

## Next Steps

Recognizing that the Forest Service has not decided whether it will seek certification, the following are relevant considerations:

The FSC Federal Lands Policy establishes three criteria to be met before any new Federal land system such as the NFS could seek certification. In summary, the criteria are a *willing landowner* (the Forest Service), a determination that *public consensus* exists regarding management of the NFS, and the development of a *set of standards* specific to each category of Federal forestland (Forest Service, Bureau of Land Management, etc.). Because the Forest Service has not determined whether it will seek certification, FSC has not yet determined whether, how or when they will address these criteria for the Forest Service.

SFI has indicated that it would welcome NFS participation in SFI certification. A landowner seeking SFI certification must formally commit to reporting and management measures specific to the SFI Program. How and whether the Forest Service could make these commitments would also need to be determined.

A public outreach effort is now underway to obtain public and stakeholder views on the outcomes of the National Forest Certification Study and the potential implications of NFS certification in general. Once this effort is completed, the Forest Service will evaluate its options and determine how to proceed.

Dated: September 10, 2008.

**Charles L. Myers,**

*Associate Deputy Chief, NFS.*

[FR Doc. E8-21611 Filed 9-16-08; 8:45 am]

**BILLING CODE 3410-11-P**

---

## DEPARTMENT OF AGRICULTURE

### Forest Service

RIN 0596-AC50

### Final Directives for Forest Service Outfitting and Guiding Special Use Permits and Insurance Requirements for Forest Service Special Use Permits

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of final directives; response to public comment.

**SUMMARY:** The Forest Service is revising directives governing special use permits for outfitting and guiding conducted on National Forest System lands by simplifying the application and administrative process; establishing a

flat land use fee for temporary use permits; developing a process for allocation of use on a first-come, first-served or lottery basis for temporary use permits to facilitate greater participation in outfitting and guiding by youth, educational, and religious groups; offering the same terms and conditions to educational and institutional permit holders as offered to other types of permit holders when they operate as a business; and clarifying policy for priority use permits governing performance, inspections, and allocation of use. In addition, the Forest Service is revising the directives governing insurance requirements for Forest Service special use permits. Public comment was considered in the development of the final directives, and a response to comments is included in this notice.

**DATES:** Effective Date: These directives are effective October 17, 2008.

**ADDRESSES:** The record for these final directives is available for inspection at the office of the Director, Recreation, Heritage, and Volunteer Resources Staff, USDA, Forest Service, 4th Floor Central, Sidney R. Yates Federal Building, 1400 Independence Avenue, SW., Washington, DC, during regular business hours (8:30 a.m. to 4 p.m.), Monday through Friday, except holidays. Those wishing to inspect these documents are encouraged to call ahead at (202) 205-1426 to facilitate access to the building. Copies of documents in the record may be requested under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** Carolyn Holbrook, (202) 205-1426, Recreation, Heritage, and Volunteer Resources Staff.

#### SUPPLEMENTARY INFORMATION:

##### Table of Contents

1. Background and Need for the Final Directives
2. Public Comments on the Proposed Directives and Agency Responses
  - Overview of Comments
  - Response to General Comments
  - Response to Comments on Specific Sections of the Directives

FSH 2709.11, section 41.53  
FSH 2709.11, section 37.21b  
FSM 2713.1

  - Response to Comments on Regulatory Certifications in the Proposed Directives
3. Summary of Revisions to the Final Directives
4. Regulatory Certifications for the Final Directives
  - Environmental Impact
  - Regulatory Impact
  - No Taking Implications
  - Civil Justice Reform
  - Federalism and Consultation and Coordination with Indian Tribal Governments

- Energy Effects
- Unfunded Mandates
- Controlling Paperwork Burdens on the Public

#### 5. Access to the Final Directives

### 1. Background and Need for the Final Directives

Outfitting and guiding conducted on National Forest System lands have become one of the chief means for the recreating public to experience the outdoors. The Forest Service administers approximately 5,000 outfitting and guiding permits, authorizing activities ranging from guided hunting and fishing trips to jeep tours and outdoor leadership programs. The agency anticipates that outfitting and guiding will increase in importance as the public's desire for use of Federal lands increases and as the agency encourages use by increasingly diverse and urban populations, many of whom may lack the equipment and skills necessary in the outdoors. Therefore, agency policy needs to reflect the public's demand for services while incorporating standard business practices and sustaining the natural environment in which these activities occur.

Except for the revision to term length for priority use permits (April 14, 2005, 70 FR 19727), outfitting and guiding directives have remained relatively unchanged since they were finalized in 1995. Since that time, proposed legislation and field implementation of current policy have shown the need for updating the directives. The changes adopted will be incorporated as appropriate in the standard special use permit for outfitting and guiding, form FS-2700-4i, and other applicable forms.

In addition, the Forest Service is updating direction on the minimum amount of insurance coverage required for special use permits generally, including outfitting and guiding permits.

### 2. Public Comments on the Proposed Directives and Agency Responses

#### Overview of Comments

The proposed directives were published in the **Federal Register** for public notice and comment on October 19, 2007 (72 FR 59246). The Forest Service received several requests for extension of the comment period and published two notices, each of which extended the comment period (72 FR 71113; December 14, 2007, and 73 FR 8264; February 13, 2008). The comment period closed on March 20, 2008.

The Forest Service received approximately 480 comments on the proposed directives. Respondents fell

into the following categories: Unguided recreation—249; camps and youth organizations—20; universities—11; nonprofit outfitters and guides—4; state agencies and officials—5; state outfitting and guiding associations—13; national outfitting and guiding associations—5; and commercial outfitters and guides—173.

#### *Response to General Comments*

*Comments.* One respondent opposed the proposed changes in their entirety and stated that the directives should be withdrawn.

A number of respondents opposed the proposed directives because they perceived them as granting exclusive access to National Forest System (NFS) lands to commercial outfitters and guides at the expense of the unguided public and without the opportunity for public input.

Another respondent believed that the proposed directives were seriously flawed because the Forest Service did not collaborate with the outfitting and guiding industry in their development, which rendered them unworkable. Another respondent recommended that the Forest Service consider meeting with key interested parties to ensure that the final directives provide a balance for the needs of parties seeking permits.

Another respondent recommended that the proposed directives be revised and republished for public notice and comment. One respondent supported the inclusion of resource protection in the overall objectives of the proposed directives.

One respondent expressed support for most of the proposed directives and viewed them as enhancing the relationship between the Forest Service and outfitters and guides.

*Response.* The Forest Service disagrees that these directives should be withdrawn in their entirety. The outfitting and guiding program is not new, and the Forest Service has many years of experience managing these services. The changes that will result from implementing these directives can be characterized as enhancement of the existing program. The directives will not significantly change the types or quantities of public services that are being provided. The directives will improve access to recreational experiences to some underserved groups and will provide a more secure business opportunity for those who intend to conduct ongoing operations. The Forest Service believes that these directives address resource protection more effectively than current policy, but does not believe that inclusion of resource

protection in the objectives section of the directives is appropriate as it is not their principal focus.

Forest Service special use permits do not grant exclusive use (36 CFR 251.55(b)).

The Forest Service followed appropriate procedures for public involvement under the Administrative Procedure Act in developing and issuing these final directives.

Many respondents recommended changes to specific sections of the proposed directives. The agency is making some changes to the proposed directives in response to these comments. Therefore, additional public notice and comment are unnecessary. Some of the comments were outside the scope of the proposed directives.

#### *Response to Comments on Specific Sections of the Directives*

FSH 2709.11, section 41.53

##### 41.53a—Authorities

*Comments.* Several respondents believed that the Federal Lands Recreation Enhancement Act (REA) should not be used as the authority for issuing outfitting and guiding permits because doing so would provide an incentive to increase commercial use of Federal lands.

*Response.* The agency believes that REA is an appropriate authority for authorizing outfitting and guiding on Federal lands. REA authorizes the Forest Service to issue special recreation permits for specialized recreation uses of Federal recreational lands and waters, such as group activities, recreation events, and motorized recreational vehicle use (16 U.S.C. 6802(h)). Outfitting and guiding is a specialized recreation use. This authority has been used since December 2004 by both the Forest Service and Bureau of Land Management (BLM) for outfitting and guiding permits. The Forest Service does not see any incentive in REA's special recreation permit authority for increasing commercial use of Federal lands.

##### 41.53b—Objectives

*Comments.* Several respondents observed that the Forest Service should recognize the important role educational providers play in furthering the agency's management goals. These respondents noted that nearly all university outdoor programs attempt to provide educational and developmental experiences for students that differ from the intent and purpose of commercial outfitting and guiding. These respondents recommended adding a new objective to encourage outfitting

and guiding services that facilitate greater participation by youth, educational, and religious groups through improved access to temporary use permits and assignment of priority use to institutional permit holders. Another respondent believed that the Forest Service should be more proactive in assisting universities in finding wilderness areas that can support more outfitters and guides, for example, by providing a list of national forests that can issue more outfitting and guiding permits. This same respondent stated that Forest Service employees appear to be reluctant to work with universities that want to conduct outfitting and guiding.

*Response.* The Forest Service agrees that it is important to recognize the contribution made by educational outfitters and guides. Accordingly, in the final directives, the Forest Service has added an objective in section 41.53b, paragraph 2, that states: "Facilitate greater participation in the outfitting and guiding program by organizations and businesses that work with youth and educational groups." The agency does not believe that it would be appropriate for the directives to address assistance to universities in finding suitable wilderness areas for outfitting and guiding. Interested parties should work with administrative units and regions to determine available opportunities.

##### 41.53c—Policy

*Comments.* One respondent stated that a goal of the directives should be to broaden the spectrum of services and service providers able to meet the demand for guided services. Several respondents believed that administrative units should take more initiative in evaluating the demand for new recreation and guiding opportunities.

*Response.* While the Forest Service agrees that broadening the spectrum of services and providers may be appropriate, the agency believes that it is best to make this determination case by case through a needs assessment, rather than to state that it is always appropriate. Additionally, it is not possible to authorize new activities without reviewing proposals and applications and conducting environmental analysis.

*Comments.* One respondent supported proposed section 41.53c, paragraph 2, which addresses authorization of permitted access routes. Another respondent questioned what was meant by this term.

*Response.* The Forest Service added the following definition in section

41.53d for permitted access route: "Any road or trail that a holder is authorized to use under an outfitting and guiding permit or operating plan for purposes of pedestrian, stock, or vehicular access."

*Comment.* One respondent suggested revising section 41.53c, paragraph 3, to be consistent with the Wilderness Act. This respondent suggested prohibiting any development or permanent improvements in wilderness areas and stated that the proposed wording was insufficient to meet the intent of the Wilderness Act by allowing improvements in wilderness areas. The respondent suggested that the wording in the current directives at section 41.53b, paragraph 3, be retained and that no development, improvements, installations, or caches be allowed in wilderness areas for the purpose of convenience to the holder or the holder's clients in order to preserve the areas' wilderness character.

*Response.* The Forest Service agrees with the respondent that the current language in section 41.53b, paragraph 3, is more consistent with the Wilderness Act and more accurately reflects the agency's intent with regard to improvements in wilderness areas. Therefore, the agency has revised proposed section 41.53b, paragraph 3, to restore the wording in the current directives.

*Comment.* One respondent suggested adding "other types of permit holders" to proposed section 41.53c, paragraph 4, and using this provision to involve outfitters and guides in developing thresholds for allocation of priority use.

*Response.* The Forest Service has added the phrase "other interested parties" to the list of individuals and entities in section 41.53c, paragraph 4, with whom the Forest Service will work to encourage outfitters' and guides' compliance with applicable law.

*Comment.* One respondent supported the content of proposed section 41.53c, paragraph 6, regarding not issuing permits to applicants with no tangible assets.

*Response.* The Forest Service agrees that outfitting and guiding permits should not be issued to applicants with no tangible assets.

#### 41.53d—Definitions

*Comments—Allocation of Use.* One respondent suggested that the agency modify the definition of allocation of use to add allocation-free systems where the unguided public as well as outfitters and guides would compete equally for limited use from a common pool. Several respondents recommended adding a definition for "common pool" or "allocation-free use" to clarify that a

common pool is open to the unguided public.

*Response.* The management of use by the unguided public is beyond the scope of these directives. See the response to comments on proposed section 41.53e for further detail.

*Comments—Commercial Use or Activity.* One respondent agreed that intent to make a profit is irrelevant to the determination of whether a use or activity is commercial. However, this respondent believed that further clarification is necessary regarding the meaning of "entry or participation fee." Another respondent recommended revisiting the definition of commercial use or activity and stated that tuition for educational guiding should not be viewed as the sale of a product. Another respondent suggested adopting a more detailed definition of commercial use or activity, based on the BLM's definition in its policy.

*Response.* The Forest Service does not believe that modification of the definition for commercial use or activity is warranted. The definition for this term in the Forest Service's directives is the same as the definition in the agency's regulations at 36 CFR 251.51 and is consistent with BLM's definition. In addition, the definition for commercial use or activity was not proposed for revision and is therefore beyond the scope of the proposed directives. Finally, current policy at FSH 2709.11, section 37.21k, provides that tuition is excluded from revenue for purposes of calculating land use fees for outfitting and guiding.

*Comments—Concessionaire.* One respondent noted that the term "concessionaire" as used in Forest Service Manual (FSM) 2713.1 governing insurance is not included in the definitions for the outfitting and guiding directives. Another respondent wanted clarification of the term "concessionaire."

*Response.* A definition for concessionaire has been added to the final directives.

*Comments—Educational Outfitting.* Several respondents suggested defining educational outfitter and guide separately from outfitter and guide, as follows: "An organization that in conducting outfitting and guiding furthers the public interest and that is either a tax-exempt or governmental entity." These respondents believed that since educational outfitters and guides spend most of their time providing educational services, they should be differentiated from other outfitters and guides, who do not typically provide educational services. These respondents also believed that they should not be

included in the definition of commercial use or activity.

*Response.* The Forest Service believes that it is not necessary or appropriate to create a new category of use for educational outfitters and guides. The definition of outfitting and guiding in the directives matches the definition of those terms in the agency's regulations at 36 CFR 251.51. Arguably, all outfitters and guides further the public interest, in that without their services, some recreational activities and amenities would be beyond the reach of many members of the public. The agency does not believe that outfitters' and guides' non-profit status determines whether they derive revenue from the services they provide. Under current directives in Forest Service Handbook (FSH) 2709.11, section 37.21k, tuition charged for a program for which students earn credit is excluded from revenue for purposes of calculation of the land use fee for outfitting and guiding. Finally, the definitions for outfitting and guiding were not proposed for revision and are therefore beyond the scope of the proposed directives.

*Comments—Interim Temporary Use.* One respondent recommended adding the following definition for interim temporary use: "For permits that are subject to conversion to priority use, temporary use may be authorized for up to five, one-year terms with no limits on the amount of use assigned to the permit until the interim temporary use permits can be converted to priority use status. The permits may include a clause that allows the use to roll over for each year if no significant performance, financial, safety, or resource protection issues are found. Use may be adjusted from year to year as may be appropriate for resource conditions. Use pools for temporary use may also be established in accordance with 41.53j (revised)." Several respondents suggested the following definition: "Authorization of use for a trial two-year term for a new outfitter with no prior experience prior to issuance of a priority use permit for a full ten-year-term."

*Response.* The Forest Service agrees that a definition is needed for temporary use permits that may be eligible for conversion to priority use permits, but prefers the term "transitional priority use," which is more descriptive of the future use contemplated. Consequently, the agency has added the following definition in the final directives: "Transitional Priority Use. Interim redesignation of temporary use as classified under the Forest Service's June 12, 1995, outfitting and guiding policy (60 FR 30830), for holders who

meet all the requirements in section 41.53p.

*Comments—Needs Assessment.* One respondent recommended modifying the definition of needs assessment to include assessment of public demand for commercial services in relation to public demand for unguided use. Additionally, some respondents stated that excess use should be allocated through a common pool open to the unguided public, as well as to commercial outfitters and guides.

*Response.* The Forest Service generally does not allocate noncommercial use. To the extent noncommercial use is allocated (for example, in wilderness areas through restrictions on the number of people at one time in an area), that type of allocation is beyond the scope of these directives. Therefore, the proposed modification of the definition of a needs assessment and the proposed allocation of excess outfitting and guiding use are not appropriate.

*Comment—Nonrecurring Temporary Use and Nonrecurring Temporary Use Pool.* One respondent suggested adding the following definition for nonrecurring temporary use:

“Authorization of a minor, non-recurring outfitting or guiding activity for 1 season or less from non-recurring use pools,” and the following definition for non-recurring temporary use pool: “A pool established for non-recurring temporary uses. The amount of use assigned to the pool may be based on the general availability of capacity at a resource but without reducing allocations from any user segment.”

*Response.* The Forest Service believes that the proposed definitions are unnecessary because they would be redundant with the definition of temporary use.

*Comment—Outfitter.* One respondent recommended dropping or clarifying the phrase “for other gain” in this definition because it is ambiguous.

*Response.* The agency believes that the phrase “for other gain” is clear. “Other gain” in this context means any value other than cash, such as barter, received by holders in exchange for services they provide on NFS lands. The Forest Service considers cash and other gain obtained by concessionaires in exchange for their services in determining and auditing their land use fee.

*Comments—Priority Use.* One respondent supported the definition of priority use. Another respondent recommended that the term “priority use” be changed to “commercial use” and that the permit term for priority use be limited to 5 years.

*Response.* The Forest Service is retaining the term “priority use” to describe long-term allocations of use for outfitting and guiding. After many years of use, affected parties are familiar with the term. In addition, the term “commercial use” would be ambiguous because all Forest Service outfitting and guiding permit holders are commercial. The term “priority use” refers to a subset of those outfitters and guides who have a long-term allocation of use. Outfitting and guiding permit terms are addressed in the response to comments on proposed section 41.53l.

*Comment—Priority Temporary Use.* One respondent wanted to add the following definition for priority temporary use: “Authorization of a minor outfitting or guiding activity for 1 season or less that may be authorized from priority temporary use pools,” and the following definition for priority temporary use pool: “A pool that may be established for access by priority use permittees from redistribution of unutilized use allocations from priority use permittees, consistent with the provisions in 41.53l. Use may also be contributed voluntarily to the pool by priority use permittees.”

*Response.* The Forest Service has added a section entitled, “Management of Priority Use Pools” that addresses temporary allocation of use to priority use permit holders. Therefore, the proposed definitions are unnecessary.

*Comments—Quota.* One respondent supported the definition of quota. Another respondent suggested adding “per year” as another unit of measure for use allocations.

*Response.* The phrase “or other unit of measure” in the definition is broad enough to include “per year” if that unit of measure were appropriate. However, allocations per year are unlikely because they generally would not provide sufficient specificity.

*Comment—Renewal.* One respondent supported the definition of renewal.

*Response.* The Forest Service has not proposed changes to and is not changing the definition for renewal.

*Comment—Resource Capacity.* One respondent supported including the definition for resource capacity, since determining resource capacity is critical for protecting national forest resources.

*Response.* The Forest Service agrees that the definition for resource capacity is warranted.

*Comments—Service Day.* One respondent recommended striking the phrase “multiplied by the number of clients on the trip” because it confuses the concept of a service day with trip capacity. Another respondent recommended simplifying the definition

of a service day, for example, by allocating use for river outfitters and guides in launches, rather than service days.

*Response.* The agency agrees that the proposed definition of service day was confusing and has corrected the last sentence of the definition to read: “The total number of service days is calculated by multiplying each service day by the number of clients on the trip.” The directives provide that use may be allocated in service days or quotas. Since launches are a type of quota, use may be allocated in launches, if appropriate.

*Comments—Temporary Use.* One respondent proposed replacing the definition of temporary use with 5 new terms: Non-recurring temporary use, non-recurring temporary use pool, priority temporary use, priority temporary use pool, and interim temporary use. Another respondent believed that the definition for temporary use was inappropriate given the lack of viable means for converting temporary use to priority use.

*Response.* The agency believes that these proposed definitions are unnecessary and that the definitions for temporary use and temporary use pool adequately address the concepts covered by the proposed definitions. The comment regarding conversion of temporary use to priority use is addressed in the response to comments on section 41.53p, Transitional Priority Use.

41.53e—Needs Assessment, Resource Capacity Analysis, and Allocation of Use

*Comments Concerning Scope.* One respondent stated that it was unfortunate that the agency was not including in these provisions members of the recreating public who do not utilize outfitting and guiding services. Many respondents were concerned that the directives would give an advantage to commercial outfitters over members of the unguided public. Others suggested that when competitive interest exists for the same resources or type of use or when significant changes are being considered to current use or demand, a common pool should be established for the distribution of outfitting and guiding permits for all recreational use groups. One respondent proposed that the Forest Service evaluate public demand for unguided recreation before evaluating any need for new or increased commercial outfitting and guiding services. One respondent stated that all users of the national forests should be able to compete equally. Another respondent

proposed a common pool for allocation of permits that would be open equally to unguided recreationists as well as outfitters and guides and issuance of commercial outfitting and guiding permits without an allocation of use.

Several respondents suggested allocating use in service days or quotas for unguided as well as guided use, following a resource capacity analysis. One respondent stated that allocation of use should not be required and should be employed only if necessary for resource protection. Another respondent was concerned that outfitters and guides would bear the brunt of use restrictions because it is more difficult to assess and control use by the general public. One respondent believed that the general public and non-permitted groups should be subject to the same use restrictions as permitted users, who are enabling recreational use by the general public in a way that benefits the national forests and the agency.

One respondent supported new provisions in the directives requiring all groups to register with the Forest Service to gain access. This respondent believed that this requirement would help manage use and mitigate impacts from noncommercial and commercial use. This respondent also suggested that all groups utilizing NFS lands be subject to fees and stated that these fees would support proper administration, resource protection, user education, and law enforcement. One respondent suggested that both for-profit and non-profit outfitters and guides receive priority with respect to obtaining an allocation if they provide educational programs and services, since educational programs directly support the agency's mission to educate visitors to the national forests. Another respondent suggested making unused service days available to priority use outfitters and guides first. Many respondents wanted assurance that the proposed directives would not require allocation of use in areas where it is not currently required, such as on the Deschutes River and in the Boundary Waters Canoe Area (BWCA).

*Response.* There appears to be some confusion among respondents about the scope of these directives. These directives will be included in the Forest Service's Special Uses Handbook (FSH 2709.11) and are specific to administration of outfitting and guiding. Outfitting and guiding on NFS lands are commercial activities that require a special use authorization under 36 CFR 251.50(a) and the Special Uses Handbook. These directives do not govern noncommercial recreational activities conducted by individuals or

groups. Generally, a special use authorization is not required for noncommercial recreational activities, such as camping, picnicking, hiking, fishing, boating, hunting, and horseback riding (36 CFR 251.50(c)).

Moreover, the Forest Service generally does not allocate use for noncommercial activities. However, some congressionally designated areas are governed by specific statutes, such as the Wild and Scenic Rivers Act, which require the Forest Service to limit recreational use. Limits on all recreational use in these areas are determined in the planning process for the areas, and a system may be established to manage unguided recreation in these areas. For example, the BWCA is a congressionally designated wilderness area that has a lottery system for unguided recreation. In addition, special use permits are issued to commercial outfitters and guides operating in the BWCA. The Forest Service does not manage the lower sections of the Deschutes River, which are used for recreational river runs. Rather, those sections are under the jurisdiction of BLM.

The Forest Service does not believe that allocation of use for commercial operators should be optional. The agency depends on allocation of use to quantify and manage outfitters' and guides' use of NFS lands. It is not feasible for commercial outfitters and guides to plan and market their businesses without knowing how much use they are authorized to conduct on NFS lands.

The agency believes that regulation of commercial and noncommercial use pursuant to applicable regulations and directives is sufficient and that registration of users of NFS lands is unnecessary. In addition, the propriety of registration of users of NFS lands is beyond the scope of these directives. The Forest Service may and does charge fees only as provided by applicable law.

As stated above, whether outfitters and guides provide educational services is irrelevant to their eligibility for allocation of use under the directives. Under the directives, outfitters' and guides' eligibility for allocation of use depends on whether they hold a priority use (longer-term) permit as opposed to a temporary use (shorter-term) permit. The agency believes that qualification for a longer-term permit is a more objective and appropriate basis for triggering allocation of use than the characteristics of services provided.

The final directives enhance allocation of unused service days and quotas for both temporary use and priority use permit holders. See sections

41.53k and 41.53n in the final directives.

*Comments Concerning Planning.* One respondent stated that the proposed directives failed to create a consistent planning process linking outfitting needs assessments, resource capacity analysis, and use allocation as well as linking all of these to existing standards and guidelines in the applicable land management plan, other relevant planning documents, and Forest Service policy. Another respondent stated that the final directives should require development of outfitting and guiding plans.

*Response.* It is not the purpose of these directives to address land management planning. The Forest Service has separate directives governing this topic (see FSM 1921). The basic unit of Forest Service planning is the land management plan. To the extent appropriate, land management plans may address outfitting and guiding use. When required by statute, a plan is prepared for a congressionally designated area and is incorporated into the applicable land management plan. Wilderness management direction is prepared as a part of the land management planning process as required by 36 CFR part 219 and FSM 1922. Planning is also conducted in compliance with the National Environmental Policy Act (NEPA) (36 CFR part 220, FSM 1950, and FSH 1909.15). The applicable land management plan is implemented through development of schedules for projects and activities designed to meet management standards and guidelines established for the wilderness area. Additionally, the agency has directives governing wilderness planning (FSM 2322) and river recreation management (FSM 2354). These directives should be read in conjunction with the directives on outfitting and guiding administration. The Forest Service believes that existing planning tools are sufficient and that outfitting and guiding land use plans are unnecessary.

*Comments Concerning Public Involvement.* One respondent was concerned that the proposed directives did not require public involvement for an outfitting and guiding needs assessment, resource capacity analysis, and use allocation or enumerate how the agency would otherwise comply with NEPA during these processes. Various respondents noted that decisions to authorize outfitting and guiding should be accompanied by environmental analysis that is conducted at the appropriate scale (regional, forest, district, or watershed level); that includes a needs assessment,

resource capacity analysis, and a reasonable range of alternatives for allocation of use to make the allocation process transparent; and that allows for public involvement, efficient analysis of cumulative impacts, development of more effective mitigation, and regional assessment of educational outfitting and guiding needs and providers. One respondent also noted that the Forest Service needs to address analysis of cumulative impacts at the appropriate temporal and spatial scales and compliance with other relevant statutes, including the Endangered Species Act and National Historic Preservation Act.

Several respondents were concerned about NEPA compliance associated with issuance of temporary use permits and noted that the proposed directives are silent on this issue. One respondent noted that environmental analysis associated with many recreation-related activities remains incomplete because it is time-consuming and expensive. One respondent believed that issuance of temporary use permits under the proposed directives without environmental analysis would simplify administration of the outfitting and guiding program and reduce agency costs. One respondent noted that a perception exists that NEPA and cost recovery requirements do not apply to temporary use permits.

*Response.* There appears to be confusion among respondents regarding the trigger for environmental analysis and the relationship among a needs assessment, a capacity analysis, and an environmental analysis. The Forest Service has separate directives governing environmental policy and procedures (see FSH 1909.15). These directives govern environmental analysis, scoping, and public participation and should be read in conjunction with these directives. Comments regarding public involvement and environmental analysis related to outfitting and guiding permits are therefore beyond the scope of these directives.

Needs assessments and resource capacity analyses are not agency decisions subject to environmental analysis. Rather, they are analytical tools that inform an agency decision. For example, a needs assessment could support a decision to issue a permit. A needs assessment also could support a decision to amend a land management plan. Additionally, a needs assessment and resource capacity analysis are typically used to develop a river management plan. The outfitting and guiding directives are intentionally flexible with regard to selection of the geographical area to be analyzed for

efficient outfitting and guiding administration because the authorized officer is in the best position to determine the appropriate scope of analysis.

Decisions that are made to authorize use pursuant to a needs assessment and resource capacity analysis, including issuance of permits, amendments of land management plans, and allocations of use in plans, are subject to NEPA. The Forest Service complies with applicable law and policy, including NEPA, in making these decisions.

*Comments Concerning Resource Capacity Analysis.* One respondent supported the direction to base allocations of use on accurate resource capacity analyses and needs assessments. One respondent recommended revising section 41.53e, paragraph 1b, to provide for review of previous needs assessments "with new public input" when reauthorizing use. One respondent stated that where a needs assessment identifies over-capacity, no new outfitting and guiding should be considered. One respondent recommended that section 41.53e be revised to require completion of a resource capacity analysis, followed by a needs assessment, and use of the information gained from these analyses in making decisions on allocation of use. One respondent believed that this section implied that all future wilderness, wild and scenic river, and land management plans would include allocations for priority and temporary use and that these allocations should be based on capacity studies and needs assessments.

One respondent believed that the directives should require development and implementation of allocation plans before, rather than after, resource capacity has been reached. This respondent wondered who would determine when information regarding resource capacity is reliable and when resource capacity has been reached. One respondent recommended revising section 41.53e, paragraph 2, to require that a resource capacity analysis be performed to assess the amount of use and types of activities that may be conducted without detrimental environmental or social impacts prior to establishing any quotas or allocating service days in permits.

*Response.* The Forest Service agrees that when complexity warrants, such as when multiple proposals are submitted for limited resources or when coordinated review of proposals is otherwise required, allocations of use should be supported by a resource capacity analysis and needs assessment.

However, a resource capacity analysis and needs assessment are not necessary for simple situations. Resource capacity analyses and needs assessments are costly, and decisions to revisit them need to be efficient.

If a resource capacity analysis identifies over-capacity, no additional use will be authorized, and existing use may be reduced. Either a resource capacity analysis or a needs assessment may eliminate a proposal from further analysis. The authorized officer has the discretion to determine which analysis to conduct first for management efficiency.

The purpose of a resource capacity analysis is to quantify the amount and type of activities that can be accommodated in a geographical area. When multiple entities want to use the same area or when multiple activities are proposed in the same area, it is necessary to evaluate the variety of uses proposed and to determine which ones to accommodate. For example, 15 entities may submit proposals when there is capacity for only 5 entities, in which case, applicants will be selected competitively (for priority use) or by lottery (for temporary use). As stated above, resource capacity analyses are not subject to environmental analysis.

The agency has modified section 41.53e, paragraph 2, to clarify that when monitoring indicates that impacts associated with use may exceed desired conditions, a resource capacity analysis should be conducted.

*Comments Concerning Needs Assessments Generally.* One respondent stated that needs assessments should be timely, based on sound science, and involve public scoping. One respondent encouraged the agency to assess public demand based on accurate visitor information and prior to assessing the need for commercial services. Another respondent stated that the allocation of service days to a large extent is arbitrary because it is based on a needs assessment that might not have a scientific basis and that service days may be increased when there is no need for additional services. One respondent believed that visitor preference surveys should not be the only means to determine use allocations because these surveys fail to measure the preferences of future visitors or past visitors who have been displaced from an area due to use trends. Another respondent wondered how the agency would acquire data on use by public and institutional groups that are not currently authorized to operate for purposes of performing accurate needs assessments.

Several respondents stated that the Forest Service should confer with or defer to states when issuing or limiting permits involving fishing and hunting. One respondent believed that the proposed directives would weaken the role a needs assessment plays in determining the appropriateness of issuing outfitting and guiding permits for hunting.

Another respondent proposed revising section 41.53e, paragraph 3, to read: "Determine the allocation of use between outfitted and guided visitors and self-outfitted, non-guided visitors," and striking the last sentence regarding allocation of temporary use. One respondent stated that temporary use pools should not be formed by decreasing the allocation of use to the public or by increasing allocations of use, but rather by employing unused commercial allocations. Another respondent believed that educational outfitters and guides need to be given preference in allocations of use so that they can provide essential safety, land ethics, and educational services the Forest Service cannot provide. One respondent underscored the importance of treating all users equitably when making choices about the levels of use in a needs assessment.

Yet another respondent suggested that no change be made to any priority use allocations until a resource capacity analysis has been completed. One respondent recommended that a resource capacity analysis be conducted before renewal of priority use permits.

*Response.* The purpose of a needs assessment in the context of commercial outfitting and guiding is to evaluate the need for a public service. The public may have a need for outfitting and guiding services (e.g., guidance, skills, or equipment necessary to access certain amenities or conduct certain recreational activities) or the agency may have a need for these services (e.g., to reduce incidents that involve search and rescue or to promote leave no trace ethics). If there is no need for these services, an outfitting and guiding proposal will not be accepted.

The agency agrees that needs assessments should be timely and based on sound information. The Forest Service has two scientifically based methods for surveying public recreation needs: National Visitor Use Monitoring, which involves systematically interviewing clients on site for each national forest and national grassland, and the National Survey on Recreation and the Environment, which involves interviewing the general public by telephone. In addition to these resources, local managers can rely on

their experience regarding the types of requests they receive for recreational use, public comments, and field observation of recreational use.

The Forest Service coordinates with state fish and wildlife agencies when evaluating the need for outfitting and guiding. The states' projected animal harvest levels are a key component of a needs assessment. The agency does not believe that these final directives will weaken the role of a needs assessment in determining the appropriateness of authorizing outfitting and guiding for hunting. Rather, the agency believes these directives will enhance consistency in the use of needs assessments.

The agency knows from discussions with youth groups, camps, and universities which use or would like to use NFS lands that access to outfitting and guiding permits could be improved by creating a sustainable reserve of use for short-term temporary permits. One of the objectives of preparing these directives was to simplify the process for issuing temporary use permits so as to increase public access to NFS lands and outfitting and guiding opportunities. The agency believes that the final directives strike a balance between supporting current and future outfitters and guides and establishing a process that will improve public access to recreational opportunities and public service. Sections 41.53k and 41.53n in the final directives address formation and operation of temporary and priority use pools. These pools will be formed from unemployed use. The appropriate distribution of priority use, temporary use, and unguided use will be determined on a site-specific basis using processes outlined in these and existing directives. The agency does not believe that it is appropriate to establish preferences for allocation of use based on the characteristics of the services provided.

A decision to adjust allocation of use in or to renew a priority use permit is separate from a decision to authorize use. The allocation of use in a priority use permit is a privilege that can be lost through non-use. Under certain conditions, the agency may shift unemployed use to another outfitter. See section 41.53m. Priority use permits are renewable, provided that certain conditions are met. See section 41.53l.

*Comments Concerning Needs Assessments and Wilderness Areas.* Several respondents advised that when conducting a needs assessment for outfitting and guiding in a wilderness area, the agency should assess whether these activities are necessary and proper for realizing the recreational or other

wilderness purposes of the area and the extent to which the activities may or may not be authorized consistent with maintaining the wilderness character of the area. These respondents recommended that the agency evaluate the spatial and temporal scope of commercial services to be authorized and document the wilderness purpose achieved by those services.

Another respondent proposed revising the directives to state that outfitting and guiding are nonconforming uses in wilderness areas that should not impair their wilderness character. One respondent objected to authorization of commercial use in all congressionally designated areas. Another respondent believed that the proposed directives were inconsistent with the intent of the Wilderness Act with regard to allocation of use to outfitters and guides in wilderness areas.

Another respondent believed that needs assessments for wilderness areas must balance guided activities, such as hunting and equestrian trips, with unguided activities, such as backpacking and hiking. Another respondent believed that the increase in motorized use has caused more conflicts with quiet activities like backpacking and hiking, and that therefore more service days in wilderness areas are required. Yet another respondent stated that the mission of youth and university-based programs is aligned with wilderness areas and that these programs need more service days in wilderness areas.

*Response.* Before commercial activities, including outfitting and guiding, are authorized in a wilderness area, a needs assessment must be completed that addresses the extent to which the activities are necessary for realizing the recreational or other wilderness purposes of the area. An environmental analysis, possibly including a capacity analysis, must also be completed to analyze the effects of the proposed activities on the wilderness character of the area. Both of these requirements are addressed in the final directives in sections 41.53e, paragraph 1a, and 41.53h, paragraph 3. The Wilderness Act and agency wilderness policy require that wilderness character be preserved.

The Forest Service disagrees that outfitting and guiding is a nonconforming use of wilderness areas. The Wilderness Act specifically allows for commercial services to be performed in wilderness areas to the extent they are necessary and proper for realizing the recreational or other wilderness purposes of the areas.

The appropriate distribution of priority use, temporary use, and unguided use in wilderness areas will be determined on a site-specific basis using processes outlined in these and existing directives. The Forest Service does not believe that more service days in wilderness areas are required because of a growth in motorized recreational use. The amount of service days allotted in wilderness areas will be based on the need to provide an outfitted and guided experience in wilderness areas, while preserving their wilderness character.

The Forest Service believes that the mission of many for-profit as well as non-profit outfitters and guides is aligned with wilderness areas and that all these operators can provide the public with a successful wilderness experience. Therefore, the agency does not believe that youth and university-based programs need more service days in wilderness areas based on the mission of these programs.

*Comments Concerning Needs Assessments and Quotas.* A respondent recommended that quotas be applied equally to all recreational uses and that outfitters and guides not be permitted to have larger group sizes. Another respondent stated that allocation of trailhead entries in a wilderness management plan is more important than allocation of service days.

*Response.* How much use to allocate to various recreational users and outfitters and guides is determined by a needs assessment. Distribution of an equal amount to all may not be the best method of serving the public. Under these directives, the authorized officer has discretion to determine whether to manage use by service days or quotas. A limit on trailhead entries is a quota, which, like service days, is a way of measuring use.

#### 41.53f—When Permits Are Required

*Comments.* One respondent recommended changing the terminology in section 41.53f, paragraph 1, from “priority use” to “commercial use.”

Another respondent suggested that the final directives provide clear and consistent direction to the field on development and issuance of the new temporary use permit.

*Response.* In the final directives, the Forest Service has retained the term “priority use” to describe permits that are issued for a period of up to 10 years to provide commercial public services. Current directives state that (1) Priority use is intended for ongoing operations, (2) priority use permits will be reissued if there is sustained satisfactory performance by the holder, and (3) a comparable permit will be issued to the

purchaser of the assets of a holder of a priority use permit if the purchaser is technically and financially qualified. Since outfitters and guides are familiar with the term “priority use” and its meaning and since the Forest Service is not changing the characteristics of priority use, it is not necessary to change the term.

There will be a standard national form for temporary use permits. Additionally, the Forest Service plans to conduct training on the new directives, including use of the new form.

#### 41.53g—Issuance of New Outfitting and Guiding Permits

*Comment.* One respondent recommended adding language to section 41.53g, paragraphs 2a through 2e, 3, and 4, to allow outfitting and guiding only after the needs for unguided recreation have been met.

*Response.* The agency does not believe that it is appropriate to supplant site-specific needs assessments with a presumption that unguided recreation should take precedence over guided recreation.

*Comments.* One respondent supported limiting use when required for protection of national forest resources. However, this respondent requested additional information about competitive issuance of permits and was concerned about the administrative and financial burden, particularly for small outfitting and guiding operations, of responding to a prospectus.

Another respondent was concerned about migration toward competitive issuance of priority use permits because of the lack of standard procedures for making selections. One respondent believed that the agency should clarify policy on competitive issuance of permits. Other respondents were concerned about how the agency makes selections in a competitive process when applicants are similarly qualified. These respondents supported the use of performance-related criteria in selection decisions.

Some respondents observed that the return to the Federal government should not be a selection criterion, and others were concerned that financial capability would become the tie-breaking factor. Another respondent recommended consideration of past experience, knowledge of the area, financial capability, economic viability of existing holders, performance record, return to the Federal government, and other factors in selecting the most qualified applicant. One respondent recommended adding the consideration of interpretive skills, educational skills, and performance record, including use

of leave no trace techniques, to the list of evaluation criteria.

One respondent noted that since institutional outfitters and guides do not earn as much revenue as for-profit outfitters and guides, institutional outfitters and guides are at a disadvantage in a competitive process, which requires submission of a proposed land use fee based on a percentage of revenues.

*Response.* It has been a long-standing policy of the Forest Service to offer new business opportunities competitively when there are multiple interested parties and not all of them can be accommodated (FSM 2712.1). That policy is now codified at 36 CFR 251.58(c)(3)(ii). FSM 2712.1, paragraph 3, lists the following evaluation criteria for applications submitted in response to a prospectus: Kind and quality of services proposed in terms of meeting public need; the applicant’s experience in this or related fields and the applicant’s qualifications to fully satisfy the public need for service; verification of financial resources; and return to the government. These directives supersede paragraph 3 of FSM 2712.1 and include the following as evaluation criteria for selecting among applicants for an outfitting and guiding permit: the applicant’s experience, knowledge of the area to be authorized, financial capability, performance record as an outfitter or guide, and other pertinent factors. To address the concern regarding the competitive disadvantage of institutional outfitters and guides, the agency has revised section 41.53g, paragraph 3a, to clarify that return to the government is not a selection criterion for outfitting and guiding permits at this time.

When a prospectus is being prepared, the authorized officer has the discretion to determine the type of services desired and may make the provision of those services a requirement for applicants. For example, the prospectus may require interpretation, education, or instruction of leave no trace ethics.

#### 41.53h—Applications for Outfitting and Guiding Permits

*Comments.* One respondent asked that the directives include a description of an applicant’s qualifications for both priority and temporary use. Another asked that a description of an applicant’s qualifications be included in the application form. Additionally, some respondents suggested that qualifications for first aid and emergency evacuation procedures for backcountry be described in the application form.



One respondent noted that applicants should be required to state and document their experience in providing services. One respondent suggested enumerating what an applicant must submit.

One respondent recommended deleting the phrase "proposed number of service days or quotas" from section 41.53h, paragraph 2. Another respondent believed that it was not appropriate to let applicants for outfitting and guiding permits identify the service days or quotas they need without considering the need of the unguided public. One respondent suggested that schools complete one application each year for uses they conduct in multiple forests.

*Response.* Special use regulations at 36 CFR 251.54(d) and Forest Service directives at FSH 2709.11, section 12.31, address the content of proposals and the information required from a proponent or applicant to determine technical and financial qualifications. These regulations and directives should be read in conjunction with these final directives. One of these requirements is a project description, which for outfitting and guiding must include the amount of use an applicant proposes to conduct. Authorized officers need the discretion to determine specific qualifications and knowledge appropriate or necessary for a particular operation in a particular location. Therefore, it would not be appropriate to predetermine those qualifications.

The Washington Office and Regional Offices of the Forest Service are not staffed to allow for submission of a single proposal and application for outfitters and guides who propose to conduct operations on multiple forests. In addition, since the supporting environmental analysis for outfitting and guiding applications must be site-specific, it does not make sense to consolidate proposals and applications for outfitting and guiding.

#### 41.53i—Requirements for Temporary and Priority Use Permits

*Comments.* Many respondents proposed that there be no assigned sites set aside specifically for outfitters and guides. These respondents believed that assigning sites would conflict with unguided use of Federal lands and that it is inappropriate to set aside assigned sites for outfitters and guides, since their services are not available to the general public free of charge.

*Response.* Assignment of sites is a management tool available to the authorized officer. These directives describe how to address assignment of sites in a permit; these directives do not

require or effect assignment of sites. Assignment of sites is a site-specific decision. Current Forest Service directives already provide for assignment of sites to outfitters and guides (*see* FSH 2709.11, sec. 37.05 and 37.21h). The topic is included in section 41.53i for purposes of administrative efficiency.

*Comments.* One respondent objected to the requirement in section 41.53i, paragraph 4, to submit a report on actual use within 30 days of the close of the operating season on the grounds that it is unnecessary and contrary to local practice. Another respondent suggested revising section 41.53i, paragraph 4, to provide for submission of the report at the beginning of each operating season or when needed.

*Response.* The requirement to report actual use within 30 days of the end of the operating season is necessary for timely reconciliation of land use fees and was not proposed for revision.

#### 41.53i, Paragraph 5—Contracts for Ancillary Services and Equipment

*Comments.* One respondent supported section 41.53i, paragraph 5, which authorizes outfitters and guides to contract for ancillary services. Another respondent agreed that permit holders should be responsible for the actions of their subcontractors. This respondent also believed that the directives should recognize holders' use of volunteers, as well as employees.

Another respondent requested clarification as to which services would be deemed ancillary and wondered whether services provided by faculty members who are contractors rather than full-time employees would be considered ancillary. One respondent noted that most Montana fishing outfitters and guides use licensed guides as independent contractors, rather than hiring guides as employees; that to be certified by the Montana Department of Labor and Industry as an independent contractor, contractors must not be under the direct control of the contracting party, as they would be classified as employees; and that unless paragraphs 4 and 5b of section 41.53i are revised, they will prevent Montana outfitters and guides from using independent contractors under their special use permits. Another respondent requested that the directives encompass arrangements that enable holders to provide a range of unique opportunities to the public, such as contracting for the services of a guest speaker or instructor.

Another respondent believed that contracted services should be provided by other permitted outfitters and guides, and that it was not appropriate to cede

management of trips to a holder who has no experience. Another respondent believed that many insurers would not cover the activities of subcontractors and wanted to add language to section 41.53i, paragraph 5b(2), to read: "The contracted guide or outfitter who already holds a permit at the resource has all required state licenses and appropriate Forest Service permits."

One respondent believed that section 41.53i, paragraph 5c, which authorizes contracting for additional services and equipment in emergencies, was too restrictive in requiring those services and equipment to be provided by another permit holder. This respondent was concerned that additional services and equipment might not be available from another holder. One respondent stated that the Forest Service should not dictate to private businesses whom they can employ.

Another respondent believed that the requirement that the contracting holder exercise management authority over day-to-day operations, including guiding services, could void the contracted guide's liability insurance and suggested striking section 41.53i, paragraph 5b(4).

Some respondents questioned the requirement for an insurance policy endorsement for contractors who provide ancillary services and equipment. Another questioned the requirement in section 41.53i, paragraph 5a(3), for a holder to submit a contract for ancillary services at the beginning of the operating season. This respondent noted that the need for ancillary services may not be identified until the last minute. One respondent was concerned that section 41.53i, paragraph 5c, would encourage illegal sublicensing of permits.

*Response.* The Forest Service developed the provisions authorizing contracts for ancillary services and equipment in response to requests from holders, who believe that the existing directives, which do not allow these contracts, are too restrictive. In order for legal requirements to be met, permit holders must remain responsible for all activities authorized by their permit and may not circumvent their responsibility through the use of contractors or volunteers. Everything authorized under an outfitting and guiding permit, including contracts for ancillary services and equipment, must be covered by insurance. For further discussion of insurance, see the response to comments on proposed FSH 2713.1, paragraph g.

These directives do not require the use of contracts for ancillary services and equipment. Rather, they allow the

use of these contracts, subject to certain conditions. The requirement to submit contracts for ancillary services and equipment at the beginning of the operating season is intended to allow sufficient time for review.

The Forest Service does not dictate whom outfitters and guides can employ. The directives give holders the option of utilizing existing holders, whose skills, experience, and insurance coverage are known to the authorized officer, to avoid submission of a contract for ancillary services and equipment at the beginning of the operating season. Additionally, the final directives give holders' contractors the option of procuring a separate insurance policy that covers their services and equipment and that names the United States as an additional insured.

The final directives at FSH 2709.11, section 41.53d, define an ancillary service as "a service that supports use authorized by an outfitting and guiding permit and that is provided by a party other than the holder or the holder's employees or agents." This definition is broad enough to include the services of a guest speaker or instructor.

A faculty member who is hired by a school as a contractor and provides ongoing outfitting and guiding services for the school would not be a contractor for purposes of these directives because outfitting and guiding is the primary use authorized by the permit, rather than an ancillary service that supports the authorized use. Thus, the faculty member must be covered by the holder's insurance. Likewise, licensed guides in Montana who are hired as independent contractors, rather than as employees, to provide ongoing outfitting and guiding services for permit holders are agents of the holder and would be providing the primary service, rather than an ancillary service, under the final directives.

*Comments.* One respondent objected to proposed section 41.53i, paragraph 5a(3), which would authorize priority use permit holders to contract for the services of a specialized guide for people with disabilities or highly technical trips on the grounds that the provision was equivalent to a requirement for specialized certification for guides and therefore burdensome to nonprofit outfitters and guides. Another respondent stated that it was useful to have the flexibility to contract for ancillary services and equipment, thereby significantly lowering specialized capital expenditures.

*Response.* Section 41.53i, paragraph 5a(3), does not require specialized certification for guides. To the contrary, paragraph 5a(3) gives outfitters and guides the flexibility to contract, as

needed, for guides with specialized training or skills.

*Comments.* One respondent commented that the Forest Service should not allow partial transfers of authorized use. Another respondent stated that some outfitters and guides swap service days and that this practice should not be prohibited. Yet another respondent proposed amending section 41.53i, paragraph 6, to allow the Forest Service to approve transfers or reassignments of authorized use to an affiliate of an existing holder. One respondent suggested revising section 41.53i, paragraph 6, to authorize transfers or reassignments of authorized use in connection with a change of control of a business entity that holds a permit. One respondent suggested reinforcing the language that precludes transfer of a permit. One respondent was concerned that section 41.53i, paragraph 5c, could allow hunting guides to increase staff and operations without oversight and could result in concentration of hunters.

*Response.* Long-standing Forest Service policy has reserved the authority to allocate use to the authorized officer. Allowing holders to transfer or reassign use would undermine the agency's ability to manage resources and to provide for public safety and liability protection. Permits and allocations of use are not transferable. However, under both the current and revised directives, when there is a change of ownership or control of a holder of a priority use permit, the Forest Service issues a new priority use permit to the purchaser if the purchaser is technically and financially qualified. In addition, utilization of allocations is reviewed, and allocations are adjusted, if appropriate (see FSH 2709.11, 41.53m). Outfitter and guide staffing and operations are addressed in operating plans, which are prepared by the holder in consultation with the authorized officer and approved by the authorized officer.

#### 41.53j—Issuance of Temporary Use Permits

The Forest Service received many comments on proposed section 41.53j. Some of these comments resulted in creation of three new sections. For clarity, comments and responses on the following topics have been moved to their corresponding new sections:

- (1) Temporary use pools: section 41.53k, Management of Temporary Use Pools;
- (2) priority use pools: new section 41.53n, Management of Priority Use Pools;

(3) conversion of temporary use permits issued under the 1995 policy to priority use: new section 41.53p, Transitional Priority Use

*Comments Regarding the 100-Day Limit on Service Days for Temporary Use.* Several respondents favored the creation of temporary use pools, but were concerned about the 100-day limit on service days for the pools. These respondents believed that it would be difficult to run more than one program during a season with only 100 service days and suggested a 200-day limit instead. One respondent suggested a 150-day limit, and another recommended a 250-day limit. One respondent observed that there are outfitters and guides who offer special week-long events that have a large number of participants (200 to 3,000) at one time, that this type of event would not qualify for a temporary use permit due to the 100-day limit, and that the outfitters and guides would therefore have to obtain a priority use permit. One respondent suggested that temporary use permits for all four seasons be offered at the beginning of every calendar year. One respondent suggested that additional consideration be given to permit holders interested in off-season use.

*Response.* The Forest Service agrees that the amount of use available for a temporary use permit should be increased and has revised section 41.53j, paragraph 1, in the final directives to provide for up to 200 service days for temporary use permits. The Forest Service does not agree that the number of service days should be increased further to accommodate large groups. Holders who intend to serve large numbers of clients at one time should obtain a priority use permit.

Additionally, section 41.53j, paragraph 2, provides that a holder may obtain one temporary use permit every 180 days. Thus, a temporary use permit holder will be able to operate in more than one season. Applicants wanting a permit in the off-season should have a good chance of getting one because there will be less use in the off-season.

*Comments Concerning Qualifications.* Several respondents believed that the Forest Service would not evaluate the qualifications of applicants for temporary use permits and would not maintain a record of their performance and that failing to do so was not in the public interest and was arbitrary and capricious. One respondent was concerned that proposals to authorize temporary use could conflict with state requirements for licensing outfitters and guides. Another respondent stated that the Forest Service should coordinate

with state licensing agencies regarding an applicant's qualifications and not duplicate state screening processes. One respondent wondered whether it would be possible to get a temporary use permit if an outfitter and guide never had a Forest Service outfitting and guiding permit. One respondent believed that educational outfitters and guides could be at a disadvantage in competing with for-profit outfitters and guides for temporary use permits.

*Response.* All applicants for special use permits must be qualified to conduct the activities that they propose (see the response to comments on section 41.53h regarding applicants' qualifications). If a state requires licensing for outfitters and guides, the Forest Service will require the holder to obtain a state license to be eligible for a Forest Service permit. However, very few states have a licensing requirement for outfitters and guides, and even those that do may require a license only for a few activities, such as hunting. Applicable qualifications are determined at the local level. Proponents and applicants do not have to have had a Forest Service permit; they must merely demonstrate their technical and financial qualifications for a permit. The agency does not elevate for-profit over non-profit status. The agency has revised section 41.53h, paragraph 2, to provide that proponents and applicants must describe their technical and financial qualifications to provide the services that they are proposing.

*Comments Concerning Performance Ratings and Operating Plans.* Several respondents recommended revising section 41.53j, paragraphs 11 and 12, to require annual performance evaluations and operating plans for holders of temporary use permits to encourage acceptable performance. Another respondent believed that conducting performance evaluations for holders of temporary use permits would enhance public safety and resource protection. One respondent recommended establishing performance standards for all permit holders and informing them of the potential for inspection and performance review. One respondent suggested requiring holders to adhere to a set of standards regarding public health and safety, protection of resources, and education of national forest visitors. Several respondents stated that not requiring performance evaluations and operating plans for temporary use permit holders would exempt them from regulatory oversight, which would be unfair to priority use permit holders.

One respondent observed that there is no guidance to field staff on when to require operating plans and that operating plans should be required for higher-risk activities and activities conducted in remote settings. One respondent suggested revising section 41.53j, paragraph 12, to provide that operating plans generally are required for higher-risk activities or activities conducted in remote settings and that operating plans should be required for extensive overnight backcountry use. Another respondent suggested that in lieu of a multi-page operating plan, the Forest Service should require a 1-page worksheet.

*Response.* The Forest Service agrees that temporary use permits should have an operating plan. Accordingly, the agency has revised section 41.53j, paragraph 6, in the final directives to provide that holders of temporary use permits must have an operating plan that addresses public health and safety, emergency procedures, and resource protection. However, the final directives do not require a performance evaluation for holders of temporary use permits. The Forest Service believes that it would be costly and unnecessary to require performance evaluations for temporary use permit holders. However, the agency has added section 41.53j, paragraph 8, to clarify that violations of law, customer complaints, and adverse performance ratings from the Forest Service or other agencies will be considered in evaluating an applicant's technical qualifications.

*Comment.* One respondent recommended revising proposed section 41.53j, paragraph 2, so that the geographic basis would be "per area consistent with" a needs assessment and capacity analysis, rather than "per area specified in" those documents.

*Response.* The Forest Service has revised section 41.53j, paragraph 2, to read "per use area."

#### 41.53j—Management of Temporary Use Pools

*Comments Regarding the Concept of Temporary Use Pools.* Several respondents supported temporary use pools. One respondent believed that they would give the public more choice by allowing institutional groups to provide commercial services, as well as expand services offered in an area.

Several respondents believed that the proposed directives were unclear regarding how temporary use permits would be allocated. These respondents also believed that the proposed directives were vague regarding procedures for establishment of temporary use pools and that temporary

use pools would create administrative burdens for the agency and confusion for applicants. These respondents questioned how long it would take to establish temporary use pools; how use would be distributed from the pools; and what would happen if critical elements of the directives regarding temporary use pools were not implemented. These respondents stated that how fast a temporary use pool is established will depend on the Ranger District's ability to complete analyses and identify priority use permit holders' unused service days and terminated temporary use permits.

One respondent suggested allowing temporary use permit holders to utilize priority use permit holders' unused service days on an annual basis. One respondent was concerned that service days for temporary use pools would be taken from existing priority use permits, at the expense of small commercial outfitters. One respondent believed that extensive authorization of temporary use would undercut the privileges of priority use permit holders.

One respondent noted that it is more financially efficient, less time-consuming, and safer for schools and other organizations to hire a priority use permit holder than to offer their own outfitting and guiding programs and that schools and other organizations buy lower-quality equipment than for-profit outfitters and guides.

One respondent recommended revising section 41.53j, paragraph 7, to provide that the unguided public may obtain for use from a temporary use pool on a first-come, first-served basis through a lottery system or through some other equitable method of allocation. Additionally, this respondent believed that allocations for temporary use pools should come from priority use permit allocations.

*Response.* The Forest Service agrees that temporary use pools will enhance public service and outfitting and guiding opportunities for qualified entities that previously had difficulty obtaining short-term permits. Some administrative units already have needs assessments and capacity analyses completed and will be able to establish these pools promptly. Other units have needs assessments and capacity analyses underway and should be able to implement pools within a year. Other units will have to initiate these tasks and may take a year or two to establish a temporary use pool.

The Forest Service agrees that more direction is needed on management of temporary use pools and has added a new section 41.53k, Management of Temporary Use Pools. Units may

authorize temporary use in accordance with section 41.53j without establishing a temporary use pool. However, a temporary use pool may be necessary in high-demand areas.

Operators of youth camps and university programs have for many years expressed frustration with their limited access to outfitting and guiding permits. These operators are not likely to hire a for-profit outfitter and guide unless they do not have the equipment or staff necessary to conduct a trip. Many university programs are training students to lead outdoor adventures. Operators of these programs are not satisfied that the services offered by for-profit outfitters and guides fit the educational and training objectives of these programs. Improving the access of youth camps and universities to temporary use permits will not detract from the privileges of priority use permit holders.

Issuance of noncommercial recreation permits to individuals and groups is beyond the scope of these directives, which govern outfitting and guiding. For additional discussion regarding unguided recreation, see the response to comments on proposed section 41.53e, Needs Assessments, Resource Capacity Analysis, and Allocation of Use.

*Comments Regarding the Function of Temporary Use Pools.* Several respondents commented on the function of temporary use pools. One respondent wanted priority use permit holders to be able to apply for a temporary use permit from a pool at least 120 days in advance. One respondent believed that holders of priority use permits should be allowed to apply for a temporary use permit 180 days in advance. Many respondents believed that it was not feasible to plan and schedule trips with only 30 days notice. One respondent recommended revising section 41.53j, paragraph 5, to treat all applicants the same. Another respondent wanted all permit holders to be able to apply for a temporary use permit 12 months in advance, so that they could manage their programs. One respondent questioned whether a priority use permit holder authorized to operate on one national forest could apply for a temporary use permit to operate on another national forest 12 months in advance.

One respondent suggested that the Forest Service establish open seasons for applications for each type of permit in each use area. This respondent believed that accepting applications on a first-come, first-served basis would result in competition to obtain permits and would make it more difficult for small outfitters and guides to obtain permits. One respondent suggested

revising proposed section 41.53j, paragraph 9, to provide that priority use service days or quotas not used within the first month of a priority use permit term be reallocated to a pool for access by all recreational use groups. One respondent recommended deleting proposed section 41.53j, paragraphs 5, 6, and 7, on the ground that they would limit access to temporary use permits by priority use permit holders.

*Response.* New section 41.53k, Management of Temporary Use Pools, in the final directives provides for establishment of one or more open seasons, specifies who may apply during an open season, addresses distribution of any use remaining after an open season has closed, and allows the authorized officer to shift service days between temporary and priority use pools based on their utilization. Service days or quotas may be allocated to a temporary use pool based on a resource capacity analysis demonstrating that additional capacity exists; a determination that service days or quotas have been insufficiently used during the first 5 years of a priority use permit; or a determination that service days or quotas may be reallocated when a priority use permit is revoked or not renewed.

Priority use permit holders in the use area are ineligible to apply for use from a temporary use pool during the open season. However, after the open season, priority use permit holders in the use area may apply for use from a temporary use pool, provided that if a priority use pool has been established for the same use area, applications for any remaining service days may be restricted to qualified applicants who do not hold a priority use permit. Priority use permit holders outside the use area may apply for use from a temporary use pool during the open season.

The Forest Service has also added section 41.53n in the final directives. This new section provides for establishment of priority use pools and contains direction on application and operating procedures for the pools, including the timing and number of open seasons.

In the final directives, the Forest Service has replaced the term "administrative unit," which includes a national forest, national grassland, or other comparable unit of the NFS per 36 CFR 212.1, with "use area," which is now defined in section 41.53d as any geographical configuration that allows for efficient management.

#### 41.53l—Issuance of Priority Use Permits

In the proposed directives, this section was numbered as section 41.53k.

*Comments.* One respondent did not object to providing outfitting and guiding opportunities for institutional and youth organizations and observed that many of these entities already hold priority or temporary use permits. One respondent requested that institutional users not be given a free permit and not be able to have their permit reissued to a for-profit business. One respondent did not support a system exclusively for institutional use. Another respondent believed that both non-profit and for-profit entities should be able to provide commercial services.

*Response.* The final directives remove the prohibition against issuing priority use permits to institutional or semi-public organizations. The Forest Service believes that each entity should have the type of permit that best fits its mode of operation. Some of the largest outfitting and guiding operations are run by non-profit entities. They are not eligible for a land use fee waiver when they are operating as a commercial entity.

*Comments.* One respondent supported authorizing priority use for up to 10 years at the discretion of the Forest Service, on the grounds that a longer term supports a positive business environment for organizations committed to long-term programs in specific areas and whose enrollment depends upon significant amounts of advance program planning and consistency.

One respondent disagreed with the agency's recent extension of priority use permit terms from up to 5 years to up to 10 years. Several respondents believed that 5 years is a more appropriate maximum permit term that would give land managers more discretion in properly managing the resource and accomplishing agency objectives and that 10 years is too long a term. One respondent stated that as permit terms are extended, the revocation process needs to be strengthened, simplified, and shortened. One respondent objected to longer terms.

*Response.* The revised maximum term length for priority use permits was published in the **Federal Register** as a proposed directive on August 13, 2004 (69 FR 50160). The final **Federal Register** notice adopting the 10-year permit term was published on April 14, 2005 (70 FR 19727). The agency did not propose changing the maximum term for priority use permits in these directives. The process for revoking permits is governed by the APA and 36 CFR 251.60 and is also beyond the scope of these directives.

*Comments.* One respondent supported a 2-year probationary period, so that an outfitter and guide who does not provide adequate public service, protect resources, or support the agency's objectives will lose the privilege to operate. Another respondent agreed and stated that it is harder to take away an allocation than to issue one. One respondent suggested using the phrase "2-year interim priority" in proposed section 41.53k, paragraph 3. Several respondents suggested an option to extend the permit for 10 rather than 8 years because new holders may need more time to establish their business. One respondent suggested that more explicit direction be provided when a permit is issued upon change of ownership. This respondent wanted clarification that a new permit would be subject to the 2-year probationary period if the purchaser was a new operator.

*Response.* The Forest Service had two objectives in proposing the 2-year plus 8-year term for new operators: To overcome the agency's inertia in converting eligible holders from an annual permit to a priority use permit, and to use the same timeframe (10 years) for evaluating environmental impacts when authorizing the use. The Forest Service disagrees with the notion that a 2-year plus 10-year term should be offered because it would not meet the standard horizon for analyzing the use. The Forest Service does not believe it is necessary to create a new term, such as "interim priority use," to refer to the probationary period. A new holder will simply have priority use for a 2-year probationary period.

*Comments.* One respondent stated that upon termination, priority use permits should be competitively bid by other prospective holders to allow for competition. One respondent wanted to revise proposed section 41.53k, paragraph 10, to provide that priority use permits may be reissued to the original holder, provided that the permits are consistent with the applicable land management plan and there has been satisfactory performance. One respondent believed that priority use permits should be renewed only if the unguided public does not need access. One respondent believed that renewal at the sole discretion of the authorized officer could be a biased decision and proposed striking "at the sole discretion of the authorized officer." This respondent also wanted to strike the citation to the cost recovery regulations at 36 CFR 251.58. One respondent supported retaining proposed section 41.53k, paragraphs 6 through 10, as written.

*Response.* Long-standing agency policy and permit terms provide for reissuance of priority use permits if the holder has satisfactory performance and issuance to the purchaser of ownership of or a controlling interest in the holder's business if the purchaser is technically and financially qualified. The agency has not proposed revising this policy in these terms in these directives.

The Forest Service is retaining the citation to the cost recovery regulations, which are beyond the scope of these directives. Outfitting and guiding applications and permits are exempt from cost recovery, unless they take more than 50 hours to process or monitor.

*Comments.* One respondent believed that priority use permits have monetary value because of their allocation of use and access rights and that the agency should be able to prevent the sale of those rights. One respondent disagreed with the assertion in proposed section 41.53k, paragraph 7b, that a permit is not real property. This respondent believed that this statement was inconsistent with a finding by the Internal Revenue Service (IRS). One respondent stated that he purchased an outfitting and guiding permit at an IRS tax auction and that the Forest Service allowed the auction to take place, thereby acknowledging that outfitting and guiding permits are real property. Several respondents wanted to revise proposed section 41.53k, paragraph 4, to provide appeal rights for performance ratings.

*Response.* Forest Service special use permits are not real property and are not transferable (36 CFR 251.59). They are a license to conduct a business on NFS lands. While an outfitting and guiding business may be sold, an outfitting and guiding permit may not, per current Forest Service directives at FSH 2709.11, section 41.53f, paragraph 4. This provision remains in the final directives at section 41.53l, paragraph 7b. Purchasers of an outfitting and guiding business must apply for and obtain a permit.

#### 41.53m—Allocation of Use for a Priority Use Permit

In the proposed directives, this section was numbered as 41.53l.

*Comments.* Several respondents supported the agency's intent to allocate use efficiently, particularly given that service days can go unused for years, while many potential operators are unable to obtain the allocation that they need. Several respondents supported the requirement to return unused service days, thereby increasing the

availability of service days for reallocation to those who will make use of them. These respondents believed that the proposed directives would potentially open up use in areas that are not available under current management practices and would be helpful to holders who consistently use and pay for allocated use. One respondent supported optimum utilization of service days and redistribution of use when outfitters and guides underperform by some reasonable margin.

One respondent proposed adjusting allocations annually instead of once every 5 years, so that unused service days or quotas could be made available to small local livery and recreational supply businesses that cater to the public. One respondent stated that use should be adjusted annually, instead of every 5 years, to allow unused service days to be made available for use by the unguided public. This respondent recommended dropping proposed section 41.53l, paragraph 2a. This respondent also recommended that use be reallocated on a first-come, first-served basis through a lottery system, a common pool, or some other method that would give access to unguided recreation. Another respondent was concerned that proposed section 41.53l would encourage holders to report more than their actual use and that surplus use would not be made available to the unguided public.

One respondent questioned whether reallocation of use would be based on holders' overall use or on their use in each authorized area or for each authorized activity and recommended that reallocation be based on the highest percentage of use from among the authorized areas or activities during the last 5 years. Several respondents suggested evaluating use over a 10-year rather than a 5-year period, since after a major wildfire or other natural disaster, it takes longer than 5 years to return to previous levels of use. One respondent objected to review of priority use every 5 years. One respondent recommended that the utilization rate be negotiated with priority use permit holders who operate in remote areas. Several respondents suggested that extenuating circumstances, such as a natural disaster, a reduction in consumer confidence, increased placement of group bookings (which are subject to change or cancellation), or a variation due to weather in the length of the operating season, should be taken into account in reviewing priority use. One respondent suggested that extenuating circumstances exempt priority use

permit holders from review and redistribution of allocations of use.

One respondent was concerned that the effort to reallocate unused priority use could create an anti-growth environment and untenable business conditions for priority use permit holders. One respondent was concerned that review of priority use would require additional Forest Service resources.

Several respondents recommended revising proposed section 41.531, paragraph 3, to provide for maintaining, increasing, or decreasing priority use allocations at the time of renewal, provided that any change to the allocations be consistent with the applicable land management plan, applicable project decision, or other appropriate analysis.

Many respondents were concerned that the proposed directives would require a reduction in allocation to priority use permit holders who are in compliance with their permits. One respondent believed that a reduction of service days would cause businesses to close. Several respondents observed that the proposed directives would not provide for returning service days to holders. Several respondents suggested that instead of requiring service days to be taken from priority use permit holders, the directives should allow them to contribute service days to a pool voluntarily without losing them. One respondent suggested that holders who contribute service days to the pool should get them back if they use them for 2 out of 10 years. One respondent observed that the proposed directives would result in a one-way decline in service opportunities for quality, long-term holders.

Many respondents were concerned that priority use permit holders would be required to use all or nearly all of their allocated use once in a 5-year period to avoid a reduction in their allocation. These respondents stated that it is impossible to achieve a 100 percent utilization rate in the tourism industry and that therefore it would be unlikely that holders could recover lost service days. These respondents stated that the tourism industry books at 100 percent to achieve a 75 to 85 percent utilization rate and that average hotel occupancy in the United States is approximately 65 percent of capacity. One respondent noted that to achieve 100 percent of capacity, most businesses in the tourism industry have to overbook in peak periods and that this practice is not allowed by Forest Service directives and land management plans. In addition, these respondents believed that utilization would always be below

100 percent because of fluctuation in the business climate, weather, game populations, snow pack, drought, and wildfires. Several respondents believed that even after adding a 10 percent cushion, allocations would be reduced because of the difficulty of obtaining the required utilization rate. Other respondents cautioned against including shoulder seasons, when there is inconsistent demand, and other periods when the permitted activity is infeasible in the utilization calculation. One respondent recommended that the 100 percent utilization requirement apply only to the peak season.

Several respondents requested that allocations not be reduced unless holders' utilization falls significantly below the average utilization for other holders providing the same services in the same use area during the peak season. These respondents recommended that the utilization rate and the peak season should be established in consultation with holders in each use area. These respondents also recommended that review of priority use be suspended when economic or environmental factors have seriously compromised the ability of holders to attract business.

Several respondents believed that a 70 percent utilization rate should be required to avoid a decrease in allocation of use. One respondent suggested that if permit holders are not able to meet the 70 percent threshold, they should be required to renegotiate the number of approved service days with the Forest Service. Another respondent stated that a 75 percent utilization rate for 1 out of 5 years was achievable. One respondent supported the 10 percent buffer on the utilization rate for large allocations, as the buffer would likely be adequate to account for temporary increases in bookings. This respondent believed that for small allocations, a buffer of 15 to 20 percent would be necessary to accommodate periodic fluctuations. Another respondent suggested a 10 percent buffer in addition to a 70 percent utilization rate.

One respondent observed that if holders have an 80 percent utilization rate, their use should not be cut 10 percent. One respondent believed that the utilization rate should be the highest amount of actual use in the last 5 years plus 20 percent. Another respondent recommended a utilization rate of actual use plus 35 percent.

Several respondents suggested adding 10, 15, or 20 percent to allocations for holders who have a 100 percent utilization rate. One respondent suggested removing the limitation in the

proposed directives that the new allocation not exceed the old one, so as to accommodate growth in public demand. This respondent suggested increasing holders' allocations by 20 percent if there is additional demand and they have a 100 percent utilization rate for 2 or more of the past 5 years. One respondent recommended allowing qualifying holders to remedy the reduction in use by fully utilizing their allocation during a reasonable period.

One respondent suggested that reductions in allocations of use be subject to administrative appeal.

*Response.* The Forest Service agrees that holders should not be allowed to retain service days or quotas they do not need. Additionally, the agency agrees that it is appropriate to provide a margin above actual use in deciding whether to adjust allocations, given the effects of fluctuations in the business climate, weather, game populations, wildfires, and natural disasters. Consequently, the final directives provide that for permits with more than 1,000 service days or the equivalent in quotas, holders can retain their highest use in 1 year during the past 5 years, plus 15 percent of that amount, provided that the total does not exceed the allocation when the permit was issued. For permits with 1,000 service days or less or the equivalent in quotas, holders can retain their highest use in 1 year during the past 5 years, plus 25 percent of that amount, provided that the total does not exceed the allocation when the permit was issued. Smaller entities, which have smaller allocations, need a bigger margin because they do not have the economies of scale available to larger entities.

Original allocations are based on requisite analysis. Any amount of use that a holder proposes to add above the original allocation would be considered a new proposal and would require environmental analysis.

The directives do not preclude overbooking. Holders may not exceed their allocation of use, but overbooking is a management decision. While 100 percent utilization of an allocation may be difficult for some operations, the agency disagrees that 100 percent utilization of an allocation is impossible. Experience shows that many holders fully utilize their allocations.

A reduction in an allocation of use would be appealable under 36 CFR part 251, subpart C.

The Forest Service believes that the customized limitations on and waivers of allocation adjustments suggested by respondents would not be affordable to administer. Additionally, these

proposed revisions would result in inconsistent treatment of similarly situated entities. Therefore the agency is not adopting these proposed revisions.

*Comments.* One respondent suggested provisions to mitigate the effects of the proposed directives on priority use permit holders, including allowing them to apply for a permit amendment to increase their allocation prior to implementation of the final directives; allowing Forest Service officials to approve requests to increase priority use allocations for operators with acceptable ratings, when consistent with the applicable land management plan; and providing for increases in allocations when holders use 100 percent of their allocation.

*Response.* The Forest Service does not believe that there is any need to mitigate effects of the final directives on priority use permit holders. Priority use permit holders may apply for an amendment to their permit at any time. Applications are evaluated in accordance with applicable laws, regulations, directives, and land management plans and requisite analysis. Allocations of use and adjustments to allocations of use are made in accordance with directives and applicable land management plans and requisite analysis. The agency believes that the determination of whether to allocate additional use and how much use to allocate for priority use permit holders should be informed by a needs assessment.

*Comments.* One respondent stated that the requirement to request and obtain approval of non-use in current section 41.53h, paragraph 4, should be retained. Another respondent recommended eliminating the requirement. This respondent stated that the requirement does not result in efficient use of allocations and takes too much time to administer.

*Response.* The Forest Service agrees that requests for and approval of non-use should be eliminated. The process for approval of non-use is costly to administer. In the final directives, the agency has replaced this process with the criteria for adjusting allocations of use.

*Comments.* One respondent suggested revising proposed section 41.53l, paragraph 2, to provide for review of actual use on a monthly basis, taking an average of all months, annually adjusting the allocation of use to the average seasonal use, and shifting all unused service days or quotas to the unguided public. This respondent recommended eliminating proposed section 41.53l, paragraphs a and b, which provided for review of use before renewal, and instead reallocating the

use to a common pool for unguided and guided recreational use or reserving it until a capacity analysis shows that recreational demand of the unguided public has been met.

*Response.* The Forest Service believes that it would be too costly and is not necessary to review use monthly. Long-standing Forest Service policy in current section 41.53f, paragraph 3, addresses renewal of outfitting and guiding permits. In the final directives, this provision is located in section 41.53l, paragraph 4. A needs assessment is conducted to determine how much commercial use is appropriate. Unguided use is not allocated by the Forest Service.

*Comments.* One respondent stated that the value of an outfitting and guiding business is directly tied to the number of service days it is allocated under a permit and that the value of the business diminishes when the agency reduces the number of service days allocated. One respondent stated that when the respondent bought two outfitting and guiding businesses, the banks wanted to know exactly how many service days would be allocated to the businesses to determine cash flow and business value. This respondent noted that outfitters and guides report false numbers to protect their service days and that it is better to pay for unused service days than to lose those days and incur devaluation of their business.

*Response.* An allocation of use is a privilege that may be lost through non-use. Allocations of use are not determinative of past and future earnings; rather, allocations of use are only one aspect of past and future earnings. In addition, under the existing and final directives, an outfitting and guiding permit is not real property, does not convey any interest in real property, and may not be used as collateral for a loan. FSH 2709.11, sec. 41.53f, para. 4a(3) in the current directives and sec. 41.53l, para. 7b, in the final directives.

*Comment.* One respondent suggested that proposed section 41.53l, paragraph 1, recognize that Section 802(2) of the Alaska National Interest Land Conservation Act (ANILCA) establishes a policy of giving preference to subsistence uses over other uses on NFS lands in the State of Alaska.

*Response.* The Alaska Region of the Forest Service has issued a regional supplement to FSH 2090.23, which addresses the provisions of Section 802(2) of ANILCA generally in the context of Forest Service programs in the State of Alaska. Therefore, the Forest Service does not believe that it is necessary to address Section 802(2) of

ANILCA in the national outfitting and guiding directives.

*Comment.* One respondent believed that by offering the same terms and conditions to educational and institutional permit holders as to other types of permit holders, the proposed directives would give thousands of young people easier access to Federal lands. This respondent believed that priority use permits facilitate greater business continuity, consistency, and longer-term business plans for youth organizations.

*Response.* The Forest Service agrees that it is appropriate to offer priority use permits to educational and institutional outfitters and guides and has done so in the final directives.

#### 41.53n—Management of Priority Use Pools

This section is new and was added in response to comments.

*Comments.* Several respondents observed that the proposed directives require drawing from the allocation of priority use permit holders to stock temporary use pools and that there is no way under the proposed directives to recover these lost service days.

Several respondents observed that priority use permit holders need additional service days to expand their businesses and requested additional direction regarding how they could increase their allocation if service days are available other than through the permit renewal process.

Many respondents suggested that pools be established or existing pools be maintained for priority use permit holders and that the final directives establish guidance for priority use pools, rather than assigning all available service days to a temporary use pool. Many respondents recommended that unused service days from priority use permits or service days from revoked or expired priority use permits be assigned to a priority use pool for a variety of purposes, including meeting the short-term needs of priority use permit holders during a season with heavy demand; meeting long-term needs of priority use permit holders by allowing them to expand their businesses; and allowing a permit holder who lost service days after an allocation adjustment to recover. One respondent proposed the use pool for the Bob Marshall Wilderness Area, which is stocked with voluntary, temporary contributions from priority use permit holders, as a model for national priority use pools.

One respondent suggested that unused service days be divided equally between temporary and priority use

pools. One respondent recommended that the agency establish a priority use pool on each administrative unit to allow for flexibility in and growth of holders' businesses.

One respondent observed that river outfitters and guides who have priority use permits also have recurring temporary use and that temporary use permits aid priority use permit holders in handling fluctuations in business. Several respondents observed that state hunting licenses are allocated by lottery and that hunting outfitters risk losing use due to circumstances beyond their control, such as state limitations on licenses for certain hunts. One respondent believed that a pool for outfitted hunts would be useful and that any licensed hunter who decides to contract with an outfitter should be eligible to apply for use from the pool. This respondent also observed that outfitters should not be restricted to specific geographical areas (such as a hunt management unit) because this type of restriction might drive up prices.

Several respondents did not want to lose existing use pools. They stated that existing pools of surplus service days are shared by priority use permit holders. Another respondent observed that existing use pools would be eliminated under the proposed directives unless they are included in a land management plan. Several respondents observed that priority use permit holders currently contribute to pools that they can use and that institutional outfitters and guides have a separate use pool.

Several respondents believed that outfitters and guides would not voluntarily relinquish use if it would be permanently lost.

One respondent recommended allowing priority use permit holders to apply for use from a temporary use pool more than 30 days in advance.

*Response.* The Forest Service agrees that the management of priority use in some situations would benefit from establishment of priority use pools and accordingly has added section 41.53n, Management of Priority Use Pools, in the final directives. Under this section, the authorized officer may establish a priority use pool when it would benefit management of outfitting and guiding. When a priority use pool is established, it will be stocked by allocating service days based on a resource capacity analysis demonstrating that additional capacity exists; a determination that service days or quotas have not been used during the first 5 years of a priority use permit; or a determination that service days or quotas may be reallocated when a priority use permit

is revoked or not renewed. The authorized officer may establish application and operating procedures for the pool, such as creation of an open season for short-term allocations. Additionally, this new section provides that once short-term needs have been met and when supported by a needs assessment and capacity analysis, the authorized officer may increase allocations for priority use permit holders or issue new priority use permits. Furthermore, this new section provides that the authorized officer may shift use between temporary and priority use pools based on their utilization.

The Forest Service does not believe that the amount of use assigned to temporary and priority use pools should be predetermined. Rather, the agency believes that this decision should be informed by a needs assessment.

Under section 41.53k of the final directives, priority use permit holders outside the use area may compete for use from a temporary use pool during the open season. Priority use permit holders inside the use area may compete for use from a temporary use pool after the end of the open season, provided that if a priority use pool has been established for the same use area, applications for any remaining temporary service days may be restricted to qualified applicants who do not hold a priority use permit in the use area.

Existing use pools adopted pursuant to formal decisions will remain in effect after issuance of the final directives. However, they must conform to these directives.

While holders may voluntarily contribute use to a pool, voluntary contributions will not change how the agency will review utilization of their allocation.

The Forest Service agrees that pools are a good management tool for meeting the needs of hunting outfitters who have little control over whether their clients will draw a license in a lottery.

#### 41.53o—Reduction of Use Based on New or Changed Decisions

In the proposed directives, this section was numbered as 41.53m.

*Comments.* One respondent supported proposed section 41.53l (section 41.53m in the final directives) as written. One respondent believed that allowing holders to retain the highest amount of actual use in a 5-year period plus 10 percent of that amount would commit the Forest Service to growth, even if it is inappropriate. One respondent suggested revising proposed section 41.53m to change the title and

the text to address both increases and decreases in use. This respondent suggested adding a paragraph stating that use may be increased when capacity analysis or other assessments indicate the availability of increased capacity. Several respondents suggested revising proposed section 41.53m, paragraph 3, to qualify that use would be allocated through issuance of a prospectus only when existing holders have sufficient use to sustain their operations, the amount of new capacity is sufficient to sustain a new permit holder, and there is competitive interest. Additionally, these respondents suggested following the direction in proposed section 41.53l, paragraphs 1 through 4, governing allocation of use for a priority use permit, if appropriate. Yet another respondent proposed that reductions in use based on new or changed decisions be mandatory and stated that when reductions are needed, the agency has the authority to reduce use. One state agency encouraged voluntary reduction of use to address game resource management needs.

*Response.* This section replaces section 41.53i in the current directives and has the same purpose, that is, to establish a procedure for reducing allocations of use when they are no longer consistent with the applicable land management plan or project decisions implementing the plan. The Forest Service agrees that voluntary reductions are desirable. However, if permit holders will not voluntarily reduce use, it may be necessary for the Forest Service to impose proportionate reductions in use or, when the amount of remaining use will not support the number of existing holders, to select among those holders through a competitive process. Increases in use or new capacity are beyond the scope of this section.

#### 41.53p—Transitional Priority Use.

This section is new and was added in response to comments.

*Comments.* One respondent observed that annual renewal of an institutional permit was cumbersome for both the holder and the Forest Service and welcomed the prospect of obtaining a priority use permit. Several respondents suggested creating an interim temporary use permit that could be authorized for consecutive 1-year terms for up to 5 years, that would not be limited in the amount of use that could be assigned to the permit until conversion to priority use status, and that could be reissued if necessary. These respondents suggested that outfitters and guides with satisfactory performance and eligibility for priority use under the current



outfitting and guiding directives routinely qualify for an interim temporary use permit. One respondent recommended modifying proposed section 41.53j, paragraphs 4 and 8, to add the phrase "or interim temporary permit" so that interim temporary permits would not be subject to renewal and that the use they authorized would be returned to a common pool.

Several respondents supported conversion from temporary use under the current directives to priority use. However, these respondents believed that there was no affordable mechanism for the conversion. One respondent recommended that the directives provide a reasonable period for applications for new or modified special use permits. Several respondents observed that needs assessments, resource capacity analyses, and NEPA compliance required for the conversion were costly, that these costs would all be passed on to permit holders through cost recovery, and that these costs would be beyond the financial capacity of many small businesses and organizations. These respondents believed that cost recovery would make conversion from temporary to priority use unaffordable for many temporary use permit holders.

*Response.* The Forest Service agrees that more direction should be provided for conversion from temporary to priority use. Therefore, the agency has added section 41.53p, Transitional Priority Use, to the final directives. This section provides that holders of temporary use under the current directives are eligible for reclassification of their use as transitional priority use when their use is active and recurring; their performance has been satisfactory; they request reclassification within 1 year of the date of publication of these final directives; and they agree to meet the application requirements for conversion to priority use within 5 years of the date of their request.

Section 41.53p, paragraph 5, in the final directives describes how the allocation will be determined for transitional priority use. When transitional priority use permit holders apply for conversion to priority use, their allocation will be based on their highest amount of actual use in 1 year during the past 5 years, plus 25 percent of that amount if their allocation was 1,000 service days or less or 15 percent of that amount if their allocation was for more than 1,000 service days.

Section 41.53p, paragraph 8, in the final directives provides that for those holders who elect conversion in a timely manner, the needs assessment and capacity analysis necessary to

determine whether the priority use may be authorized will be considered programmatic costs and will not be subject to processing fees. Thus, for cost recovery purposes, the agency's costs for converting transitional priority use to priority use will be based on an estimate of the costs associated with reviewing the application and conducting the environmental analysis necessary to issue a priority use permit for the first time. Environmental analysis costs associated with outfitting and guiding permits for two national forests ranged from \$120 to \$8,750. We estimate that these costs will typically be \$1,200. Additionally, these costs could be spread over 5 years if necessary. The typical estimated cost of \$1,200 is comparable to the average cost of \$950 for processing applications for all types of special uses established in a 1995 nationwide study. Adjusted for inflation the typical average cost would be \$1,345. Applicants may spread these costs over 5 years, if necessary. Annual costs for conversion from transitional priority use to priority use are estimated to range from \$24 to \$1,750 per entity. Thus, the average annual cost is \$269 per entity.

#### 41.53q—Administration of Outfitting and Guiding Permits

In the proposed directives, this section was numbered as 41.53n.

*Comments.* One respondent commented that proposed section 41.53n did not address how permits with service days on multiple Ranger Districts would be administered and suggested that they should be administered by one Ranger District only.

Several respondents suggested that the findings from inspections be subject to administrative appeal. One respondent suggested that termination of permits be subject to administrative appeal because termination is based on findings from field inspections that need to be subject to objective review. One respondent suggested that the directives provide at least 90 days between performance evaluations and ratings to allow holders to take corrective action.

One respondent proposed that the directives require all commercial users to abide by the same leave-no-trace standards that apply to noncommercial users. One respondent suggested that proposed section 41.53n, paragraph 4, regarding imposition of an immediate suspension of a permit to protect public health and safety or the environment, reference fish and wildlife specifically as an integral part of the environment.

*Response.* When an outfitting and guiding permit covers use on multiple Ranger Districts, the Forest or Grassland Supervisor has the option of assigning permit administration to the supervisor's office or assigning a lead Ranger District pursuant to FSM 2704.33 and 2704.34.

Findings from inspections are not written decisions of the authorized officer and are therefore not appealable under 36 CFR part 251, subpart C. However, the performance rating based on those findings is a written decision of the authorized officer relating to administration of a permit and is therefore subject to administrative appeal. While revocation of a permit is appealable pursuant to 36 CFR 251.60(a)(2)(ii), termination of a permit is not appealable pursuant to 36 CFR 251.60(a)(2)(iii).

The Forest Service disagrees that the time provided to take corrective action should be fixed at 90 days. The authorized officer needs to have discretion to determine the appropriate amount of time to take corrective action, based on case-specific circumstances.

The authorized officer has discretion to require compliance with leave-no-trace standards. These types of requirements are usually addressed in the operating plan, which covers day-to-day operations.

Consistent with Forest Service regulations at 36 CFR 251.60(f), the final directives state that an immediate suspension may be imposed on all or part of a permit to protect public health and safety or the environment. The agency believes that the term "environment" is broad enough to include fish and wildlife.

#### 41.53r—Administration of Priority Use Permits

In the proposed directives, this section was numbered as 41.53o.

*Comments.* One respondent observed that proposed section 41.53o would give unfettered discretion to authorized officers. One respondent was concerned that the agency would not be able to conduct an annual review of each permit holder's operation, given the agency's limited resources, and did not want the agency to establish a requirement that could not be met. This respondent observed that competitive issuance of a permit and reissuance of a priority use permit depend on the holder's past performance and that it is therefore critical for the agency to complete performance evaluations. One respondent suggested conducting performance evaluations of transitional priority use permit holders and adding professional associations to the list of

consultants in proposed section 41.53o, paragraph 3.

*Response.* The agency believes that authorized officers need discretion in administering priority use permits. Performance reviews are necessary to establish performance ratings, which serve as the basis for determining whether enforcement action is necessary and whether a priority use permit may be reissued.

The agency agrees that performance reviews are important in competitive offerings. Competitive offerings are typically used for priority use permits, which are subject to performance reviews. The agency also agrees that performance reviews are important for transitional priority use permit holders and has therefore included a requirement for performance evaluations for transitional priority use permit holders in section 41.53p, paragraph 4, of the final directives. The Forest Service does not believe that it is necessary to conduct performance evaluations for temporary use permit holders, especially as temporary use will no longer be a stepping stone to priority use. The Forest Service does not believe that it is appropriate to consult professional associations when performance standards are established, as doing so could raise concerns under the Federal Advisory Committee Act.

FSH 2709.11, Section 37.21b, Flat Fee for Temporary Use

*Comments.* A number of respondents commented on the amount of the flat land use fee for temporary use. Several stated that the proposed fee was too high because it did not accurately reflect outfitting and guiding revenue, while others stated that the proposed fee was too low.

One respondent commented that the proposed flat fee for temporary use should not be based on gross revenue.

Some stated that the fee should be waived for non-profit entities, while others were concerned that non-profit entities would be given an unfair advantage if the fee were waived and believed that the standard fee policy should apply to all outfitters and guides. One respondent stated that the Forest Service should not establish a flat fee schedule for temporary use without changing other outfitting and guiding fees because the different fee structure for the same activities would likely result in unfair competition. Some respondents noted that non-profit status does not denote noncommercial status or eligibility for a fee waiver. One respondent stated that priority use outfitters and guides should pay the

same fee as temporary use outfitters and guides.

One respondent suggested increasing the number of service days covered by the flat fee.

*Response.* The Forest Service has several objectives in establishing a flat land use fee for temporary use permits. First, the land use fees for these permits need to be sufficient to cover the cost of administering them. To meet that objective, the agency needs to reduce the administrative cost of calculating the fees. Applications for these permits will typically be exempt from cost recovery because they will involve 50 hours or less to process. However, the agency estimates that it will cost from \$236 to \$512 to screen a temporary use proposal and to issue and administer a temporary use permit under the final directives. Under the final directives, the agency is likely to collect less in fees than it costs to issue permits with up to 100 service days and to collect more than it costs to issue permits with up to 200 service days.

Second, the temporary use permit system is intended to increase access to NFS lands; fees for those permits should not be higher than necessary so as to encourage participation in the program. Like land use fees for priority use permits, the flat fee schedule is based on 3 percent of gross revenue. The flat fee of \$150 for up to 50 service days was determined by multiplying 50 service days by \$100, which is a typical service day charge, and multiplying the product by 3 percent (i.e.,  $50 \times \$100 = \$5,000$ ;  $\$5,000 \times .03 = \$150$ ). Holders of a temporary use permit will pay a lower fee than under the current directives if their service day charge exceeds \$100 or a higher fee if their service day charge is less than \$100.

In most contexts, gross revenue is an appropriate basis for calculating the value of special use privileges. Generally, the gross revenue of a business conducted on NFS lands is an accurate reflection of the value of the business's use of those lands, regardless of whether the business involves improvements on NFS lands. Gross revenues derived from use or occupancy of NFS lands are an accurate indicator of the value of that use or occupancy because generation of the income depends on use of NFS lands; without them, the business would not exist. This conclusion is supported by the 1996 Government Accountability Office (GAO) report, "Fees for Recreation Special-Use Permits Do Not Reflect Fair Market Value," which compares land use fees for outfitting and guiding based on a percentage of gross revenue that are charged by the Forest Service with land

use fees for outfitting and guiding based on a percentage of gross revenue that are charged by the State of Idaho (GAO Report, RCED-97-16, at 7 (Sept. 1996)).

Third, the flat fee should be based on the market value of the authorized use. Consequently, the Forest Service does not believe that fees for non-profit entities should be waived. The outfitting and guiding program serves both for-profit and non-profit entities. Non-profit outfitters and guides are providing commercial services (36 CFR 251.51). Some of the largest outfitters and guides operating on NFS lands are non-profit entities. Waving fees for non-profit entities would give them an unfair advantage.

*Comment.* One respondent stated that the agency must clarify FSH 2709.11, section 37.21c, paragraph 2, Fees for Commercial Use for Non-Profit Organizations, and section 37.21k, Fees for Commercial Use for Educational Institutions.

*Response.* FSH 2709.11, sections 37.21c and 37.21k, were not proposed for revision and are beyond the scope of these directives.

*Comment.* One respondent stated that the proposed directives appear to conflict with the flat fee policy for outfitting and guiding land use fees being developed in the Alaska Region, since under the proposed directives, outfitters and guides in the Alaska Region will pay fees for temporary use based on a percentage of their gross revenues. This respondent wondered whether the national directives or the regional directives would apply to temporary use in the Alaska Region.

*Response.* Land use fees for outfitting and guiding permits in the Alaska Region will be determined by the Alaska Region's flat fee policy.

FSM 2713.1—Liability and Insurance

*Comments.* Some respondents commented that the proposed insurance standards were reasonable and were industry standards.

A number of outfitters and guides were concerned about the Forest Service's proposed classification of levels of risk. These respondents stated that the definitions of low, medium, and high risk were arbitrary, confusing, and untenable and that these classifications would unfairly penalize quality operators and unnecessarily limit public access to activities deemed to be higher risk. These respondents believed that risk should be determined by a holder's historical safety record, current risk management plan, and level of training. Some respondents were concerned that their outfitting and guiding activities might be characterized as high risk by

the agency. Some respondents were concerned that the Forest Service would impose unreasonable liability insurance requirements and thus increase the cost of insurance premiums. Some respondents believed that Forest Service personnel do not have the expertise to set insurance limits and that minimum liability insurance levels should be set by the market for the industry involved, the degree of risk assessed by an insurance carrier, and the amount of exposure for the holder's business. One respondent stated that hunting outfitters should not be required to carry more than \$500,000 in insurance coverage.

Some respondents stated that allowing Regional Foresters and Forest Supervisors to increase coverage amounts could result in too much variation among administrative units. One respondent suggested that the directives state that liability limits may be adjusted based on the availability of coverage in the insurance market and the reasonableness of rates.

One respondent objected to dropping the requirement to provide proof of liability insurance for holders of temporary use permits, another respondent believed that insurance requirements for temporary use permits were unclear, and another respondent was concerned that temporary use permits might be held to a lower standard than priority use permits with respect to insurance.

Several respondents believed that the requirement for an endorsement for contracted services and equipment was unworkable and unaffordable and suggested that contractors obtain their own insurance coverage and certificate of insurance.

Some respondents stated that it is unclear why the agency requires a copy of an insurance policy and that a certificate of insurance should be sufficient. Some respondents stated that other large permit holders, besides the Boy Scouts of America should be able to file a single set of insurance papers with the Forest Service's National Insurance Center to lower administrative costs for the agency and to reduce the administrative burden for the field staff.

One respondent recommended requiring an occurrence policy, which covers all claims that arise while the policy is in effect, regardless of whether the claims are reported during that period, as that type of policy would provide better protection for the agency, outfitters and guides, and the guided public.

One respondent recommended clarifying that the list of activities with inherent risk is not exhaustive by stating

"activities, such as but not limited to \* \* \* swimming, boating, skiing \* \* \*." One respondent recommended revising the standard outfitting and guiding permit form, form FS-2700-4i, to reflect the inherent risk recognized in FSM 2713.1, paragraphs 1a, b, and c, because the language in clause IV.G of the permit subjects holders to strict liability.

Some respondents believed that it was appropriate for the Forest Service to be named as an additional insured and to be indemnified as required by permits. One respondent did not believe that permit holders should be required to indemnify the United States for its own gross negligence or willful misconduct. Several state universities stated that they could not agree to the indemnification requirement if it exceeds state tort liability limits.

One respondent stated that it is not feasible for holders to provide a safe operation, as required by the directives.

*Response.* The Forest Service has modified FSM 2713.1, paragraph 2d, by removing the level of risk chart and replacing it with an exhibit showing minimum coverage amounts for liability insurance by type of special use. Many concessionaires already meet these requirements, which are consistent with industry standards and which are already required in many regions of the Forest Service.

Under the final directives, as under the current directives, temporary use permit holders will be treated the same as priority use permit holders for purposes of insurance requirements.

The final directives give holders' contractors the option of procuring a separate insurance policy that covers their services and equipment and that names the United States as an additional insured.

The remaining comments on this section are beyond the scope of these directives, i.e., address provisions that were not proposed for revision. Regardless, the Forest Service believes it is appropriate for Regional Foresters to have discretion to increase minimum requirements for insurance coverage based on the market for activities conducted in their region.

The agency needs a copy of concessionaires' insurance policies to verify all aspects of coverage. Unlike other concessionaires, the Boy Scouts of America has a single set of insurance policies that covers its operations world-wide and therefore needs to file only one set of insurance papers. If other entities have a single insurance policy that covers multiple operations, they may submit the same policy for those operations.

The agency agrees that occurrence policies are preferable to claims-made policies. While claims-made policies are allowed, they may require additional endorsements, for example, providing for a 2-year extension for filing claims, to achieve sufficiency.

The text of FSM 2713.1 makes it clear that the list of inherent risks is illustrative, rather than exhaustive. The agency does not believe that form FS-2700-4i needs to be modified with regard to inherent risks, which are more appropriately addressed in an assumption of risk form provided by outfitters and guides to their clients. In addition, form FS-2700-4i does not impose strict liability in tort, i.e., liability without regard to negligence.

The agency agrees that it is appropriate to name the United States as an additional insured on concessionaires' policies and to require indemnification of the United States under special use permits. These requirements minimize the liability of the United States for permit holders' acts and omissions on NFS lands and for third-party claims associated with permit holders' use and occupancy of NFS lands. The Forest Service assumes responsibility for its own acts and omissions to the extent authorized by law. The Forest Service believes that states and state agencies can indemnify the United States under applicable law. Where states maintain that they cannot indemnify the United States beyond state liability limits, the Forest Service will agree to accept unconditional indemnification up to the state liability limits, supplemented by self-insurance or procured insurance that is sufficient to cover the assessed risk of the states' use and occupancy of NFS lands.

A key component of the Forest Service's mission is to address public health and safety on NFS lands. Therefore, the agency believes that it is appropriate to require concessionaires to operate safely on NFS lands.

#### *Response to Comments on the Regulatory Certifications in the Proposed Directives*

##### Environmental Impact

*Comments.* Several respondents believed that these directives had the potential for environmental impact, that the Forest Service should prepare an environmental assessment (EA) or environmental impact statement (EIS) prior to implementing the directives, and that failure to do so would violate NEPA and its implementing regulations.

*Response.* The Forest Service disagrees that issuance of these directives requires documentation of

environmental analysis in an EA or EIS. Pursuant to NEPA's implementing regulations, the Forest Service promulgated a series of categorical exclusions (CEs) from documentation in an EA or EIS, which are set forth in FSH 1909.15, section 31.12. The specific CE relied upon by the Forest Service in publishing both the proposed and final directives is "rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions." Publication of the proposed and final directives falls squarely within this CE because the directives establish national policy, procedures, and direction for administration of the Forest Service's outfitting and guiding program. However, issuance of a permit under these directives may trigger the need for documentation of environmental analysis under NEPA on a case-by-case basis.

#### Regulatory Impact

*Comments.* One respondent stated that the agency did not conduct a Regulatory Flexibility Act analysis on the proposed directives. Another respondent stated that the proposed directives would negatively affect small businesses. Another stated that they would diminish opportunities for a number of small businesses and organizations. Another commented that the proposed directives would have a disastrous effect on rural economies. Another respondent stated that the proposed directives would be detrimental to the value and viability of existing permits.

One respondent stated that those outfitters currently operating all or a substantial portion of their business under temporary use permits would have their use automatically and immediately cut because existing temporary use permits would be invalidated and because temporary use would be limited to 100 service days, an amount that is less than what is currently available. One respondent stated that reduction of service days would cause businesses to close.

*Response.* There are three types of costs potentially incurred by small entities as a result of implementation of the final directives: (1) The cost of environmental analysis associated with the conversion from transitional priority use to priority use; (2) an increase in land use fees for temporary use permits; and (3) an increase in the cost of liability insurance. Based on the threshold Regulatory Flexibility Act analysis conducted by the agency, the agency has determined that the final directives will not have a significant

effect on a substantial number of small entities.

With proration of the additional cost associated with conversion from transitional priority use to priority use, no transitional priority use permit holders will experience additional costs exceeding 5 percent of their projected annual gross revenue. Only 1.7 percent of all outfitting and guiding permit holders may experience additional costs equal to 5 percent of their projected annual gross revenue. Only 1.8 percent of all outfitting and guiding permit holders may experience additional costs exceeding 1 percent of their projected annual gross revenue, and less than 3.5 percent of all outfitting and guiding permit holders may experience additional costs of less than 1 percent of their projected annual gross revenue. Moreover, applications for approximately 70 percent of holders likely to be eligible for conversion from transitional priority use to priority use are likely to be exempt from processing fees. Finally, holders that are not exempt from processing fees may request a reduction of processing fees per 36 CFR 251.58(c)(1)(ii)(A).

The current minimum land use fee for an outfitting and guiding permit is \$95. The new land use fee for temporary use permits will be \$150 for up to 50 service days or the equivalent in quotas. The new land use fee represents an increase in \$55 for temporary use permits authorizing the least amount of use. A \$55 increase in fees is likely to represent 1.2 to 1.8 percent of annual gross revenue for a temporary use permit, which authorizes a small amount of use, and typically represents 5 to 20 business days for an outfitter or guide. Thus, the increase in fees will constitute a minor part of the business income.

Increasing the minimum amount of liability insurance coverage will not adversely affect small business because most outfitters and guides voluntarily carry, and several Forest Service regions already require minimum coverage consistent with the minimums required in the final directives, in accordance with industry practice.

### 3. Summary of Revisions to the Directives

#### *In General*

The Forest Service has reformatted and renumbered FSH 2709.11, section 41.53, in its entirety. The agency has expanded the number of sections from 12 to 18 (sections 41.53a through 41.53r).

#### *Objectives*

The Forest Service has added section 41.53b, paragraph 2, to facilitate greater participation in outfitting and guiding by organizations and businesses that work with youth and educational groups.

#### *Policy*

The agency has revised section 41.53c, paragraph 2, to state that permitted access routes and a definition for that term are included in section 41.53d. The agency has revised paragraph 3 for greater consistency with the Wilderness Act. The agency has added paragraph 7 to address consideration of applicable provisions in ANILCA regarding issuance and administration of outfitting and guiding permits in the Alaska Region.

#### *New Definitions*

The Forest Service has added the following definitions in alphabetical order in section 41.53d of the final directives:

*Ancillary Service.* A service that supports use authorized by an outfitting and guiding permit and that is provided by a party other than the holder or the holder's employees or agents. This definition clarifies what constitutes an ancillary service.

*Open Season.* A period specified by the authorized officer during which eligible applicants can apply for service days from a temporary or priority use pool. This definition clarifies how use in a temporary or priority use pool may be obtained.

*Permitted Access Route.* Any road or trail that a holder is authorized to use under an outfitting and guiding permit or operating plan for purposes of pedestrian, stock, or vehicular access. This definition clarifies that a permit may specify which access routes a holder may use.

*Priority Use Pool.* A pool of service days or quotas in a use area that may be:

1. Distributed seasonally to priority use permit holders in that use area and returned to the pool for redistribution during the next open season; or
2. Distributed for the term of a permit to increase use allocated under priority use permits or to establish use for new priority use permits. This definition clarifies the purpose and function of priority use pools.

*Temporary Use Pool.* A pool of service days or quotas in a use area that are reserved for short-term, non-recurring, seasonal distribution during an open season to qualified applicants who do not hold a priority use permit in that use area, and thereafter may be

distributed to all qualified applicants on a first-come, first-served basis. This definition clarifies the purpose and function of temporary use pools.

*Transitional Priority Use.* Interim redesignation of temporary use as classified under the Forest Service's June 12, 1995, outfitting and guiding policy (60 FR 30830), for holders who meet all the requirements in section 41.53p. This definition clarifies the agency's intent with regard to conversion of temporary use to priority use.

*Use Area.* Any geographical configuration, such as a Ranger Districts, a wilderness areas, Wild and Scenic River, or National Forest, that allows for efficient management of temporary and priority use pools. This definition clarifies that the authorized officer has the discretion to determine the appropriate geographical area for efficient management.

#### *Revised Definitions*

The agency has revised the following definitions to read as follows:

*Quota.* An allocation of use that is measured as the number of stock per trip, people at one time, trips per hour or per day, the number of launches per day, or other unit of measure other than a service day; that is consistent with applicable land management plan guidance; and that is established in a programmatic or project decision. The agency has modified this definition to be consistent with terminology used elsewhere in the final directives.

*Service Day.* An allocation of use constituting a day or any part of a day on National Forest System lands for which an outfitter or guide provides services to a client. The total number of service days is calculated by multiplying each service day by the number of clients on the trip. As worded originally, this definition would have erroneously calculated the capacity of an entire outfitted and guided trip, instead of defining a single service day.

*Temporary Use.* Short-term, non-renewable outfitting or guiding use that is authorized in increments of 50 service days, up to a maximum of 200 service days in a 180-day period. The agency modified this definition to be consistent with changes made to section 41.53j.

#### *Removed Definition*

The agency has removed the definition for incidental use and has replaced it with the definition for temporary use.

#### *Unchanged Definitions*

The agency is retaining the definition of transportation livestock in section 41.53c of the current directives and will not adopt the proposed term "livestock use". The remaining definitions in the proposed directives remain unchanged.

#### *Land Use Management*

The Forest Service has modified section 41.53e slightly. In paragraph 1a, the agency has deleted the following phrase: "consider whether authorizing the activities would impede the Forest Service's ability to meet the recreational and other goals of the Wilderness Act." The agency has revised paragraph 2 to provide that resource capacity analysis may be conducted when monitoring demonstrates that impacts associated with the use may exceed desired conditions. The Forest Service has revised paragraph 2c to add the phrase "and visitor use trends."

#### *Applications*

The Forest Service has reversed the order of paragraphs 1 and 2 and has revised paragraph 1 of section 41.53h to state that proposals and applications to use and occupy NFS lands for outfitting and guiding shall be evaluated pursuant to 36 CFR 251.54 and FSM 2712. The agency has revised section 41.53h, paragraph 2, to clarify that applicants for priority use permits will use form SF-299 and that applicants for temporary use permits will use a new form, Application and Temporary Special Use Permit for Outfitting and Guiding.

#### *Operations*

The agency has revised section 41.53i, paragraph 5, to provide that the holder's contractor may provide a separate insurance policy that covers the contractor's services and equipment and that names the United States as an additional insured. The agency has redesignated the endorsement exhibit as 2713.1, exhibit 02.

#### *Special Uses Streamlining*

The agency has revised section 41.53j, Issuance of Temporary Use Permits, as follows:

Paragraph 1 clarifies that all temporary use will be authorized using the new form, Application and Temporary Special Use Permit for Outfitting and Guiding, and increases the number of service days that may be allocated for temporary use permits to 200.

Paragraph 2 provides that only 1 temporary use permit may be issued per 180 days.

Paragraph 3 was revised to clarify how permits will be issued non-competitively.

Paragraph 10 was renumbered as paragraph 5.

Paragraph 6 replaces proposed paragraph 12 and identifies the elements required in an operating plan for a temporary use permit.

Paragraph 7 replaces proposed paragraph 11 and directs authorized officers not to conduct performance evaluations for temporary use permit holders.

Paragraph 8 is new and provides for consideration of past performance in deciding whether to issue temporary use permits.

The agency has moved paragraphs in section 41.53j addressing operation of temporary use pools to new section 41.53k, Management of Temporary Use Pools. Section 41.53k in the final directives provides that the authorized officer may establish a temporary use pool and develop application and operating procedures for the pool. Paragraph 2 provides that the authorized officer may establish one or more open seasons to facilitate administration and equitable distribution of service days from the pool. Paragraph 2a provides that during an open season, qualified applicants other than holders of priority use permits in the use area may apply for service days from the pool. Paragraph 2b provides that once an open season ends, any use remaining may be distributed on a first come, first-served basis, including to priority use permit holders in the use area, provided that if a priority use pool has been established for the same area, applications for any remaining use may be restricted to qualified applicants who do not hold a priority use permit. Paragraph 2c provides that upon termination of a temporary use permit, all service days or quotas assigned to that permit will be placed in the temporary use pool for the use area. This provision replaces proposed 41.53j, paragraph 8. Paragraph 2d provides the basis for allocation of use to temporary use pools and matches the basis for allocation of use to priority use pools in section 41.53n of the final directives. Paragraph 2e provides that the authorized officer may shift service days and quotas between temporary and priority use pools based on their utilization.

The agency has redesignated section 41.53k in the proposed directives as section 41.53l in the final directives. Paragraph 1 clarifies that priority use may be authorized under a term permit, while temporary use may not. The other

paragraphs in this section remain unchanged.

The agency has redesignated section 41.53l, Allocation of Use for a Priority Use Permit, in the proposed directives as section 41.53m in the final directives. Paragraphs 2a and 3b revise the amount of use above actual use that a holder may retain as an allocation. Holders with 1,000 service days or less may retain the highest amount of use in 1 year during the past 5 years, plus 25 percent of that amount, provided that the total not exceed the allocation when the permit was issued. The agency has edited paragraphs 4, 4a, and 4b for clarity.

Section 41.53n, Management of Priority Use Pools, is new. This section provides for establishment of priority use pools and application and operating procedures for the pools at the authorized officer's discretion. Paragraph 1 addresses short-term allocations that will be returned to the pool at the end of the year. Short-term allocations must be authorized under a temporary permit using the new form, Application and Temporary Special Use Permit for Outfitting and Guiding. Paragraph 2 addresses distribution from the pool after short-term allocation requests have been met. Paragraph 3 provides the basis for allocating service days to a priority use pool. Paragraph 4 provides that the authorized officer may shift service days between temporary and priority use pools based on their utilization.

The agency has redesignated section 41.53m, Reduction of Use Based on New or Changed Decisions, in the proposed directives as section 41.53o in the final directives.

Section 41.53p, Transitional Priority Use, is new. This section provides that holders of temporary use under the current directives are eligible for reclassification of their use as transitional priority use when their use is active and recurring; their performance has been satisfactory; and they request reclassification of their use as transitional priority use within 1 year from the date of publication of the final directives. Paragraph 2 provides that reclassification of transitional priority use as priority use must be supported by a needs assessment, resource capacity analysis, or other pertinent analysis and is not guaranteed. Paragraph 3 provides that the permit may be extended annually each year until the application for reclassification is granted or denied. Paragraph 4 provides that performance evaluations will be conducted on transitional priority use holders. Paragraph 5 provides that the allocation for a transitional priority use permit will

be determined by the highest actual use in 1 year during the last 5 years, plus 25 percent of that amount for permits with 1,000 service days or less or 15 percent of that amount for permits with more than 1,000 service days provided that the total may not exceed the highest amount of use allocated during that period. Paragraph 6 provides that a purchaser of a business that holds a temporary use permit is not guaranteed reclassification of transitional priority use as priority use. Paragraph 7 provides that if supported by a needs assessment, transitional priority use must be reclassified as priority use within 5 years of the date of the request. Paragraph 8 provides that the cost of a needs assessment and capacity analysis needed to determine whether transitional priority use may be reclassified will be considered programmatic and will not be subject to processing fees. Paragraph 9 provides that work associated with reclassification of transitional priority use as priority use that is subject to cost recovery fees may be covered by a major or master cost recovery agreement spanning more than 1 year, with fees spread over the term of the agreement. Paragraph 10 provides that if holders of a temporary use permit are ineligible for reclassification of their use as transitional priority use, their use will be reallocated to a temporary use pool upon expiration of their permit.

#### *Permit Administration*

The agency has redesignated section 41.53n, Administration of Outfitting and Guiding Permits, in the proposed directives as section 41.53q in the final directives.

The agency has redesignated section 41.53o, Administration of Priority Use Permits, in the proposed directives as section 41.53r in the final directives. Additionally, the agency has modified paragraph 1 to clarify that temporary use may not be authorized under a term permit.

#### *Flat Fees for Temporary Use Permits*

The agency has modified section 37.21b to extend the flat fee rate for up to 200 service days.

#### *Changes to the Insurance Directives*

The Forest Service has modified FSM 2713.1, paragraph 2d, by removing the level of risk chart and replacing it with an exhibit showing minimum coverage amounts for liability insurance by type of special use. The Endorsement for Contracted Outfitting and Guiding Services and Equipment has been renumbered as exhibit 02.

## **4. Regulatory Certifications for the Final Directives**

### *Environmental Impact*

These final directives will revise national policy governing administration of special use permits for outfitting and guiding. FSH 1909.15, section 31.12, paragraph 2 (57 FR 43180, September 18, 1992), excludes from documentation in an environmental assessment or environmental impact statement "rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions." The agency has concluded that these final directives fall within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

### *Regulatory Impact*

These final directives have been reviewed under USDA procedures and Executive Order 12866, as amended by Executive Order 13422, on regulatory planning and review. The Office of Management and Budget has determined that these are not significant directives. These final directives cannot and may not reasonably be anticipated to lead to an annual effect of \$100 million or more on or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; raise novel legal or policy issues; or materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of beneficiaries of those programs. Accordingly, these final directives are not subject to Office of Management and Budget review under Executive Order 12866, as amended by Executive Order 13422.

These directives have also been considered in light of the Regulatory Flexibility Act (RFA) (5 U.S.C. 602 *et seq.*). There are three types of costs potentially incurred by small entities as a result of implementation of the final directives: (1) The cost of environmental analysis associated with the conversion from transitional priority use to priority use; (2) an increase in land use fees for temporary use permits; and (3) an increase in the cost of liability insurance. Based on the threshold RFA analysis conducted by the agency, the agency has determined that the final directives will not have a significant

effect on a substantial number of small entities.

With proration of the additional cost associated with conversion from transitional priority use to priority use, no transitional priority use permit holders will experience additional costs exceeding 5 percent of their projected annual gross revenue. Only 1.7 percent of all outfitting and guiding permit holders may experience additional costs equal to 5 percent of their projected annual gross revenue. Only 1.8 percent of all outfitting and guiding permit holders may experience additional costs exceeding 1 percent of their projected annual gross revenue, and less than 3.5 percent of all outfitting and guiding permit holders may experience additional costs of less than 1 percent of their projected annual gross revenue. Moreover, applications for approximately 70 percent of holders likely to be eligible for conversion from transitional priority use to priority use are likely to be exempt from processing fees. Finally, holders that are not exempt from processing fees may request a reduction of processing fees per 36 CFR 251.58(c)(1)(ii)(A).

The current minimum land use fee for an outfitting and guiding permit is \$95. The new land use fee for temporary use permits will be \$150 for up to 50 service days or the equivalent in quotas. The new land use fee represents an increase in \$55 for temporary use permits authorizing the least amount of use. A \$55 increase in fees is likely to represent 1.2 to 1.8 percent of annual gross revenue for a temporary use permit, which authorizes a small amount of use, typically 5 to 20 business days. Thus, the increase in fees will constitute a minor part of the business's income.

Increasing the minimum amount of liability insurance coverage will not adversely affect small businesses because most outfitters and guides voluntarily carry, and several Forest Service regions already require, minimum coverage consistent with the minimums required in the final directives, in accordance with industry practice.

Based on the foregoing, the agency has determined that these final directives will not have a significant economic impact on a substantial number of small entities because the directives will not impose new record-keeping requirements on them; will not affect their competitive position in relation to large entities; and will not significantly affect their cash flow, liquidity, or ability to remain in the market.

To the contrary, the efficiencies and consistency to be achieved by the final

outfitting and guiding directives will benefit small businesses that seek to use and occupy NFS lands by providing the potential for greater business continuity for outfitters and guides and by reducing the frequency of time-consuming and sometimes costly processing of special use applications. The benefits cannot be quantified and are not likely to substantially alter costs to small businesses.

#### *No Taking Implications*

The Forest Service has analyzed these final directives in accordance with the principles and criteria contained in Executive Order 12630 and has determined that the final directives will not pose the risk of a taking of private property.

#### *Civil Justice Reform*

These final directives have been reviewed under Executive Order 12988 on civil justice reform. Upon adoption of the final directives, (1) All State and local laws and regulations that are in conflict with the final directives or that will impede their full implementation will be preempted; (2) no retroactive effect will be given to the final directives; and (3) they will not require administrative proceedings before parties may file suit in court challenging their provisions.

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

The agency has considered these final directives under the requirements of Executive Order 13132 on federalism and has concluded that the final directives conform with the federalism principles set out in this executive order; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, the relationship between the federal government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the agency has determined that no further assessment of federalism implications is necessary.

Moreover, these final directives do not have tribal implications as defined by Executive Order 13175, entitled "Consultation and Coordination With Indian Tribal Governments," and therefore advance consultation with tribes is not required.

#### *Energy Effects*

These final directives have been reviewed under Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply,

Distribution, or Use." The agency has determined that these final directives do not constitute a significant energy action as defined in the Executive Order.

#### *Unfunded Mandates*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the agency has assessed the effects of these final directives on State, local, and tribal governments and the private sector. These final directives will not compel the expenditure of \$100 million or more by any State, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

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

These final directives do not contain any record-keeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Any information collected from the public that will be required by these final directives has been approved by the Office of Management and Budget and assigned control number 0596–0082. Accordingly, the review provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

#### **5. Access to the Final Directives**

The Forest Service organizes its directive system by alphanumeric codes and subject headings. The intended audience for this direction is Forest Service employees charged with issuing and administering outfitting and guiding special use permits. To view the final directives, visit the Forest Service's Web site at <http://www.fs.fed.us/specialuses/>. Only those sections of the FSM and FSH that are the subject of this notice have been posted, specifically, FSH 2709.11, sections 37.21b and 41.53a through 41.53r, and FSM 2713.1. Alternatively, the entire chapters may be viewed at <http://www.fs.fed.us/im/directives/>.

Dated: September 4, 2008.

**Sally Collins,**

*Associate Chief.*

[FR Doc. E8–21618 Filed 9–16–08; 8:45 am]

**BILLING CODE 3410–11–P**