW OF PROPOSED INTERSTATE NATURAL GAS FACILITIES

Federal Energy Regulatory Commission
Office of Energy Projects
Division of Gas – Environment and Engineering

In May 2002, the "Interagency Agreement (IA) on Early Coordination of Required Environmental and Historic Preservation Reviews Conducted in Conjunction with the Issuance of Authorizations to Construct and Operate Interstate Natural Gas Pipelines Certificated by the Federal Energy Regulatory Commission (FERC)" was signed by the FERC and other nine other federal agencies (signatory agencies).

In order to facilitate the coordination between the FERC and the other agencies, the FERC staff developed this document to:

- Inform federal, state, and local agencies (participating agencies) about the basic procedures for the two processing options available to project proponents for the types of projects covered by the IA, with the FERC as the lead federal agency;
- Serve as a supplement to each signatory agency's internal direction on implementing the IA;
- Ensure that all participating agencies have a clear and common understanding of the applicable FERC procedures, and the FERC's expectations of project proponents and each participating agency; and
- Describe how each of the participating agencies can become engaged in the environmental and historic preservation reviews of proposals and applications for interstate natural gas projects.

The FERC is responsible for authorizing the siting, construction, and operation of interstate natural gas pipelines, natural gas storage fields, and the liquefied natural gas (LNG) facilities pursuant to sections 3 and 7 of the Natural Gas Act of 1938 (NGA), as amended. Virtually all applications to the FERC for interstate natural gas projects require some level of coordination with one or more federal agencies to satisfy the FERC's requirements for environmental review under the National Environmental Policy Act (NEPA), the Endangered Species Act, the National Historic Preservation Act, and the Magnuson-Stevens Act.

2726.34a - Exhibit 01--Continued

The May 2002 Interagency Agreement (IA) applies to those projects where the FERC would normally prepare an environmental assessment (EA) or an environmental impact statement (EIS) pursuant to its siting authority under the NGA. The IA provides a framework designed to expedite and streamline environmental and historic preservation reviews that must be conducted in conjunction with the processing of proposals and applications for these projects. Smaller projects can be constructed under blanket-type or automatic authority, or may qualify as categorical exclusions which do not require the FERC to prepare an EA or an EIS.[1]

PROPOSALS AND APPLICATIONS FOR NEW FACILITIES

Project proponents seeking authorizations from the FERC under sections 3 or 7 of the NGA have a choice, subject to the FERC's approval, of one of two procedures:

A. The "Traditional Filing Process"; or

B. The recently-adopted "NEPA Pre-Filing Process"

Both processes require the project proponent to begin working as soon as possible with the relevant participating agencies to enable them to identify resources and begin their analysis of the project, including identifying any cost recovery procedures.

A. The Traditional Filing Process

In the Traditional Filing Process, the project proponent, not the FERC, makes the first contacts with the participating agencies. The project proponent normally contacts the relevant agencies seeking information to determine the feasibility of building and operating the proposed facilities within an identified project area. The project proponent may contact agency staff informally by phone, or make contact in a written request for information. It is also common for the project proponent to file right-of-way applications with other participating agencies prior to filing an application with the FERC. Some participating agencies may spend considerable time providing data to the project proponent, reviewing possible corridors and alternatives, and working with the project proponent to select a route that avoids or minimizes known resource conflicts.

1/ Most existing interstate natural gas companies hold Blanket Certificates from the FERC that allow them to construct facilities if they meet certain environmental standards and project cost limitations (see CFR 18, sections 157.203 and 157.205) without further Commission review or approval. Consultation with agencies is still required for land use authorizations and environmental consultations because other agencies may have their own permit requirements and may require separate NEPA analysis. Although these types of projects are not covered by the IA, the companies may approach signatory agencies seeking input for environmental review and approval.

2726.34a - Exhibit 01--Continued

For most large projects, project proponents hold one or more pre-filing meetings with the FERC staff to obtain guidance regarding the required information to meet the FERC's filing requirements, as well as advice on what the project proponent can do to help ensure efficient processing of the application by the FERC. The project proponent may or may not have already contacted the appropriate participating agencies to discuss potential issues prior to a pre-filing meeting with the FERC.

Regardless of whether or not the project proponent contacts the FERC prior to filing its application, under the Traditional Filing Process, the FERC establishes contact with other participating agencies after the application is filed. This first contact generally occurs in conjunction with the FERC's issuance of a Notice of Intent (NOI) to prepare an EA or EIS, and may be oral or written. The NOI constitutes the beginning of the environmental review process; it contains a brief description of the proposal; a request for participating agencies to identify ("scope") issues and comment on the proposal; a request for cooperating agencies; and contact information with details regarding phone numbers, mail and website addresses. The scoping process is conducted to identify issues, and to identify means of resolving conflicts, and avoiding or mitigating adverse effects. As discussed in the IA, this early point in the process is where the signatory agencies begin to work collaboratively to complete the required review process as expeditiously as feasible.

The key difference between the Traditional Filing Process and the NEPA Pre- Filing Process (described below) is that in the Traditional process the environmental analysis, including scoping, does not begin until after the project proponent files its application with the FERC. Thus, there is often little interaction between the FERC, the project proponent, and other relevant agencies. The result of this is that interagency coordination is deferred until later in the process.

B. The NEPA Pre-Filing Process

The FERC developed the NEPA Pre-Filing Process as a mechanism to identify and resolve issues at the earliest stages of project development by involving the participating agencies and the public earlier in the process. While the NEPA Pre-Filing Process is a voluntary process, available at the request of the project proponent, it is subject to the FERC's approval. The FERC strongly encourages project proponents to avail themselves of the benefits and efficiencies to be gained from increased public involvement and early issue resolution.

Not unlike the Traditional Filing Process, in the NEPA Pre-Filing Process, a participating agency may first become aware of a project through a contact by the project proponent. The project proponent is responsible for asking agencies, other than the FERC, to participate in the NEPA Pre-filing Process. When asked to participate, each participating agency reviews of the project, examines its resources and program goals, and then determines whether it is willing and

2726.34a - Exhibit 01—Continued

available to participate in the NEPA Pre-Filing Process. A key consideration for some federal land management agencies' participation in the NEPA Pre-Filing Process is the project proponent's willingness to file a preliminary right-of-way application and establish a cost recovery account to fund agency participation (for example, the Bureau of Land Management and the Forest Service).

After the project proponent ascertains the willingness of the other agencies to participate in the NEPA Pre-filing Process, it must send a request to the FERC describing why the project proponent wants to use the process, any work done to date, and plans for public involvement. Based on this information, the FERC must then determine whether pre-filing coordination is likely to be successful.

If the FERC approves a project proponent's request to use the NEPA Pre-Filing Process, the project is assigned a Docket Number with a "PF" prefix (e.g., PF01-01) which serves as the identifier for placing all relevant correspondence in the FERC's public record for that project. The FERC then notifies the participating agencies by telephone or in writing that the project proponent's NEPA Pre-Filing request has been approved. The FERC will also discuss the agencies' participation in a planning or informational meeting with the project proponent to discuss land and resource issues and concerns. The FERC and the participating agencies may consult regarding the agencies' ability to commit to a pre-filing time frame and a schedule established by the FERC. Most of the activities described in the IA regarding the NEPA Pre-Filing Process take place much sooner than they would otherwise be conducted in the Traditional Filing Process.

The FERC asks each participating agency to designate a primary contact for the project, and to devote the resources needed to commit to the schedule for processing the proposal. Similarly, the FERC identifies a project manager for each case. The reviews and schedules of all the agencies participating in the NEPA Pre-Filing Process will run concurrently, rather than sequentially, as is often the case in the Traditional Filing Process.

The signatory agencies have agreed in the IA to work with each other, and with other entities as appropriate, to ensure that timely decisions are made and that the responsibilities of each agency are met. The signatory agencies are also expected to provide the information and expertise to conduct the reviews in a timely manner, consistent with the established schedule. Other responsibilities of the signatory agencies in the IA include:

- Identifying each agency's role and responsibilities;
- Identifying significant issues or other administrative or land use/land designation barriers;
- Providing available data and recommendations; and
- Assisting in the drafting of NEPA documents, and related activities.

2726.34a - Exhibit 01--Continued

TIMELINE COMPARISON

The following discusses the typical timeline for a proposed project, highlighting some of the differences in activity and timing that might occur during the Traditional Filing Process, in comparison to what might occur during those same blocks of time during the NEPA Pre-Filing Process.

Months 0 - 5:

During this initial stage of any project, the project proponent is actively developing and marketing its proposal. Exploratory requests and planning activities are initiated solely by the project proponent. There is little difference between the Traditional and the NEPA Pre-Filing Processes during this time period.

The FERC staff has only very limited knowledge of the project at this stage, based on articles in the trade press, or through informal meetings with the project proponent. At this point, the FERC would not assign any resources to review or evaluate the project proponent's proposal.

As the project proponent develops a study of potential rights-of-way, the participating agencies, landowners, and the general public may be contacted by the project proponent to inform all interested parties of its plans. A project proponent may contact a participating agency with requests for information, such as land ownership patterns, land status, and other available resource data or studies, including requests for copies of documents such as land management plans, existing studies, corridor designations, etc.

It is near the end of this phase that the project proponent may contact federal land management agencies about filing right-of-way applications with and establish cost recovery accounts.

Months 5 - 12:

During this stage, in the Traditional Filing Process, a project proponent is continuing to develop its project plans, and is beginning to identify a preferred route (and alternatives). As required surveys are started, federal, State and local land management agencies, and landowners are contacted. The FERC staff becomes much more aware of the project at this point, but there is no requirement that the project proponent notify the FERC prior to filing an application. The FERC typically does not devote significant resources to the project during this time. Likewise, other participating agencies with permitting authority would not be expected to devote significant time or resources toward evaluating or addressing a proposal during this phase.

2726.34a - Exhibit 01--Continued

With the NEPA Pre-Filing Process, the FERC staff would begin to devote significant resources to addressing the proposal and working with the project proponent as much as 8 months prior to the filing of an application at the FERC. The FERC staff will make contact with the project proponent and the participating agencies at the earliest possible point to initiate scoping activities and begin the environmental analysis.

It is during this early period of early notification and contact with the interested parties, the development of shortened timelines and schedules, that the benefits of the NEPA Pre-Filing Process are most evident. However, participating agencies should be aware that at this point the project proponent may not have as much specific information about its proposal as it would have under the Traditional Filing Process, after an application has already been submitted to the FERC.

Months 12 - 20:

Using the Traditional Filing Process, the project proponent prepares its environmental reports and assembles its application for filing with the FERC during this period. After the filing of the application, the FERC notifies the public of the receipt of the application, conducts the necessary scoping, identifies and resolves issues, prepares and issues the NEPA document, then issues an Order (equivalent to a Record of Decision) approving the project. For a project requiring an EIS, this process can take 14 to 16 months.

With the NEPA Pre-Filing Process, the frontloading of the scoping, environmental analysis, and initial documentation of that analysis, makes it possible for the FERC staff, in cooperation with the participating agencies, to finalize and issue a Draft EIS shortly after an application is filed (approximately 2 to 3 months after filing of the application). As a result, a final environmental document and Order can be issued by the FERC in 5 to 7 months.

1/ Most existing interstate natural gas companies hold Blanket Certificates from the FERC that allow them to construct facilities if they meet certain environmental standards and project cost limitations (see CFR 18, sections 157.203 and 157.205) without further Commission review or approval. Consultation with agencies is still required for land use authorizations and environmental consultations because other agencies may have their own permit requirements and may require separate NEPA analysis. Although these types of projects are not covered by the IA, the companies may approach signatory agencies seeking input for environmental review and approval.

2726.4 - Electric Transmission and Distribution

2726.41 - Powerline, Rural Electrification Administration Financed

Refer to FSH 2709.11, chapter 30 for direction on fee administration. See FSH 2709.11, chapter 40 for direction on permit administration.

2726.42 - Other Utility Improvement, Rural Electrification Administration Financed

Refer to FSH 2709.11, chapter 30 for direction on fee administration. See FSH 2709.11, chapter 40 for direction on permit administration.

2726.43 - Powerline [Reserved]

2726.44 - Other Utility Improvement [Reserved]

2727 - TRANSPORTATION

2727.1 - Aircraft Facility

This category of use deals with sites that involve some form of aviation-related activity. The category does not include certain support functions, such as electronic air navigation aids. Determine the appropriate category when issuing authorizations for related uses.

2727.11 - Airport, Heliport

This designation includes sites used for the takeoff and landing of aircraft. It may include all related facilities ranging from service buildings to approach lighting systems. In addition, an authorization may include a reasonable amount of land set aside for needed obstruction clearance along approach and departure paths.

This type of use generally excludes other uses of the land. Do not issue an authorization if non-Federal land is available.

2727.12 - Hangar and Service Facility

This designation includes structures related to aircraft use where the airport itself is not located on National Forest System land.

2727.13 - Airport Concession

Issue an authorization under this designation only if the concession relates directly to aircraft use, such as pilot training facilities or aircraft rental offices. For other concession uses, the community use categories of FSM 2723.6 are appropriate. Consider including these uses in an airport permit (FSM 2727.11) if the airport facility itself is located on National Forest System land.

2727.14 - Airport or Airway Beacon

This designation includes airport approach lighting systems or rotating beacons where the airport itself is not located on National Forest System land. It also includes the few instances where a navigation route marker consists of a visual, nonelectronic device.

2727.15 - Helicopter Landing Site

This designation includes only temporary facilities used for helicopter operations not associated with other uses.

2727.2 - Marine

This category includes uses associated exclusively with nonrecreational water travel. See FSM 2721 for recreational water uses.

2727.21 - Mooring Point

This designation includes minor uses along waterways for securing boats or other water craft to the land. Generally, there are no improvements at such sites.

2727.22 - Boat Dock, Wharf, Pier

This designation includes improvements along rivers or shores used for securing water craft. These may range from minor pilings for log raft operations to larger pier facilities for servicing and storing boats or ships. Verify the ownership of the water area. Include only those facilities actually located on National Forest System land or water areas.

2727.23 - Canal

This designation includes only artificially constructed waterways used for transportation. Other water uses are described in FSM 2729.

2727.24 - Navigation Aid, Lighthouse

Structures under this designation include the lighthouse building itself and directly related improvements necessary for the operation of the facility.

2727.25 - Navigation Aid (Beacon, Buoy Marker, and Others)

This designation includes sites where there are nonelectronic signaling or locating devices assisting operators of water craft to determine their positions.

2727.3 - Railroads

Authorizations under this category include rights-of-way for the tracks and related facilities used for the operation of a railway system. Many railroads own the land under the mainline and major spurs in fee or control it through a permanent easement. However, additions to the system outside the limits of the grant (such as for additional tracks or new signal devices) require separate authorizations. Consider long-term authorizations for these uses.

2727.31 - Railroad Right-of-Way

This designation includes the track and all facilities relating to the operation of the railway.

2727.32 - Railroad Signal Device

The designation may include lighted crossing gates or approach signs.

2727.4 - Federal Aid Highway Right-of-Way

Refer to FSM 2730 for policies, authorities, and other direction for granting rights-of-way for roads and trails across National Forest System lands and interests in lands. Their listing here is for cross-reference and to provide continuity in the designation of use codes.

2727.41 - Department of Transportation (DOT) Easement

Refer to the direction in FSM 2730.

2727.5 - Road or Trail Authorization

Refer to the direction in FSM 2730.

2727.51 - Forest Road and Trail Act Easement

Refer to the direction in FSM 2730.

2727.51a - Cost Shared

Refer to the direction in FSM 2730.

2727.51b - Non-cost Shared

Refer to the direction in FSM 2730.

2727.51c - Forest Road

Refer to the direction in FSM 2730.

2727.51d - Private Road

Refer to the direction in FSM 2730.

2727.51e - Public Road Agency

Refer to the direction in FSM 2730.

2727.52 - Federal Land Policy and Management Act (FLPMA) Easement

Refer to the direction in FSM 2730.

2727.52a - Forest Road

Refer to the direction in FSM 2730.

2727.52b - Private Road

Refer to the direction in FSM 2730.

2727.52c - Road Reservation

Refer to the direction in FSM 2730.

2727.53 - Federal Land Policy and Management Act (FLPMA) Permit

Refer to the direction in FSM 2730.

2727.53a - Forest Road Permit

Refer to the direction in FSM 2730.

2727.53b - Private Road Permit

Refer to the direction in FSM 2730.

2727.53c - Temporary Permit to Cooperator

Refer to the direction in FSM 2730.

2727.53d - License (Bureau of Land Management)

Refer to the direction in FSM 2730.

2727.53e - Trail

Refer to the direction in FSM 2730.

2727.53f - Stock Driveway

Refer to the direction in FSM 2730.

2727.54 - Wilderness Act Authorization for Road and Trail

Refer to the direction in FSM 2730.

2727.6 - Pipeline - Non-Energy Related

This category includes only pipelines whose purpose is to transport material other than water or oil and gas. See FSM 2729 for a description of pipelines used for transmission of water. See FSM 2726.3 for direction on oil and gas pipelines.

2727.61 - Slurry Pipeline

A slurry system consists of a finely divided material that uses a liquid (usually water) as a transportation medium. Examples of material carried in these systems include coal, borax, and such.

2727.7 - Cableway and Conveyor

2727.71 - Tramway or Conveyor

These systems move personnel or material by means of cables or belts. They often reach several miles in length.

2728 - COMMUNICATIONS

This category includes all of the various uses of National Forest System lands that support telecommunication. The transmission or reception of voice, data, sound, signals, pictures, writings, or signs of all kinds, by wire, fiber, radio, light, or other visual or electromagnetic means are telecommunication uses. Communication sites support wireless technologies, or the use of airways. Linear rights-of-way are required for wire-line technologies (all forms of wire, cable, and fiber) that are ground based and require a physical connection.

2728.1 - Communication Site - Non-Broadcast

This special use group includes a variety of wireless communication use categories, which utilize National Forest System lands. Typically, the use occurs on a designated site and includes buildings, towers, and other support improvements. For further direction, refer to FSH 2709.11, chapter 90.

2728.11 - Wireless Internet Service Provider

These uses may or may not be in bands licensed by the Federal Communications Commission (FCC). A wireless internet service provider (ISP) utilizes wireless technology to connect subscription users to the internet. For rental determination purposes, an ISP that is a facility owner or a tenant is considered a microwave use, and a customer of an ISP who has a communications facility on National Forest System lands to receive and transmit an ISP signal is considered a private mobile radio service use. This use category also includes WiFi, WiMAX, and cellular provider internet services accessed directly by a personal or laptop computer card without a cellular telephone.

WiFi is used for mobile devices, land area networks, and the internet. WiFi enables a person with a wireless-enabled computer or personal digital assistant to connect to the internet when near an access point. The geographical region covered by one or several access points is called a hotspot.

WiMAX is an acronym that stands for Worldwide Interoperability for Microwave Access, a certification mark for products that pass conformity and interoperability tests required by the Institute of Electrical and Electronic Engineers IEEE standard 802.11. WiMAX is a standards-based wireless technology that provides high-throughput broadband connections over long distances. WiMAX can be used for a number of applications, including broadband connections, hotspots and cellular backhaul, and high-speed connectivity for business.

2728.12 - Cellular Telephone and Personal Communications Services

This category has been assigned use code 810. Cellular telephone and personal communications services (PCS) include holders of FCC-licensed systems and related technologies for mobile communications that use a blend of radio and telephone switching technology to provide public switched network services for fixed and mobile users within a geographical area. These systems consist of cell sites containing transmitting and receiving antennas, cellular base station radio, telephone equipment, and often microwave communications equipment utilized as backhaul for that site, as well as communications equipment directly related to operation, maintenance and monitoring of the use.

2728.13 - Passive Reflector

This category has been assigned use code 807. Passive reflectors include various types of non-powered reflector devices used to bend or ricochet electronic signals between active relay stations or between an active relay station and a terminal. A passive reflector commonly serves a microwave communications system. The reflector requires point-to-point line of sight with the connecting relay stations, but does not require electrical power. Reflectors seldom require site visits for maintenance or monitoring.

2728.14 - Private Mobile Radio Service

This category has been assigned use code 806 and includes holders of FCC-licensed private mobile radio systems primarily used by a single entity for the purpose of mobile internal communications and the communications equipment directly related to the operation, maintenance, or monitoring of that use. The communications service is not sold to others and is limited to the user. Services generally include local internal radio dispatch for municipalities, utilities, and non-communications businesses, private paging services, and ancillary microwave communications equipment for control of the mobile facilities.

2728.15 - Commercial Mobile Radio Service

This category includes FCC-licensed users providing mobile radio communications service to individual customers and the communications equipment directly related to the operation, maintenance, or monitoring of that use. Examples of mobile radio systems in this category are two-way voice and paging services such as community repeaters, trunked radio (specialized mobile radio), two-way radio dispatch, public switched network (telephone/data) interconnect service, and microwave communications link equipment.

2728.16 - Local Exchange Network

This category has been assigned use code 805 and refers to a radio service that provides basic telephone service, primarily to rural communities.

2728.17 - Microwave Industrial

This category has been assigned use code 804 and includes ancillary microwave facilities that support pipeline and power companies, railroads, and other businesses, as well as communications equipment directly related to the operation, maintenance, or monitoring of the ancillary microwave facilities, such as a mobile radio service or relay of cellular traffic from one or more cellular sites. When a portion of the microwave bandwidth is used commercially, include a microwave use in the inventory and rental calculation for the facility.

2728.18 - Facility Manager

A facility manager does not directly provide communications services and does not hold an FCC license to operate communications equipment. A facility manager owns a communications facility on National Forest System lands and has a special use authorization to lease building, tower, and related facility space as part of a business enterprise.

2728.19 - Microwave Common Carrier

This category has been assigned use code 803 and includes holders of FCC-licensed facilities used for long-line intrastate and interstate public telephone, television, information, and data transmissions.

2728.2 - Telephone and Telegraph

Telephone telecommunications service are provided over telephone lines characterized by a wire or wire-like connection carrying electricity or light between the subscriber and the rest of the telecommunications network. Wire-line service implies a physical connection. Delivery of broadband and other data can occur via telephone. Telegraph is a message delivery service.

2728.21 - Telephone and Telegraph Line

Use this designation when authorizing wire-line telephone or telegraph uses not eligible for financing pursuant to the Rural Electrification Act.

2728.22 - Telephone Line Eligible for Financing Pursuant to the Rural Electrification Act

Use this designation for telecommunications that are fee exempt under FLPMA section 504g pursuant to the Rural Electrification Act of 1936, as amended. Refer to FSH 2709.11, chapter 30 for direction on fee administration. See FSH 2709.11, chapter 40 for direction on permit administration.

2728.23 - Fiber Optic Cable

This category includes fiber optic system uses on National Forest System lands. Components of such systems include fiber optic cables, conduits, and individual fibers. See FSH 2709.11, section 48.23 for detailed direction on the processing of applications, issuance of authorizations, and establishment of rental fees for fiber optic cable uses on National Forest System lands.

2728.3 - Other Communications Facilities

This category includes miscellaneous uses not otherwise categorized. These facilities can be commercial or private use, either a linear right-of-way use or a communication site based use.

2728.31 - Other Wire-line Communications Improvement

Use this designation when authorizing cable television or other wire-line telecommunications systems not previously defined, that provide a communication service solely by wire-line. See FSM 2728.2 for direction on telephone systems.

2728.32 - Other Communications Improvement Eligible for Financing Pursuant to the Rural Electrification Act

Use this designation when authorizing uses not previously defined that qualify for the REA exemption. Refer to FSH 2709.11, chapter 30 for direction on fee administration. See FSH 2709.11, chapter 40 for direction on permit administration.

2728.33 - Navigational Equipment

Several Federal agencies utilize the category of navigational equipment for electronic signaling for aviation or marine navigation, astronomy stations, or other improvements not accounted for in other categories.

2728.34 - Amateur Radio

This category has been assigned use code 801 and includes private radio use licensed by the FCC as amateur radio.

2728.35 - Personal Private Receive Only

This category has been assigned use code 802 and includes receive only antennas designed for reception of electronic signals to serve private homes.

2728.36 - Natural Resource and Environmental Monitoring

This category has been assigned use code 814 and includes monitoring equipment and other small, low-power devices used to monitor or control remote activities. See FSH 2709.11, chapter 90.

2728.4 - Communication Sites - Broadcast Use

2728.41 - AM and FM Radio Broadcast

This category has been assigned use code 816 and includes facilities licensed by the FCC that broadcast AM and FM audio signals for general public reception and the communications equipment directly related to the operation, maintenance, and monitoring of that use. Users include radio stations that generate revenues from commercial advertising and public radio stations whose revenues are supported by subscriptions, grants, and donations. Broadcast areas often overlap State boundaries. This category of use relates only to primary transmitters and not to any rebroadcast systems such as translators, microwave relays serving broadcast translators, or uses licensed by the FCC as low power FM radio.

2728.42 - Broadcast Translator, Low Power Television, and Low Power FM Radio

This category has been assigned use code 808 and consists of FCC-licensed translators, low power television (LPTV), low power FM radio (LPFM), and communications equipment, including microwave facilities, directly related to the operation, maintenance, or monitoring of that use. Microwave facilities used in conjunction with the systems are included in this category. Broadcast translators receive a television or FM radio broadcast signal and rebroadcast it on a different channel or frequency for local reception. In some cases the translator relays the signal to another amplifier or translator. LPTV and LPFM radio stations are broadcast translators that originate programming. This category of use includes translators associated with a public telecommunications service.

2728.43 - Cable Television

This category has been assigned use code 809 and includes FCC-licensed facilities that transmit video programming to multiple subscribers in a community over a wired or wireless network and the communications equipment directly related to the operation, maintenance, or monitoring of that use. These systems normally operate as a commercial entity within an authorized franchise area. This category does not include rebroadcast devices or personal or internal antenna systems, such as private systems serving hotels or residences.

2728.44 - Television Broadcast

This category has been assigned use code 817 and includes facilities licensed by the FCC that broadcast UHF and VHF (ultra high and very high frequency) audio and video signals for general public reception and the communications equipment directly related to the operation, maintenance, and monitoring of that use. Users include television stations (major and independent networks) that generate income through commercial advertisement and public television stations whose operations are supported by subscriptions, grants, and donations. Broadcast areas may overlap State boundaries. This category of use relates only to primary transmitters and not to any rebroadcast systems such as translators, transmitting devices such as microwave relays serving broadcast translators, or uses licensed by the FCC as low power television (LPTV).

2729 - WATER (NON-POWER GENERATING)

Direction in this section governs non-power generating water uses.

2729.01 - Authority

Issue authorizations for the impoundment, storage, transmission, or distribution of water under the appropriate provisions of the Federal Land Policy and Management Act of October 21, 1976 (43 U.S.C. 1761), The Act of October 27, 1986, or if in wilderness, under the Wilderness Act of September 3, 1964.

2729.1 - Water Transmission [Reserved]

2729.11 - Irrigation Water Ditch [Reserved]

2729.12 - Irrigation Water Transmission Pipeline, 12” Diameter or More [Reserved]

2729.13 - Irrigation Water Transmission Pipeline, Less Than 12” Diameter [Reserved]

2729.14 - Water Transmission Pipeline, 12” Diameter or More [Reserved]

2729.15 - Water Transmission Pipeline, Less Than 12” Diameter [Reserved]

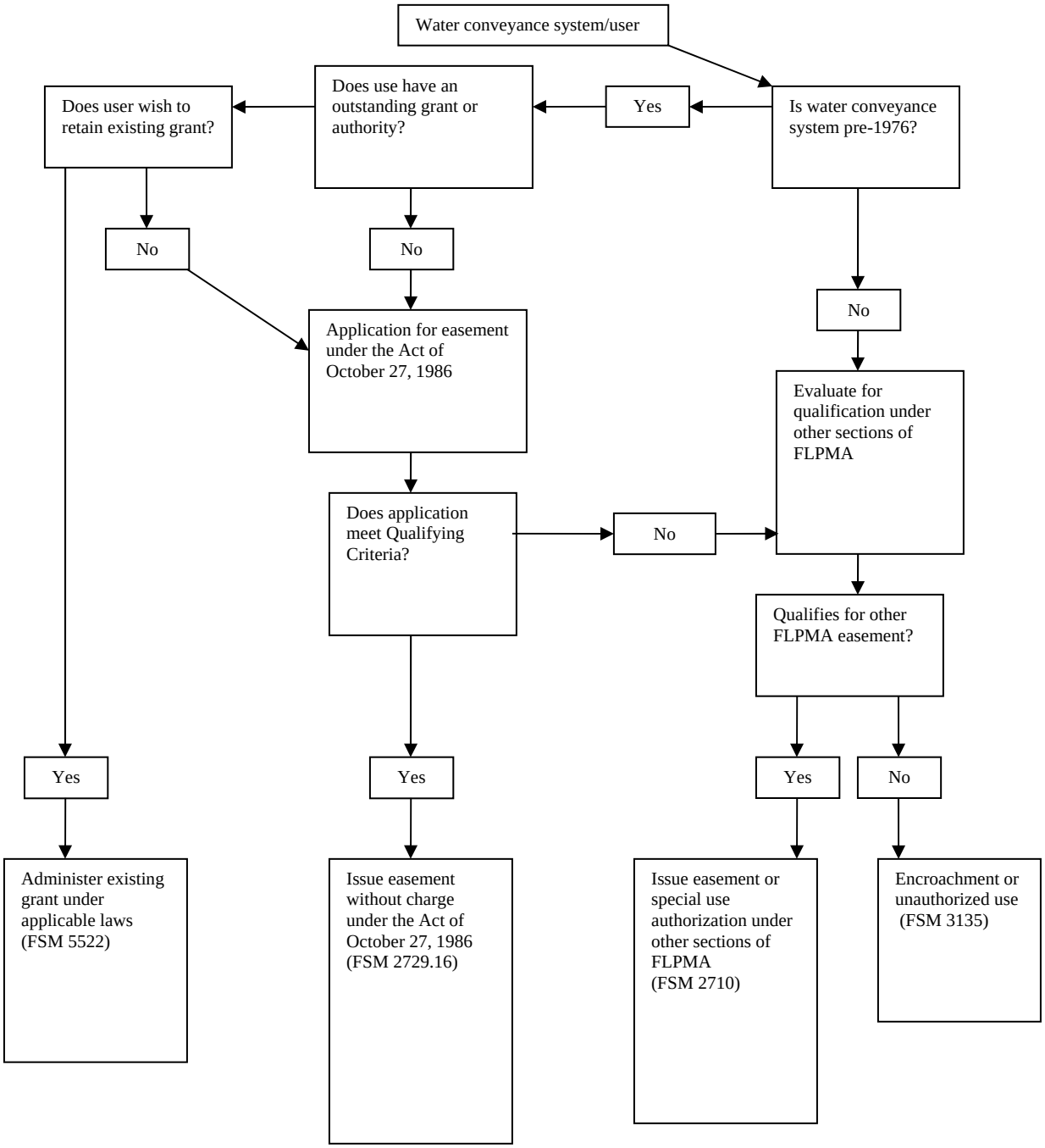
2729.16 - Water Conveyance System Easements Under the Act of October 27, 1986

The Act of October 27, 1986, amended Title V of the Federal Land Policy and Management Act of October 21, 1976 (FLPMA) (43 U.S.C. 1761) to authorize the Secretary of Agriculture to issue permanent easements without charge for water conveyance systems used for agricultural irrigation or livestock watering. The act requires applicants to submit information concerning

the location and characteristics of the water conveyance system necessary to ensure proper management of National Forest System lands. Extensions or enlargements constructed after October 21, 1976, do not qualify for an easement, and must be covered by other authorities (FSM 2729.16p). Exhibit 01 is a flowchart for evaluating applications for easements under the Act of October 27, 1986.

2729.16 - Exhibit 01

WATER CONVEYANCE SYSTEM ANALYSIS/EVALUATION FLOWCHART



2729.16a - Qualifying Criteria for Issuance of Easements Without Charge

Qualifying water conveyance system facilities on National Forest System lands include reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water, including roads and trails required by the owner and/or assignees for maintenance and operation of the system facilities, provided that such water conveyance system facilities were constructed and in operation before October 21, 1976.

The authorized officer must issue an easement without charge for uses under this designation if all of the following criteria are met:

1. The applicant submits a written application on or before December 31, 1996.

2. The system was constructed and placed into operation prior to October 21, 1976. This includes systems for which there was no authority, and those authorized under the following acts:

   a. The Act of July 26, 1866 (43 U.S.C. 661).

   b. The Act of March 3, 1891 (43 U.S.C. 946-949).

   c. The Act of June 4, 1897 (16 U.S.C. 473-475, 477-482, 551).

   d. The Act of February 15, 1901 (43 U.S.C. 959).

   e. The Act of February 1, 1905 (16 U.S.C. 524).

3. The National Forest System lands occupied by the system are in one of the following States where the appropriation doctrine governs the ownership of water rights: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, New Mexico, Nevada, North Dakota, South Dakota, Oklahoma, Oregon, Texas, Utah, Washington, and Wyoming.

4. The applicant has a valid existing right, established under applicable State law, for water to be conveyed by the water system.

5. The water conveyance system or that portion of the system for which the application applies is used solely for agricultural irrigation or livestock watering purposes at the time an application is submitted. Agricultural irrigation and livestock watering uses are distinguished from industrial and municipal water uses, but include incidental domestic use of water which may be either consumptive or non-consumptive.

6. The originally constructed facilities comprising the water conveyance system have been in substantially continuous operation without abandonment.

7. The system or portion of system submitted by applicant is not an enlargement or extension constructed after October 21, 1976. Enlargements or extensions constructed after October 21, 1976, are considered a new use and require a separate authorization under the applicable sections of FLPMA and 36 CFR part 251 (FSM 2729.16p). Maintenance and minor improvements necessary to maintain the original capacity are not considered enlargements.

8. The use served by the water conveyance system is not located solely on Federal lands.

9. The system is identifiable by a recordable survey. Recordable survey, as used in the act, is one which allows the authorized officer to locate the water conveyance system facilities on the ground, and allows the authorized officer to post the water conveyance system facilities on Forest Service land status records. There is no statutory requirement that the survey be recorded.

2729.16b - Documents That Meet Forest Service Survey Requirements

The following are examples of documents that meet the Forest Service survey requirements if tied to an acceptable land survey monument and if they accurately depict the location of the system: State ditch location statements; deeds; maps; public land surveys; centerline surveys; metes and bounds surveys; plats; orthophoto quads; topographic quads; or any combination of the above. For reservoirs, the applicant must furnish copies of the high water line surveys filed with the State Engineer, if available. No easement shall be issued until these depictions are confirmed in the field by the authorized officer.

An acceptable land survey monument is any existing or original Bureau of Land Management or General Land Office corner; Homestead Entry Survey or Mineral Survey corner; or, if none of these corners exists within two miles of either the point of diversion or points of ingress or egress on National Forest System lands, a described and photo-identifiable monument. Such monuments may be permanent physical features used by surveyors as local custom or practice.

2729.16c - Application Procedure and Requirements

The authorized officer shall ensure that the applicant meets the qualifying criteria listed in FSM 2729.16a. Pre-application discussions should assist the user in determining whether it is reasonable to proceed with an application (FSM 2729.16, ex. 01). Require the applicant to submit only the minimum information needed. The authorized officer shall acknowledge the receipt of all applications with a letter.

An application consists of:

1. A completed Special Use Application and Report (Form SF-299), or a letter containing the information requested on the form.

2. Documentation supporting the applicant's claims to having a grant or easement issued under the acts repealed by FLPMA (FSM 5520).

3. Submission of information qualifying as a recordable survey. Only the minimum information needed to post status records and locate the improvements on the ground is required.

4. Submission of additional information concerning location and characteristics of the system as requested by the authorized officer as necessary to recognize and protect the water system and other National Forest System uses established before or subsequent to the water system. Examples include: points at which the water system enters and exits natural channels used to carry water, typical cross-sections, headgates, diversion structures, roads, locks, gauges or other flow measuring devices, crossings by roads and other easements, flumes, dam specifications, reservoirs, and pipelines.

2729.16d - Evaluation of Application

1. Existing water conveyance system facilities may have been authorized under a Forest Service special use authorization or by an easement or grant issued by another agency, usually the Department of the Interior.

a. The authorized officer should be prepared to discuss with the holder advantages and disadvantages of applying for an easement or retaining the existing grant. Advise users that one purpose of FLPMA is to resolve title claims arising under statutes repealed by the act, but that there is no obligation to apply for an easement under this designation. Water users may choose to continue the use under existing authorizations and grants.

b. The issuance of a special use authorization to a water user does not necessarily extinguish existing easements and grants issued under statutes repealed by FLPMA. However, the act requires an applicant to relinquish any existing easements and grants as a condition of obtaining an easement under the act.

c. If an applicant claims to have a grant or easement issued under the acts repealed by FLPMA, advise the applicant to submit documentation supporting the assertion as part of the application (FSM 2729.16c, para. 2).

(1) Water conveyance system grants issued under the Act of July 26, 1866 (43 U.S.C. 661) were not formally documented and may be shown by water decrees, deeds, ditch location statements, field survey notes filed by the Bureau of Land Management (BLM) water rights applications, testimony, court decrees, permits, water use records, water administrative records, irrigation records, ditch rider notes, or other historic data.

(2) Most easements established under the Act of March 3, 1891 (26 Stat. 1095) were issued by the Department of the Interior and a search by the applicant of the BLM and Forest Service records may provide information that will aid in verification of the easement.

2. Where no prior easement or grant exists, but the water conveyance facility occupied National Forest System land prior to October 21, 1976, determine if the applicant holds a valid interest in the water conveyance system facilities and water rights.

3. If an easement or grant is shown to exist and no easement is sought under this section, the authorized officer must administer existing easements or grants under the applicable laws and the regulations of the agency originally assigned administration of the use (FSM 5522.12). (Most of the relevant U.S. Department of Interior regulations appear at 43 CFR part 2800.)

4. Determine if the existing use meets all of the other criteria listed in FSM 2729.16a. If the use meets all of the criteria, the authorized officer must offer an easement at no charge.

5. Authorized officers should explain the benefits of the authorization or easements under the authority of the act to water users who have no valid existing right or current authorization. If, after notice, the owner fails to obtain a special-use authorization or an easement under the act, the authorized officer shall treat the use as an encroachment and proceed accordingly under the provisions of FSM 5335.

2729.16e - Easement Preparation and Issuance

1. Issue the standard Easement for Agricultural Irrigation and Livestock Watering, form FS-2700-9a, as set out in FSH 2709.11, section 54.4.

2. Record additional information, as set out in FSM 2729.16c, paragraph 4, and attach it to the easement.

2729.16f - Compliance with the National Environmental Policy Act (NEPA)

Granting easements under FLPMA for existing water conveyance system facilities, with historic operational activities, is not discretionary and, therefore, does not constitute a Federal action subject to analysis or review. Conditions of the grant, including operations and maintenance activities (FSM 2729.16k), may require environmental analysis and review (FSM 1952.2).

2729.16g - Conversion of Fee Permits Under Other Authorizations to Easements Without Charge

There is no authority to forgive past due fees billed for existing special use authorizations of water conveyance system facilities built before October 21, 1976, or to discontinue current year billing. When converting an existing fee permit to an easement without fee under the FLPMA, the authorized officer shall proceed as follows:

1. Prior to Receipt of Easement Application. The authorized officer shall continue to bill the established annual fee until the holder submits a complete written application for a easement under the act (FSM 2729.16c) or shows that an outstanding right exists (FSM 2729.17a).

2. Post-Application Receipt. The authorized officer shall defer any new billing of the annual fee for the use until a decision is made on whether or not the use qualifies for an easement without fee.

2729.16h - Multiple Users of the Same Water System

The authorized officer shall issue separate easements to each qualifying person or entity holding a valid interest in the water conveyance system facilities and water right. Many transfers of interests in water rights and water conveyance systems have taken place since the uses were established, and the intent is not to interfere with those transfers. There is no fee for easements issued to users who qualify under the FLPMA. In circumstances where nonqualifying uses are involved under different authorities and fee schedules, determine fees for the nonqualifying uses in proportion to the amount of water allocated to flow through the system under each authorization.

2729.16i - Amendments

Process as an amendment to the easement any changes to the water conveyance system the holder proposes to make, other than minor improvements that do not constitute extensions or enlargements as described in FSM 2729.16a.

2729.16j - Transfers

The provisions of the FLPMA allow transfers of the easement to other agricultural irrigation or livestock watering users without the imposition of fees, terms, or conditions. The new holder must notify the Forest Service of changes in ownership within 60 days. Easements granted under this act terminate if the holder transfers the easement to a person or entity that uses the water for purposes other than agricultural irrigation or livestock watering (FSM 2729.16n). If the water right transfers completely to a nonagricultural user, that user must apply for an authorization under other sections of this act (FSM 2729.16p).

1. Complete Transfer to Multiple Users. If the holder of an easement issued under the FLPMA sells water rights to an agricultural irrigation or livestock water user and to a nonagricultural user, the holder may transfer the easement to the agricultural user. However, the nonagricultural user must apply for an authorization under other sections of the act (FSM 2729.16p).

2. Partial Transfer to Multiple Users. If the holder of a easement issued under FLPMA retains some water rights, sells a portion to an agricultural irrigation or livestock water user and the remaining portion to a nonagricultural user, then the holder retains the easement under the act, and the new agricultural user must apply for an easement under the act. The nonagricultural user must apply for an authorization under other sections of the act (FSM 2729.16p).

2729.16k - Operations and Maintenance

Require water users to review operations and maintenance with the authorized officer prior to initiation of use under the new easement issued under FLPMA. The water user may instead prepare a written plan by mutual agreement with the authorized officer. The plan should describe how facilities will be operated and maintained to prevent unacceptable damage to National Forest System lands and resources. Operations and maintenance plans should be kept current, and should be attached to the easement.

2729.16l - Liability

The easement holder is liable for the damage to National Forest System lands caused by the holder's negligence, intentional acts, or failure to comply with the terms and conditions of the easement or any applicable law. If a water conveyance system facility deteriorates and threatens persons or property and, after consultation, the easement holder refuses to perform the repair necessary to remove the threat, the Forest Service may perform the repair and maintenance on the facilities and assess the holder for the cost (43 U.S.C. 1761).

2729.16m - Relinquishment of Easement

Holders of easements issued under the FLPMA may apply for a replacement easement under other sections of the act. The holder may retain the existing easement until the authorized officer has processed such applications (FSM 2729.16o). The holder must then relinquish the existing easement when the new easement is authorized.

2729.16n - Terminations

The act provides for termination of the easement under three circumstances: change in the end-use of the water to a nonqualified use, abandonment, or termination under the provisions of section 506 of FLPMA.

1. The authorized officer must terminate an easement under the terms of FLPMA if the water conveyance system facilities are used for any purpose other than agricultural irrigation or livestock watering. The water user must apply for a replacement authorization under other applicable sections of the act (FSM 2729.16o).

2. The authorized officer must terminate easements that meet the conditions of abandonment. A determination of abandonment is based on a rebuttable presumption of abandonment, which is a failure of the holder to use the facilities for agricultural irrigation or livestock watering for any continuous 5-year period. The authorized officer must make a preliminary review of all the facts to determine if the right-of-way meets the conditions of abandonment. Before proceeding to terminate an easement, the authorized officer must ask the owner of the facilities to voluntarily relinquish the easement. If the owner does not relinquish the easement, the authorized officer shall refer the matter to the Office of General Counsel (OGC) for advice on how to proceed.

3. The authorized officer may initiate action to terminate an easement for breach of terms and conditions. Regulations at 36 CFR 251.60 and 7 CFR 1.130 - 1.151 delineate the process for termination of easements as described in section 506 of FLPMA. The action requires a formal proceeding before a Department of Agriculture Administrative Law Judge. The authorized officer shall refer the case to OGC for advice on how to proceed.

2729.16o - Reporting Use

Use code 916 in the Forest Land Use Reporting system (FSM 2790) for water conveyance system easements issued under FLPMA.

2729.16p - Water Conveyance Systems Under Other Authorities

Follow the direction in FSM 2710 and 2720 for authorizing water systems under other sections of FLPMA. Enlargements or extensions constructed after October 21, 1976, are considered a new use and require a separate authorization under the applicable sections of FLPMA and 36 CFR Part 251. This does not apply to maintenance and minor improvements to a system.

See FSM 5522 for systems covered by outstanding Federal grants and agreements.

2729.16q - Fee Refunds for Outstanding Authorizations, Grants, or Other Situations Where Fees Were Erroneously Charged

Discontinue billing and process fee refunds for confirmed holders of grants issued under the Act of July 26, 1866, and easements authorized under the Act of March 3, 1891. Refunds are given for the period starting with December 31 of the calendar year preceding the request for confirmation of the grant. Direction for administering outstanding authorizations and grants is contained in FSM 5522.

2729.2 - Impoundment [Reserved]

2729.21 - Debris and Siltation Impoundment [Reserved]

2729.22 - Dam, Reservoir [Reserved]

2729.23 - Water Diversion, Weir [Reserved]

2729.24 - Reservoir [Reserved]

2729.25 - Dam, Reservoir, Public Law 99-545 [Reserved]

2729.26 - Reservoir, Public Law 99-545 [Reserved]

2729.3 - Development [Reserved]

2729.31 - Well, Spring, Windmill [Reserved]

2729.32 - Stock Water [Reserved]

2729.33 - Wildlife Water Supply Reserved]

2729.34 - Fish Ladder [Reserved]

2729.35 - Water Storage Tank [Reserved]

2729.4 - Measurement [Reserved]

2729.41 - Stream Gauging Station [Reserved]

2729.42 - Water Quality Monitoring Station [Reserved]

2729.5 - Water Treatment [Reserved]

2729.51 - Water Treatment Plant [Reserved]