No. 13-35770

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC.,
Plaintiff – Appellant,

v.

CHIP WEBER, Flathead National Forest Supervisor, and
UNITED STATES FOREST SERVICE,
Defendants – Appellees,

and

WILLIAM GLIDDEN, RAYMOND LEOPOLD, EUGENE THOMAS,
NORMAN DeFORREST, and KNIGHTS OF COLUMBUS,
Intervenor-Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
(Chief Judge Dana L. Christensen) No. 12-19

RESPONSE BRIEF FOR THE FEDERAL APPELLEES

ROBERT G. DREHER
Acting Assistant Attorney General

JENNIFER SCHELLER NEUMANN
DAVID B. GLAZER
JOAN M. PEPIN
Attorneys, U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 7415
Washington, D.C. 20044
(202) 305-4626
joan.pepin@usdoj.gov

Of Counsel:
ALAN J. CAMPBELL
ELLEN R. HORNSTEIN
U.S. Department of Agriculture
Office of the General Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES & REGULATIONS:

MISCELLANEOUS:

INTRODUCTION

This case concerns a privately-owned statue of Jesus that has stood for 60 years on Big Mountain in Whitefish, Montana, pursuant to a special use permit issued by the United States Forest Service to the Knights of Columbus in 1953. The statue is one of the few elements remaining intact from the early development of Whitefish as a resort town, and both the Forest Service and the Montana State Historic Preservation Officer concluded that it is eligible for listing in the National Register of Historic Places. The statue is also associated in the minds of many locals with veterans of the famed Army 10th Mountain Division, some of whom hailed from the Whitefish area and returned there after World War II. They brought home memories of mountaintop shrines in the Italian Alps, and wanted to erect one at home in honor of their fellow soldiers.

As the Big Mountain ski area has developed over the years, the setting around the statue has changed. What was once a remote location, uphill from the top of the resort's lone ski lift, is now accessible to skiers using later-developed lifts and slopes, although the statue remains obscured from most angles by a copse of trees. As a result of this increased accessibility, the statue, which is often playfully decorated with ski gear, has become, as the record shows, a beloved, quirky local landmark and a reminder of the area's more rustic early days.

STATEMENT OF JURISDICTION

1. District court jurisdiction – The district court's jurisdiction is in dispute. Plaintiff Freedom From Religion Foundation (FFRF) invoked the district court's jurisdiction under 28 U.S.C. §133, 28 U.S.C. §2202, and 28 U.S.C. §1343. The Intervenor-Defendants Knights of Columbus moved to dismiss, arguing that FFRF lacked standing. The district court held that FFRF had standing based on the declaration of Pamela Morris.

2. Appellate jurisdiction – The federal appellees concur in FFRF's statement of appellate jurisdiction.

STATEMENT OF THE ISSUES

1. Whether FFRF has representational standing based on the declarations of three members to bring this Establishment Clause challenge to the statue.

2. Whether reissuance of a special use permit to maintain a monument on National Forest System lands, pursuant to regulations that are neutral with respect to viewpoint, violates the Establishment Clause because the monument in question has religious content.

STATEMENT OF FACTS

I. Legal Background

A. Regulations governing special use permits in 1953

In 1942, the Secretary of Agriculture promulgated regulations requiring generally that "[a]ll uses of national forest lands," excepting temporary uses such as fishing or camping and uses otherwise provided for by statute, "shall be designated 'special uses' and shall be authorized by 'Special Use Permits.'" 36 C.F.R. §251.1 (Cum. Supp. 1944) (Addendum (Add.) at 3) The regulation imposed detailed requirements on certain types of special use permits, such as those for mining or power transmission lines. For other, unspecified types of uses, however, the regulation required only that the permit "contain such terms, stipulations, conditions and agreements as may be required by the regulations of the Secretary of Agriculture and the instructions of the Chief of the Forest Service," and that permit holders "shall comply with all State and Federal laws and all regulations of the Secretary of Agriculture relating to the national forests and shall conduct themselves in an orderly manner." *Id*.; *see also* Excerpts of Record (ER) at 70. Under the 1942 regulation, the Forest Service issued some 70 special use permits for the installation and maintenance of

privately-owned monuments on National Forest System lands. Dodds Decl. Exh.1.[1]

The 1942 regulation generally directed the Forest Service to impose a "fee or charge commensurate with the value of the use authorized by the permit," 36 C.F.R. §251.3, but authorized the issuance of free special use permits for, among other things, "noncommercial purposes." 36 C.F.R. §251.2 (Cum. Supp. 1944) (Add.4)

B. Regulations governing the issuance and reissuance of special use permits in 2010

The Forest Service substantially overhauled its regulations governing special use permits in 1998. 63 Fed. Reg. 65950 (Nov. 30, 1998) (Add.5-25). The revised regulations set forth a two-tiered screening process for new requests for special use permits. *Id.* at 65950; 65953 (Add.6,9). The screening process applies only to requests for "new or substantially changed uses." *Id.* at 65953 (Add.9). Renewals and reauthorizations of existing uses are governed by a separate regulation and are not subject to the screening criteria.

[1] The Forest Service filed a motion for judicial notice of the Declaration of Steven M. Dodds, custodian of the Forest Service's Special Use Database, attaching a list of all monuments currently authorized by special use permits to occupy National Forest System lands.

1. Proposals for new special use permits

Under the revised regulations, the Forest Service must screen each proposal for a new special use to ensure that it meets nine enumerated requirements, one of which is that it "will not create an exclusive or perpetual right of use or occupancy." 36 C.F.R. §251.54(e)(1)(iv). The Forest Service Handbook (FSH) explains that in order to satisfy that criterion, the proposed use should "not in effect grant title to Federal land to an authorization holder or ... create the appearance of granting such a right." Monuments are listed as an example of the sort of use that could in effect grant title, or create the appearance of doing so. FSH 2709.11, Ch. 10, sec. 12.21, para. 4.

A proposal that clears the initial screening process is then screened for consistency with five additional criteria. The authorized officer must reject any proposal that, among other things, is "inconsistent or incompatible with the purposes for which the lands are managed," or which "would not be in the public interest." 36 C.F.R. §251.54(e)(5)(i) & (ii). The section of the FSH implementing this regulation, FSH 2709.11, Ch. 10, secs 12.32 & 12.32a, directs the officer to "[s]ee FSM 2703.2 regarding appropriate use of National Forest System Lands." The referenced section of the Forest Service Manual, in turn, directs that, in applying the "public

interest" criterion in the second-level screening stage, the officer should "[a]uthorize use of National Forest System lands only if . . . [t]he proposed use cannot reasonably be accommodated on non-National Forest System lands . . . ." FSM 2703.2.

A proposed use that clears both initial and second-level screening is then formally accepted as an application for a special use permit. At that point, appropriate environmental analysis must be conducted. FSH 2709.11, Ch.10, sec. 12.5. Once that analysis is complete, the Forest Service may grant or deny the permit.

2. Reauthorization of existing uses

The reauthorization of existing uses is not subject to the two-tiered screening process described above, but rather is governed by a separate regulation, 36 C.F.R. §251.64. The FSH section implementing this regulation explains that:

> 2. Proposals involving existing uses do not have to be submitted as proposals first and then accepted as applications. Rather, proposals involving existing uses are immediately accepted as applications upon submission. In reviewing an application involving an existing use, the Authorized Officer shall consider:
>
> a) Whether the proposed use would conform to the applicable Forest land and resource management plan;
>
> b) Whether the area requested is still being used for the purposes for which it is or was authorized;

c) Whether the holder is in compliance with the terms and conditions of the authorization; and

d) Whether the holder has the technical and financial capability to continue to undertake the use and to fully comply with the terms and conditions of the authorization.

FSH 2709.11, Ch. 10, sec. 11.2; *see also* ER76.

C. The National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies to "take into account" the effect of their decisions on sites and structures eligible for inclusion in the National Register of Historic Places. 16 U.S.C. §470f. The Advisory Council on Historic Preservation, an independent federal agency established under NHPA, 16 U.S.C. §470i, has established regulations governing federal agencies' duties under NHPA, *see* 36 C.F.R. Part 800, and criteria governing the eligibility of properties for inclusion in the National Register of Historic Places. *See* 36 C.F.R. §60.4; *see also National Register Bulletin: How to Apply the National Register Criteria for Evaluation*, reproduced at Add. 26-85.[2]

NHPA's implementing regulations require agencies, in consultation with the State Historic Preservation Officer (SHPO), to determine whether

[2] This Court may take judicial notice of a government publication. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 n.2 (9th Cir. 2007), *citing Tampa Elec. Co. v. Nashville Coal. Co.*, 365 U.S. 320, 332 & n.10 (1961). This particular government publication was also specifically cited and relied upon by the State Historic Preservation Officer in this case. *See* ER93.

there are any eligible historic properties within the project's area of potential effect. *Id*. §800.4; *see also id*. §800.2(c)(1)(i). Properties may be eligible for inclusion based on their significance to local, state, or national history. National Register Bulletin at 9. (Add.40). Properties owned by religious institutions are not eligible for listing based on their religious significance *alone*, but can qualify based on "architectural or artistic distinction or historical importance." *Id*. at 26 (Add.57). Similarly, a commemorative property such as a memorial cannot qualify for listing based solely on its association with the people or event commemorated, but may be eligible based on *its own* historic significance, acquired over time. The National Register Bulletin states that "[a] commemorative marker erected early in the settlement or development of an area will qualify if it is demonstrated that, because of its relative great age, the property has long been a part of the historic identity of the area." *Id*. at 40.

II. Factual Background

A. The statue's first 57 years

1. The statue's physical setting

On September 11, 1953, the Knights of Columbus Council of Kalispell, Montana, applied to the U.S. Forest Service for a special use permit to erect a statue of Jesus on a piece of land about 400 feet away from and 70 feet higher in elevation than the upper end of what was, at the time, Big

Mountain's only ski lift. ER69. In accordance with the regulations in effect at that time, the permit was granted for "free use" – that is, use without charge – on October 15, 1953. ER73-74. The permit authorized non-exclusive use of the 25' by 25' site, which was, and remains, subject to another non-exclusive special use permit for operation of a ski area.

The Knights of Columbus commissioned a statue, which was installed at the permitted location in 1954. ER383-84. The statue, which is about 6 feet tall, sits atop a concrete base that rises 6 feet from the ground. In typical winter snow conditions, the base is buried in the snow and the statue stands at about ground level. ER384.

Because the statue was, at the time of its installation, some 70 feet higher in elevation than the top of the then-existing T-bar ski lift, the statue was not easily accessible to skiers. *Id.* at 386. In 1968, however, the resort replaced the old T-bar with a chairlift, the terminus of which is above the statue. Although the statue remains obscured from most of the runs on Big Mountain, since 1968 it has been possible for skiers to happen upon the statue while skiing. *Id.* In summer, visitors are less likely to encounter the statue because no hiking trails pass near it. *Id.* at 387.

Other changes have occurred during the 60 years that this statue has stood on Big Mountain. The statue was originally a natural stone color, but

at some point between 1981 and 1997, a Boy Scout painted it as part of an Eagle Scout project. *Id.* at 384. In 2007 or 2008, the resort installed a fence behind the statue in an attempt to prevent skiers from high-fiving it, a common practice that resulted in the statue's hands being broken off numerous times. *Id.* at 385.

In 2010, the resort installed a plaque explaining the statue's history, ownership, and purpose. Dan Graves, President and CEO of Whitefish Mountain Resort, explained that over the years, he had observed skiers stopping by the statue and wondering where it came from and why it was there. ER435. He decided, as a matter of customer service, to put up an informational sign. The resulting plaque states:

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

> this special shrine of Christ to the Big Mountain and hope that you enjoy and respect it.
>
> -- Whitefish Mountain Resort, 2010

ER 385.

2. Uses and perceptions of the statue

Among the locals, there is a widespread belief that the statue is a memorial to veterans of World War II, in particular those who served in the 10th Mountain Division, ER402, although the historical record is ambiguous as to whether that was the actual intent of those who placed the statue, or whether that perception developed over time from the undisputed fact that many of the men involved in the development of the resort and the placement of the statue were World War II veterans, some from the 10th Mountain Division. ER387-88. Many of those responsible for the statue's placement are now deceased, but one of the few who remains attests that the statue was intended as a veterans' memorial. Bill Martin, a former manager of the resort who served on its board of directors for 50 years, stated in a declaration that

> 4. I was close friends with Ed Schenk, who developed the Big Mountain ski area in the late 1940s.
>
> 5. Ed had been an officer in the Army in World War II and was stationed in Italy with the 10th Mountain Division.
>
> 6. Ed recounted to me how almost all the slopes in Italy had statues of Jesus on the slopes.

> 7. Ed wanted to install a statue of Jesus on Big Mountain in memory of the men who had lost their lives in World War II.
>
> 8. Ed contacted the Knights of Columbus in Kalispell to help get the statue installed.
>
> 9. I can recall that the statue was installed in memory of the veterans Ed served with in World War II.

Supplemental Excerpts of Record at 48-49; *see also ER*486-487; 489. The 10th Mountain Division veterans group has, over the years, used the site as "a gathering place for some of their events." ER424.

The record reveals sporadic use of the statue site for religious purposes, including church services and weddings, but perhaps due to the weather or to the statue's being hard to find, ER392-93, 483, it has not been regularly used for such purposes. ER389-91. There is much more extensive evidence of religious activities occurring elsewhere on the mountain, either in the lodges or at the summit. ER390.

The record indicates that the site has been principally used as "simply a well-known landmark and meeting place for skiers on the mountain." ER394. Particularly in the days before cell phones, it was "an easy place [for skiers] to say 'Hey, I'll meet you either at the top of Two or over at the statue.'" *Id*. In addition, the statue has served as a fun backdrop for tourists to take photographs of themselves. Two long-time local skiers, Jean Arthur and Mike Jenson, both recalled seeing, and being asked to take, many

photographs of skiers posing with the statue. ER418, 450. The record contains one such photograph, ER397, taken from this website: http://www.calgarysun.com/2011/10/23/canadians-called-on-to-save-ski-hill-jesus.

There is a well-documented tradition of skiers treating the statue with playful and irreverent affection. ER396-398. Longtime resident Jean Arthur stated that it was a "comical institution on the mountain" to "decorate Jesus" with "necklaces or neckties and gloves . . . ." ER419. More recently, the statue has often been accessorized with ski gear, as shown in this photograph.

ER 397, reprinting photo from www.smh.com.au/travel/blogs/miss-snow-it-all/oh-my-ski-god-20110507-1edel.html.

"One of the best-documented parts of [the statue's] history on the mountain" is the repeated breaking off of its hands and fingers by overly-enthusiastic high-fives from passing skiers. ER398-400. Although the resort installed a fence in 2007 or 2008 to reduce the accidental vandalism by making it harder to ski past the statue at high speed, ER384-85, the high-fiving and resultant damage continues; a hand went missing in 2011, and in 2012 the replacement was accidentally broken off and turned into the resort's lost-and-found. ER399.

The most commonly-expressed sentiment about the statue is that it is simply part of the area's history; something that has been there as long as people can remember. "[N]early all of the local people interviewed by HRA said that they perceived the statue as an important part of the ski area's history and as a landmark that has simply always been there." ER382. Jean Arthur, a longtime Whitefish resident and author of *Hellroaring: Fifty Years on the Big Mountain*, stated that for her, the statue represented "just long-time memories. That it's just a part of the mountain as much as the old chalet." ER419. Mike Muldown, a lifelong resident of Whitefish, opined

that "It's nostalgic. . . . [I]t's always been there. It's like a lot of things. You just – it becomes part of your chord of memory . . . ." ER455.

B. The 2010 permit reissuance process

1. The Knights of Columbus applied for reissuance of their special use permit in 2010

The original permit issued to the Knights of Columbus in 1953 had no expiration date, ER73-74, but for reasons unexplained by the record, it was replaced in 1990 with a new permit with a ten-year term. ER84. That permit was reissued for another ten years in 2000, and the Knights of Columbus submitted a request for reissuance on July 19, 2010. *Id.*

2. FFRF filed a Freedom of Information Act request relating to reissuance of the permit

On May 26, 2011, plaintiff FFRF sent a Freedom of Information Act (FOIA) request to the Forest Service, requesting copies of the permit and application for reissuance, as well as Forest Service rules or policies governing private displays on public property. ER248-49. The letter opined that "[t]he statue of Jesus Christ cannot legally remain in Flathead National Forest. Several courts have ruled that government property may not contain religious images," and contained citations to case law. *Id.*

On June 28, 2011, the Forest Service responded to FFRF's FOIA request, providing the requested documents and internet links to the requested Forest Service rules and policies. The letter further stated that

"[t]he Forest has not reissued the permit at this point and discussions are underway to resolve the issue of the statue residing on national forest system land." ER250.

3. The Forest Service convened a meeting with the Knights to discuss FFRF's opposition to reissuance of the permit

The Forest Service convened a meeting on June 10, 2011, with representatives of the Knights of Columbus and the Whitefish Mountain Resort to discuss the permit for the statue. The meeting notes indicate that FFRF's FOIA request was the impetus for the meeting. ER225. According to the notes, the participants discussed four options for dealing with the statue: moving the statue to private land; authorizing the statue under Whitefish Mountain Resort's special use permit; having the statue declared a historical monument; and pursuing a legislative land conveyance. ER225-26. The notes do not indicate that the participants ever discussed or considered processing the permit reissuance request in accordance with 36 C.F.R. §251.64 and FSH 2709.11 Ch. 10, sec. 11.2, which are, respectively, the regulation and the Forest Service directive applicable to requests for reissuance of special use permits. ER225-26.

At the end of the meeting, the Forest Service informed the Knights of Columbus that the permit reissuance request would be denied. ER226. The Knights of Columbus indicated their intention to appeal that decision.

4. The Forest Service denied the application for reissuance of the permit

The Forest Service denied the Knights' application for reissuance of the permit. ER84-87. The Forest Service letter denying the application contained a brief recitation of the permit's history, and a two-sentence discussion of Establishment Clause jurisprudence. It noted that "Forest Service policy at FSM 2703.2 limits authorized uses of NFS lands to those that '. . . *cannot be reasonably accommodated on non-National Forest System lands,*'" *ER*85 (emphasis in original), although it failed to acknowledge that that criterion applies only to proposals for new special uses, not applications for reauthorization of existing special uses. 63 Fed. Reg. 65953 (Add.9); FSH 2709.11, Ch. 10, sec. 11.2. The letter then concluded that

> . . . renewing your permit would result in an inappropriate use of public land. The original stated purpose for the statue was to establish a shrine, an inherently religious object. Furthermore, the statue and its religious objective can be accommodated on adjacent private land. Therefore, I will not renew the special use permit for this statue.

ER 86.

The denial letter noted that the Forest Service was "currently assessing the historical significance of the statue in accordance with the National Historic Preservation Act." ER85. The letter noted that although the statue could not be deemed historically significant under NHPA "by virtue of its religious value to a group or community alone," the statue was being evaluated for its historical significance with respect to its "relation to the United States Army's 10th Mountain Division and the development of the Whitefish Mountain Ski Area." *Id.*

5. The Knights of Columbus appealed the denial

The Knights of Columbus filed an administrative appeal from the Forest Service's decision not to reissue the permit. The appeal alleged that the Forest Service was "treating religious and nonreligious uses differently" in violation of legal obligations and "patently discriminating against" religious uses. ER89. The appeal also noted that due to the statue's age and the way it is constructed, it cannot be moved without being damaged or destroyed. *Id.*

6. The Forest Service and the Montana State Historic Preservation Officer determined that the statue is a significant piece of local history

While the Knights' appeal was pending, the Forest Service completed its review of the statue's historic significance, concluding that the statue

merits inclusion in the National Register of Historic Places for its significance to local history. In a letter to Dr. Mark Baumler, the Montana SHPO, Forest Archaeologist Timothy Light noted that the statue is one of the few remaining elements from the early development of the ski area, which "play[ed] a significant role in the transition of Whitefish from a town heavily dependent on the lumber industry to a community built around tourism, skiing, and outdoor recreation." ER91. Light concluded that

> The statue has integrity of location, setting, materials, workmanship, feeling, and association and is a part of the early history of the ski area and would be considered a contributing element of such a historic district. Individually, it represents a small part of the history of the ski area but since so little remains intact of that early history, the statue of Jesus is probably eligible for listing on the National Register of Historic Places under criteria "a" – associated with events important to local history.

ER 92. Accordingly, Light sought the SHPO's concurrence in the determination of eligibility.

> On September 19, 2011, the SHPO concurred, noting that the statue
>
> has long been a part of the historic identity of the area. It is not believed to be a religious site because unlike Lourdes or Fatima, people do not go there to pray, but it is a local land mark that skiers recognize, and it is a historic part of the resort. Based on this we believe that it is close enough to the third example of an Eligible property description presented in National Register Bulletin #15 on page 40.

ER93; *see also* Add.71.

7. The Forest Service withdrew its decision denying reissuance of the permit

Citing the SHPO's concurrence that the statue is eligible for inclusion in the National Register of Historic Places, the Forest Service withdrew its decision denying reissuance of the permit, ER83, thereby mooting the Knights' pending administrative appeal. The Forest Service then solicited public comment on reissuance of the permit, and received approximately 95,000 comments.

8. The Forest Service issued a new decision reissuing the permit

On January 31, 2012, the Forest Service issued a Decision Memo reissuing the special use permit for another ten years. The decision noted that "[t]he statue has been a long standing object in the community since 1953 and is important to the community for its historical heritage." ER94. The decision also found that reissuance of the permit "is consistent with all Forest Plan goals, standards, and objectives for this management area." ER99. Although the Flathead Forest Plan generally allows "only those uses of National Forest System land that cannot be reasonably placed on private land," the Decision Memo explained that "the statue's historic value and eligibility for listing on the National Register of Historic Places is, in part, directly linked to the current physical location on National Forest land,"

which "constitutes a reasonable limitation to placing this statue in a new location on private land." *Id*.

C. Litigation in the district court

FFRF filed a complaint on February 8, 2012, claiming that the "continued presence of the Jesus shrine on Forest Service property . . . violates the Establishment Clause . . . by giving the appearance of the government's endorsement of Christianity in general, and Roman Catholicism, in particular . . . ." ER563. The Knights of Columbus successfully moved to intervene. ER540.

The Knights moved to dismiss for lack of standing, noting that FFRF had not identified any members who had seen and been offended by the statue. ER498-99. FFRF responded by submitting the Declaration of William Cox, who averred that he has "frequent and unwanted contact and exposure to the statue when I am skiing on Big Mountain many times each winter, which I find to be offensive," ER365, and moving to amend its complaint to add Cox as a plaintiff.

The district court denied FFRF's motion to amend the complaint because the deadline for amending pleadings had passed and FFRF had not shown good cause for failing to meet it. ER502. The district court denied

the Knights' motion to dismiss, however, because it found that FFRF had organizational standing based on Cox's declaration. ER505.

The Forest Service and the Knights both moved for summary judgment. The Knights renewed their standing argument, noting that discovery had revealed that Cox was not a member of FFRF at the time the complaint was filed and that his declaration therefore could not be considered in support of FFRF's standing. FFRF contended that Cox's declaration could be considered, but also submitted declarations from Doug Bonham and Pamela Morris, both of whom were members of FFRF when the complaint was filed.

Bonham and Morris's standing declarations, however, were unconventional. Unlike Cox, neither alleged that they had "frequent and unwanted contact with the statue . . . which [they] find to be offensive." ER365. Although Bonham professed that the statue, which he had seen 7 or 8 years earlier, "has the effect of making non-believers, like myself, feel marginalized in the community," he also admitted that his "aging knees" prevent him from actually skiing or hiking past the statue anymore and that he had not seen it since. ER357. Nevertheless, Bonham, who lives "approximately 60 miles from Big Mountain," alleged that he is "still

affected by the statue" because it "literally and figuratively looms over the valley." *Id.*

Pamela Morris stated that she had seen the statue once, in 1957, when she was 15 years old. Although she was at that time "active in the Methodist Youth Fellowship," she felt the statue was "startlingly out of place: intrusive" and it made her feel "unsettled." ER361. She has since "avoided the area: I backpack, fish and camp where nature has not been so violated in Montana." *Id.* She objects to "the intrusion of partisan artificial icons" on public lands, and will not revisit Big Mountain until it is "a welcome site for all who love nature." *Id.*

The district court held that FFRF could not rely on Cox's declaration to establish standing because the court must assess standing from the "facts as they existed at the time the plaintiff filed the complaint." ER45-46. The court held, however, that FFRF had organizational standing based on Morris's declaration. ER49. The court did not address whether Bonham would have standing. ER50.

Turning to the merits, the district court acknowledged that two distinct legal tests have been applied in varying situations to Establishment Clause challenges. Traditionally, Establishment Clause challenges have been analyzed under the *Lemon* test, under which government actions

involving religion are constitutional if they (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) [do] not foster excessive government entanglement with religion." ER51. The court noted, however, that the applicability of the *Lemon* test to longstanding monuments with religious content was called into question by *Van Orden v. Perry*, 545 U.S. 677 (2005), which declined to apply the *Lemon* test to an Establishment Clause challenge to a monument bearing the Ten Commandments on the grounds of the Texas State Capitol. ER51-52. Justice Breyer's controlling opinion in that case examined how the monument was used; its context; and its history, in particular the length of time the monument has stood without legal challenge. ER52. Following this Court's example in *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011), the court applied both tests and concluded that "no . . . constitutional violation exists under either the *Lemon* test or the *Van Orden* analysis." ER53.

Applying *Lemon*, the court found that the Forest Service's purpose in "allow[ing] a private organization's continued maintenance of a privately owned statue on public land leased to a private ski resort" was, at least in part, to preserve a "statue that has been part of the community since 1953 and reflects its historical heritage." ER54. The court rejected FFRF's

insistence that the government's purpose in reissuing the permit was necessarily identical to the Knights' purpose in applying for it, holding that "[t]he Knights' religious beliefs and reasons for erecting the statue are not juxtaposed onto the government." ER54, *citing Barnes–Wallace v. City of San Diego*, 704 F.3d 1067, 1084 n.15 (9th Cir. 2012).

The court next found that a reasonable observer would not perceive the statue as reflecting a governmental endorsement of religion. The court found it significant that the statue is flanked by a plaque informing the viewer of its private ownership and that it is located within a privately-operated ski resort, "not at a county courthouse, a federal reserve or some other property obviously governmental in nature." ER55. The court noted that the statue's location, "secluded within a group of trees off the side of a run at a private ski resort" was "less reflective of governmental religious endorsement" than the monument upheld in *Van Orden*, which was located on the grounds of a state capitol. ER55-56. The court also noted that unlike the cross at issue in *Trunk*, the statue "is not visible from miles away nor does it tower over a section of town mired in a history of anti-Semitism." ER56. On the whole, the court concluded that "permitting continued presence of the statu[]e at Big Mountain does not reflect governmental endorsement of religion." *Id.*

Finally, the court held that the statue's private ownership and maintenance do not entail any excessive government entanglement with religion. ER56. The court likened this case to *Barnes-Wallace v. City of San Diego*, in which this Court found no excessive entanglement where the city leased land to a religious organization because, among other things, the lease was "allocated on the basis of criteria that neither favor nor disfavor religion," and the city was not involved in managing the leased properties. ER56, *quoting Barnes-Wallace*, 704 F.3d at 1084. Here, the court held, the government does not maintain the statue, and its involvement is limited to processing a request for reissuance of the permit every ten years. "This limited involvement cannot amount to excessive government entanglement under the *Lemon* test." ER56.

Turning to *Van Orden*, the court examined the uses of the statue and found that its "secular and irreverent uses far outweigh the few religious uses it has served. The statue is most frequently used as a meeting point for skiers or hikers and a site for photo opportunities, rather than a solemn place for religious reflection." ER27. The court noted that the "independent secular value" of the statue was "recognized by the State Historic Preservation Officer." *Id.*

The context of the statue, the court held, is likewise secular. The court noted that the statue "sits next to a ski run" and that "[n]one of the statue's surroundings support a religious message – there are no seats for observance of the statue or similar accommodations for worshipers. Typical observers of the statue are more interested in giving it a high five or adorning it in ski gear than sitting before it in prayer." ER27-28.

Finally, the court noted that in *Van Orden*, Justice Breyer found it "determinative" that the monument had stood for 40 years without legal challenge, indicating that few if any observers interpreted it as a government effort to favor a particular religion. ER28, quoting *Van Orden*, 545 U.S. at 702. The court held that this "statue's 60 year life free of formal complaints . . . tips the scales in this case." ER28.

SUMMARY OF ARGUMENT

The district court lacked jurisdiction over this case because FFRF lacks organizational standing to bring this claim. William Cox joined FFRF after the complaint was filed, so his declaration cannot be considered in support of FFRF's standing. Doug Bonham's declaration fails to assert any concrete, ongoing injury. Pamela Morris's declaration asserts only aesthetic or environmental injury, which is not within the zone of interests of the

Establishment Clause, and so does not establish that she would have a cause of action in her own right.

Assuming that FFRF may bring this suit on behalf of its members, the judgment of the district court should be affirmed. The Forest Service's reissuance of the Knights' special use permit does not violate either the *Lemon* or *Van Orden* test. Under the *Lemon* test, which looks to the action's purpose and effects, the reissuance is constitutional because it had the secular purpose of allowing the Knights to maintain a statue that "has been a long standing object in the community since 1953 and is important to the community for its historical heritage," ER94, and because no reasonable observer, familiar with the relevant regulations, would interpret the reissuance as a government endorsement of the Knights' private religious speech. The statue also satisfies *Van Orden* because its secular uses have predominated over religious ones; its setting and context are entirely secular; and its long history without legal challenge indicates that those who encountered it did not mistake it for a government endorsement of religion.

The district court's judgment is also correct under public forum jurisprudence. Under the regulations in existence when the initial permit for the statue was issued, monuments were a permitted special use, and

thus a limited public forum was created. Governments may not discriminate against religious speech in a limited public forum without violating the Free Speech Clause, and allowing religious speech on neutral terms in a limited public forum does not contravene the Establishment Clause.

FFRF contends that public forum analysis does not apply to permanent monuments, but the general rule FFRF cites applies only to public forums that are too small to accommodate permanent monuments from all who might wish to install them. That limitation does not apply to the 193 million acre National Forest System. FFRF also raises numerous allegations that the Forest Service did not administer its permit program neutrally, but rather gave this statue preferential treatment. None of FFRF's allegations of preferential treatment, however, withstands examination.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989, 996 (9th Cir. 2013).

ARGUMENT

I. FFRF lacks standing under the Establishment Clause

To have standing under Article III of the Constitution, a plaintiff must have suffered an "'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," that was caused by the complained-of conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). To have representational standing to assert the claims of its members, FFRF must establish "that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490 (1975). In other words, an organization may bring suit on behalf of its members if (among other requirements) it identifies members who could bring suit on behalf of themselves.

Subsequent cases paraphrased *Warth*'s holding as requiring an organization to show that identified members "would have standing to sue in their own right," *see, e.g., Friends of the Earth, Inc. v. Laidlaw Env. Serv.*, 528 U.S. 167, 169 (2000); *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009), but that notion of "standing" included the zone of interests test. *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318,

320 n.3 (1977). The Supreme Court's recent decision in *Lexmark Int'l, Inc. v. Static Control Components*, 134 S.Ct. 1377, 1387 (2014), states that the zone of interest test is more aptly described as an inquiry into whether a particular plaintiff has a cause of action than as an element of "prudential standing," but however it is described, it remains a limitation on who can obtain judicial review under a particular statutory or constitutional provision. Because the rule set forth in *Warth* held that an organization's standing depends on showing that a member could "make out a justiciable case had [they] themselves brought suit," 422 U.S. at 511, then if FFRF cannot identify members who could bring suit in their own right, FFRF cannot bring suit on their behalf.

In Establishment Clause cases, the "concept of a 'concrete' injury is particularly elusive . . . because the Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature." *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1250 (9th Cir. 2007). Nevertheless, there are minima. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), the Supreme Court held that the plaintiff organization lacked standing to challenge a transfer of government property to a Christian college because the plaintiffs "fail[ed] to identify any personal

injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485 (emphasis in original). Although a plaintiff's distress stemming from mere disagreement with a purported Establishment Clause violation is insufficient to confer standing, where a plaintiff claims that the alleged violation has inflicted "the psychological consequence [of] exclusion or denigration on a religious basis within the political community," the alleged injury is "sufficiently concrete." *Catholic League v. City and County of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) (en banc).

A. William Cox's declaration cannot be considered in support of FFRF's standing

FFRF filed its complaint in this action on February 8, 2012. ER556-565. William Cox, a resident of Kalispell, Montana, read about the suit in the newspaper and decided to join FFRF. He testified that "I wrote to them on February 18, 2012, after the suit was filed in which we're involved today, and I sent in my dues or my initial contribution at that time . . . ." ER130.

"The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint." *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007). Because Cox was not a

member of FFRF when FFRF filed the complaint, his affidavit cannot be considered in assessing FFRF's standing.

B. Doug Bonham's declaration does not allege an ongoing, concrete injury

Mr. Bonham states in his declaration that he saw the statue once, 7 or 8 years earlier, and that he perceived it as "an oppressive reminder that Christians are a controlling and favored group in the Flathead Valley."[3] He acknowledges, however, that he has "not skied or hiked by the statue since, and my aging knees limit me, in any event." ER357. Though he cannot see the statue, he claims that he is "still affected" by it because it "literally and figuratively looms over the Valley." *Id*.

Bonham does not allege either that he has ongoing direct and unwelcome contact with the statue or that he has been forced to alter his behavior in order to avoid such contact. His one past encounter with the statue is insufficient to establish standing: "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive

[3] According to the 2010 U.S. Religion Census, 32.4% of the residents of Flathead County, Montana, are religious adherents, making it the 2710th most religious of 3143 counties in the United States. By way of reference, the consolidated City and County of San Francisco, California, ranked 2530th, with 35.3% of the population claiming religious adherence. http://www.rcms2010.org/

relief . . . if unaccompanied by any continuing, present adverse effects." *Lujan*, 504 U.S. at 564. Bonham's claim that he continues to be injured by a statue he cannot see because it "looms over the Valley" is insufficiently concrete to establish standing. It is, rather, a paradigmatic example of the sort of alleged injury that is "too tenuous, indirect, or abstract to give rise to Article III standing." *Vasquez*, 487 F.3d at 1251.

C. Pamela Morris's declaration does not allege an injury within the zone of interests of the Establishment Clause

Pamela Morris's declaration states that she saw the statue once, in 1957, when she was 15. ER361. Although she was then "active in the Methodist Youth Fellowship," and therefore presumably not *religiously* offended by an image of Jesus, she felt the statue was "startlingly out of place: intrusive," and it gave her an "unsettled feeling." *Id.* As a result, she claims, she has avoided the area these past 57 years, preferring to "backpack, fish and camp where nature has not been so violated in Montana." *Id.* She would ski at Big Mountain again "if it were a welcome site for all who love nature. The Jesus Statue, however, is an intrusive icon, and therefore, I do avoid Big Mountain." *Id.* Morris spoke of her love for Montana and its natural beauty, and her desire to "protect our public lands from the intrusion of partisan artificial icons." *Id.* The declaration quotes a

comment she sent to the Forest Service, arguing that the statue "is pollution, as it is both artificial [and] not environmentally beneficial." ER360 (emphasis in original).

"The question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" has traditionally been a part of the standing analysis. *Association of Data Processing Serv. Orgs v. Camp*, 397 U.S. 150, 153 (1970). In its recent decision in *Lexmark*, the Supreme Court stated that "prudential standing is a misnomer as applied to the zone-of-interests analysis," and that the zone of interests test is better described as "ask[ing] whether [a particular person] has a cause of action under the statute." *Id.* at 1387 (internal citation omitted). However it is described, the zone of interests test remains a limitation on *who* can invoke the Court's jurisdiction to decide a particular case, and both this Court and the Supreme Court have explicitly held that it applies to constitutional as well as statutory claims. *Individuals for Responsible Gov't, Inc. v. Washoe Cnty.*, 110 F.3d 699, 702-03 (9th Cir. 1997); *Valley Forge*, 454 U.S. at 475. Indeed, Justice Scalia, who authored the *Lexmark* opinion, has argued the zone of interests test "is *more* strictly applied when a plaintiff is proceeding under a constitutional provision

instead of the generous review provisions of the APA." *Wyoming v. Oklahoma*, 502 U.S. 437, 468-69 (1992) (Scalia, J., dissenting) (emphasis in original, internal citation omitted).

Morris fails to allege an injury within the Establishment Clause's zone of interests because her alleged injury is aesthetic or environmental, not religious. All her claims of injury stem from her feeling that the statue is an "intrusion" on the "natural beauty" of the Montana mountains. ER361. Unlike Bonham, Morris does not aver that the statue makes her, as a non-Christian, "feel marginalized in the community." *See* ER358. Instead, she states that the statue made her feel "unsettled" because it was "intrusive" and a violation of nature. ER361. As this Court held in *Catholic League*, psychological consequences are a sufficiently concrete injury for Establishment Clause standing when "the psychological consequence was exclusion or denigration *on a religious basis* within the political community." 624 F.3d at 1052 (emphasis added). Morris's claimed injury does not satisfy that standard.

It is true that Morris describes the statue as "a Christian icon on public land that has the effect of promoting one particular sect," ER362, but that comment describes the supposed constitutional *violation*, not its consequential *injury* to Morris. For standing purposes, it is not sufficient

merely to allege "that the Constitution has been violated;" a plaintiff must also "identify [a] personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequences presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485 (emphasis in original). Morris may well believe that no religious images should be permitted on public property, but that belief is not sufficient to confer standing. Standing requires a personal injury, and the only injury Morris claims to have suffered as a result of her one encounter with the statue 57 years ago is not within the Establishment Clause's zone of interests.

The district court, following this Court's precedent in *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004), found that Morris's avoidance of Big Mountain due to her feelings about the statue constitute a cognizable injury. In *Buono*, the plaintiff was a practicing Catholic who admitted that his opposition to the cross at issue was based on his ideological opposition to religious images on public property, rather than any personal religious or spiritual injury. Although the Supreme Court in *Valley Forge* held that sort of injury insufficient for Establishment Clause standing, this Court distinguished *Valley Forge*, holding that because Buono altered his behavior to avoid seeing the cross, he had shown an injury in fact.

Intervening Supreme Court case law, however, has confirmed that a plaintiff "cannot manufacture standing merely by inflicting harm on themselves" in order to avoid non-cognizable harm. *Clapper v. Amnesty Int'l, USA*, 133 S.Ct. 1138, 1151 (2013). *Buono*'s holding on standing should therefore be reconsidered.

Ms. Morris has not been "forced to assume special burdens to avoid" religious exclusion or denigration or other cognizable injury. *Valley Forge*, 454 U.S. at 487 n.22. Rather, she has chosen to assume certain burdens (namely, to ski elsewhere) to avoid confronting a governmental policy choice with which she disagrees. Such "self-inflicted" injuries do not establish standing. *Clapper*, 133 S.Ct. at 1153; *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam). Otherwise, plaintiffs could confer standing on themselves by incurring some tangible burden to avoid non-cognizable injuries. The Supreme Court in *Valley Forge* nowhere suggested that assuming such a cost would be sufficient to convert non-cognizable offense into cognizable injury.

The standing inquiry turns on the nature of the underlying harm the plaintiff suffers, not on whether she has assumed some cost to avoid it. To be sure, when a person is forced to change her behavior to avoid an injury that *is* cognizable under the Establishment Clause, then the harm caused by

that behavior change gives rise to standing. But when the alleged harm that is fairly traceable to the government's conduct is not cognizable for standing purposes, as is true in this case, then a would-be plaintiff cannot bootstrap her way into standing by choosing to inflict on herself an additional or different injury. *Clapper*, 133 S.Ct. at 1151.

II. The Forest Service's reissuance of the special use permit does not violate the Establishment Clause

A. The Forest Service's reissuance of the Knights' permit satisfies the *Lemon* and *Van Orden* tests

The traditional test used to determine whether a government action violates the Constitution's prohibition against the establishment of religion was set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). To be constitutional, the government action must "(1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion." *Barnes-Wallace*, 704 F.3d at 1082-83. In later decisions, "the Supreme Court essentially has collapsed these last two prongs to ask 'whether the challenged governmental practice has the effect of endorsing religion.'" *Trunk*, 629 F.3d at 1106. The combined effects/entanglement inquiry requires a court to examine "(i) whether governmental aid results in government indoctrination; (ii) whether recipients of the aid are defined by

reference to religion; and (iii) whether the aid creates excessive government entanglement with religion." *Barnes-Wallace*, 704 F.3d at 1083, *quoting Card v. City of Everett*, 520 F.3d 1009, 1015 (9th Cir. 2008). Both the purpose and effect of the challenged government action are evaluated from the viewpoint of a "reasonable, informed observer." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995).

In 2005, the Supreme Court declined to apply the *Lemon* test in *Van Orden v. Perry*, 545 U.S. 677 (2005), a case concerning a Ten Commandments monument on the grounds of the Texas state capitol. This Court, in a case involving a monument substantially identical to the one in *Van Orden*, explained that *Van Orden* "establishes an 'exception' to the *Lemon* test" in cases involving "longstanding plainly religious displays that convey a historical or secular message in a non-religious context." *Card*, 520 F.3d at 1016. The scope of that exception, however, is unclear. *Trunk*, 629 F.3d at 1107.

It is not clear whether this privately-owned monument fits within the exception to the *Lemon* test recognized by this Court in *Card*. However, because the statue is a longstanding, plainly religious monument with historical significance and secular use in a non-religious context, it arguably falls within the exception, so we, like the district court, address both tests.

Regardless of which test applies, reissuance of the special use permit does not violate the Establishment Clause.

1. The decision to reissue the permit satisfies the *Lemon* test

a. Reissuance of the permit had a secular purpose

In reissuing the Knights' special use permit, the government had the purpose of allowing a private organization to continue to maintain a "statue that has been a long standing object in the community since 1953 and is important to the community for its historical heritage." ER94. That legitimate secular purpose satisfies the first prong of the *Lemon* test, which requires only that the government's action is motivated "at least in part by [a] secular purpose." *Cholla Ready Mix v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004). The government's "stated reasons will generally get deference" as long as they are "genuine, not a sham, and not merely secondary to a religious objective." *McCreary County v. ACLU*, 545 U.S. 844, 864 (2005). A court may invalidate a government action "on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). As detailed below, pp. 61-64, the finding that the statue has local historical significance

is consistent with both the facts and the eligibility criteria, so FFRF's assertion that it is a pretext or sham is baseless.

FFRF emphasizes that the *Knights'* purpose in erecting and maintaining the statue is religious. That is presumably so, but it does not follow that the *Forest Service's* purpose in simply processing an application submitted to it is religious. As the district court correctly stated, "[t]he Knights' religious beliefs and reasons for erecting the statue are not juxtaposed onto the government." ER54. There is no evidence whatsoever that the Forest Service had a religious purpose in reissuing the permit. Its stated reason is valid and secular, and the inquiry into purpose does not require more.

b. A reasonable observer would not perceive the reissuance of the Knights' permit as an endorsement of religion

In *Barnes-Wallace*, this Court addressed a case strikingly similar to this one. The City of San Diego had, pursuant to neutral leasing practices, leased property to the Boy Scouts of America, which was stipulated to be a religious organization that occasionally held religious activities on the leased property. This Court held that because the leases were "allocated on the basis of criteria that neither favor nor disfavor religion," 704 F.3d at 1084, *quoting Agostini v. Felton*, 521 U.S. 203, 232 (1997), a reasonable

observer "familiar with San Diego's leasing practices, as well as with the events surrounding the leasing of [the specific leased properties] and the actual administration of the leased properties, could not conclude that the City was engaged in religious indoctrination, or was defining aid recipients by reference to religion." *Id.* at 1083. The neutrality of the City's policies and practices also compelled the conclusion that "an objective observer familiar with the history of the City's leasing projects could not view the Boy Scouts leases as an 'endorsement' of religion by the City. Nothing in the City's overall leasing policy can reasonably be regarded as 'appearing to take a position on questions of religious belief or . . . making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* at 1084 n.15, *quoting County of Allegheny v. ACLU,* 492 U.S. 573, 594 (1989)(internal citations omitted).

This Court's decision in *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993), is also instructive. There, as here, the government granted a permit for a religious display in a public forum pursuant to policies that were neutral with respect to religion. In applying the "reasonable observer" test to the "effects" prong, the Court noted that the "hypothetical observer is informed as well as reasonable; we assume that he or she is familiar with the history of the government practice at issue, as well as with the general

contours of the Free Speech Clause and public forum doctrine." 1 F.3d at 784. The Court then held that "such an observer could not fairly interpret the City's tolerance of the Committee's display as an endorsement of religion." By allowing such displays, the Court held, "the city merely states that it neither favors nor disfavors religious speech." *Id.*

The same analysis that resulted in findings of no Establishment Clause violation in *Barnes-Wallace* and *Kreisner* compels the same result here. A reasonable observer, familiar with the history of this statue, the viewpoint-neutral regulations under which it was originally permitted and under which the permit was reissued, *see* pp. 4-7, *above*, and with the general contours of the governing law, could not reasonably perceive government endorsement of religion, or the allocation of government benefits by reference to religion, from the Forest Service's reissuance of the Knights' special use permit to maintain their private display. As in *Barnes-Wallace*, nothing in the Forest Service's special use regulations, past or present, "can reasonably be regarded as 'appearing to take a position on questions of religious belief or . . . making adherence to a religion relevant in any way to a person's standing in the political community" or, indeed, to one's eligibility for a special use permit. 704 F.3d at 1084 n.15, *quoting County of Allegheny v. ACLU*, 492 U.S. at 594 (internal citations omitted).

FFRF erroneously attempts to focus the "effects" inquiry on the statue itself, rather than on the government action actually challenged in this lawsuit, namely, the permit reissuance. FFRF's analysis is misguided. The sole case on which FFRF relies in its effects argument, *Trunk v. City of San Diego*, concerned a veterans memorial that is owned by the federal government. In that case, therefore, unlike this one, the memorial itself is the government action or speech under challenge, and so the memorial was properly the focus of the effects analysis. In this case, however, the government action alleged to violate the Establishment Clause is not the display of a monument; it is the reissuance of a permit authorizing a private party to do so. The focus of Establishment Clause analysis, therefore, is on the permit decision.

Nevertheless, even if it were appropriate to focus on the statue itself, a reasonable observer would still find that it does not have the primary effect of advancing or endorsing religion. The statue sits by the side of a ski slope on a privately-operated ski resort. Unlike the displays on courthouse steps in *Allegheny* or on the state capitol grounds in *Van Orden*, there is nothing about this setting that suggests government endorsement or sponsorship of the statue's message. No one is compelled to pass by it to do anything but ski. Were it not for the plaque, it is unlikely that a casual passerby would

even know that the statue is located on public property, since it appears to be part of a commercial ski resort. The same plaque that informs the viewer of public ownership of the land, however, also informs the viewer that the statue is the private property of the Knights of Columbus. Thus, it is virtually impossible for either the hypothetical reasonable observer, or an actual observer, to form the mistaken impression that the statue is government property or represents a government-sponsored message.

In addition, nothing about the setting encourages reverence or religious devotion. There are no benches or other accommodations for anyone wishing to spend time contemplating the statue, and there has been no attempt to discourage the playful irreverence with which it has long been treated. The record documents a long-standing tradition of skiers decorating the statue with ski gear or other garb, posing for photos with it, and high-fiving it, frequently resulting in breaking off the statue's hands. ER395-400. The most commonly-noted use of the statue is as a meeting place for skiers, particularly in the days before cell phones made it easier for people to find each other. A reasonable observer would therefore conclude that the setting and use of the statue are secular, and do not create an impression of government endorsement of religion.

2. If the statue were government speech, it would be constitutional under *Van Orden*

In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Supreme Court held that a display of the Ten Commandments on the grounds of the Texas state capitol, despite its plainly religious content, does not violate the Establishment Clause. Justice Breyer, in a concurrence which this Court has recognized as the controlling opinion, *Card*, 520 F.3d at 1018 n.10, declined to apply the *Lemon* test, stating instead that a court must "examine how the [monument] is *used*," its context, and its history. *Van Orden*, 545 U.S. at 701 (emphasis in original). Of particular significance to the monument's history is the length of time for which it has stood without legal challenge. Justice Breyer found it "dispositive" that the monument in that case had stood for 40 years without legal challenge, indicating that "few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to 'engage in' any 'religious practic[e],' to 'compel' any 'religious practic[e],' or to 'work deterrence' of any 'religious belief.'" *Id.* at 702, *quoting School Dist. of Abingdon, PA v. Schempp*, 374 US 203, 305 (1963)(Goldberg, J., concurring).

Because the statue in this case is private speech, the focus of Establishment Clause analysis is on the government's permitting decision, not on the statue itself. Assuming *arguendo* that Establishment Clause analysis should be applied to the statue itself, however, the statue easily satisfies *Van Orden*'s test of constitutionality. Although the statue, like the Ten Commandments monument in *Van Orden*, unquestionably has religious content, the record shows that secular *uses* of the statue predominate over religious ones. The statue has seen only light and sporadic use as a site for religious services, but it has been consistently used as a meeting place, a site for photo-taking, and as an object of irreverent fun.

The context and setting of the statue is a commercial ski resort. As in *Van Orden*, "the setting does not readily lend itself to meditation or any other religious activity." 545 U.S. at 702. The setting primarily lends itself to skiing, and the statue's unexpected appearance beside the slopes of a commercial ski resort lends itself more to curiosity and playfulness than to reverence or worship. The fact that the statue is frequently decorated with ski gear or other garb further reinforces the secular nature of the scene.

Finally, the history of the statue shows that it stood for 57 years after its erection in 1954 before attracting legal challenge. That period of time,

longer than the 40 years held to be "dispositive" in *Van Orden*, indicates that those who encountered the statue did not perceive it as a government endorsement or establishment of religion. Rather, they either knew or assumed it to be what it is: an old, privately-owned statue reminiscent of "those bygone days of sack lunches, ungroomed runs, rope tows, t-bars, leather ski boots, and 210 cm. skis." ER34 (Dist. Ct. Opinion).

B. The pre-1998 regulations governing special use permits created a limited public forum on National Forest System lands

In 1953, when the Knights of Columbus first applied for a permit to erect a statue of Jesus, the regulations governing special use permits placed few restrictions on the allowable use of National Forest System lands. Certain specified uses, such as mining, power transmission lines, and other uses provided for by statute, were subject to more detailed regulation, but other uses, including the construction and maintenance of monuments, required only that the permit "contain such terms, stipulations, conditions and agreements as may be required by the regulations of the Secretary of Agriculture and the instructions of the Chief of the Forest Service," and that permit holders "comply with all State and Federal laws and all regulations of the Secretary of Agriculture relating to the national forests and . . . conduct themselves in an orderly manner." 36 C.F.R. §251.1 (Cum. Supp.

1944) (Add.4); *see also* ER70. Under those regulations, the Knights' initial request for a special use permit to construct a monument was properly granted, as were the roughly 70 similar requests from state and local governments, schools, clubs, historical societies, and individuals. Dodds Decl., Exh. 1.

By allowing the public to engage in expressive conduct, including the installation of monuments, on the property under its management, the Forest Service created a limited public forum. In *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), the Supreme Court explained that there are three different categories of public forums. In the first category, traditional public forums such as parks and public streets, the government may not prohibit communicative activity. It may enforce reasonable, content-neutral restrictions on the time, place, and manner of expression, but may not enforce content-based[4] restrictions unless they are narrowly drawn to serve a compelling state interest. *Id*. at 45.

[4] Content-based restrictions are distinct from viewpoint-based restrictions. Content-based restrictions may limit the use of a forum to the purposes for which it was created – for example, education – but may not limit the point of view expressed. Viewpoint-based restrictions restrict what point of view may be presented in the forum, and they are "presumed impermissible" in any type of public forum. *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 830 (1995).

A second category of public forums, known as "limited public forums," consists of "public property which the state has opened for use by the public as a place for expressive activity." *Id.* The state "is not required to indefinitely retain the open character of the facility," but "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.* at 45-46.

Public property which "is not by tradition or designation a forum for public communication" constitutes the third category. Such "nonpublic forums," such as the school mail system at issue in *Perry*, may be reserved for their intended purposes, as long as the regulation on speech is reasonable and is not intended to suppress the speaker's viewpoint. *Id.*

Until the Forest Service revised its special use regulations in 1998, the lands of the National Forest System were in the second category: a limited public forum. The Forest Service imposed reasonable time, place, and manner restrictions by requiring that special uses, including monuments, comply with all applicable laws and with "such terms, stipulations, conditions and agreements as may be required by the regulations of the Secretary of Agriculture and the instructions of the Chief of the Forest Service." 36 C.F.R. §251.1 (Cum. Supp. 1944) (Add.4). It did not impose any restrictions on the content or viewpoint expressed by permit holders.

As the Supreme Court noted in *Perry*, the government "is not required to indefinitely retain the open character of the facility," and in 1998, the Forest Service revised its regulations in a manner that effectively closed the limited public forum to monuments. Already-existing special uses, including monuments, remain eligible for reauthorization so long as they meet certain minimal requirements. *See* pp. 4-7, *supra*; *see also* FSH 2709.11, Ch. 10, sec. 11.2. Proposals for new special uses, however, must now satisfy certain viewpoint-neutral screening criteria that, in practice, require the denial of most proposals to install new monuments. *Id*.

C. Private religious speech in a limited public forum does not violate the Establishment Clause

Both this Court and the Supreme Court have repeatedly held that private religious speech in a public forum does not constitute government speech, and does not violate the Establishment Clause. The statue here is, at most, private religious speech in a public forum, and therefore reissuance of the permit does not violate the Establishment Clause.

In *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993), the plaintiff alleged that the City violated the Establishment Clause by allowing a private group (the Christmas Committee) to erect a religious display in a public park during the Christmas season. This Court held that there was no violation of the Establishment Clause as long as the city acted in a

"nondiscriminatory manner" in approving permits for displays in the park. *Id.* at 776.

Applying the *Lemon* test, this Court held that the City had a valid secular purpose in approving the Christmas Committee's permit request.

> The City cites two such purposes: (1) the promotion of holiday spirit and (2) the promotion of free expression. We need not consider the City's first avowed purpose because the second suffices. The Supreme Court has made it clear that a policy of permitting open access to a public forum, including non-discriminatory access for religious speech, is a valid secular purpose.

Id. at 782, *citing Board of Education v. Mergens*, 496 U.S. 226, 249 (1990) and *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). This Court also held that the display, "notwithstanding its strong religious content," did not have the primary effect of advancing religion "because the display is private speech in a traditional public forum removed from the seat of government." 1 F.3d at 782.

> Tolerance of religious speech in an open forum "does not confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274, 102 S.Ct. at 276. "Thus . . . truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer."

1 F.3d at 785, quoting Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992) (en banc).

Similarly, the Supreme Court has repeatedly held that religious speakers may not be excluded from public forums on the ground that the government wishes to avoid an Establishment Clause violation, because no Establishment Clause violation occurs when private religious speakers participate in a neutrally-operated public forum. *Widmar*, 454 U.S. at 270-75 (allowing religious student groups to use university facilities generally open to student groups would not violate Establishment Clause); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 386 & 395 (1993) (allowing religious group to show religious movie on public property made available for "social, civic and recreational meetings and entertainments" would not violate Establishment Clause); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 845 (1995) ("To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their [religious] viewpoint"); *Good News Club v. Milford Ctrl. School Dist.*, 533 U.S. 98, 113 (2001) ("school has no valid Establishment Clause interest" in excluding religious club for children from after-school use of building that was available to secular clubs).

The statue in this case is privately owned. Its expressive content is the private speech of the Knights of Columbus. That expression exists on

federal land due to special use permit regulations that allowed permanent monuments, and that were neutral with respect to religion, thus creating a limited public forum. Although those regulations have since been amended in a manner that effectively closes the limited public forum to new monuments, the current regulations regarding both new and existing uses are likewise neutral with respect to religion. Existing monuments, whether secular or religious, may be reauthorized as long as they meet the requirements for permit reissuance. Proposed new monuments, whether secular or religious, are unlikely to be authorized because current regulations generally discourage that use. The Forest Service's actions with respect to the Knights' initial permit request and the permit reissuance have been entirely neutral with respect to religion,[5] and thus cannot constitute a violation of the Establishment Clause. *See Rosenberger*, 515 U.S. at 839 ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.")

[5] The initial permit denial was, admittedly, not neutral with respect to religion; it explicitly based the denial on the statue's religious content. ER84-86. That decision has been withdrawn, however, and is of no further effect.

D. When the limited public forum covers 193 million acres, permanent monuments do not necessarily represent government speech

Notwithstanding the regulations that allowed special use permits to be issued for monuments on National Forest System lands without discrimination on the basis of religion, FFRF maintains that "the Free Speech Clause's forum analysis 'simply does not apply to the installation of permanent monuments on public property.'" Br. at 54, *quoting Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 480 (2009). Although that quotation is accurate, it omits significant qualifying language. The paragraph from which FFRF quotes begins "To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument . . . ." The sentence from which FFRF quotes begins "But as a general matter. . . ." The Court did not, as FFRF suggests, state a categorical rule that public forum analysis never applies to permanent monuments; it was, rather, making a generalization based on the assumption that most public forums are small municipal parks.

The Court's reasoning that public forum principles did not apply in *Summum* was explicitly based on the assumption that public parks can handle only so many permanent monuments:

> The forum doctrine has been applied in situations in which government-owned property or a government program was

> capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. . . . By contrast, public parks can accommodate only a limited number of permanent monuments.

555 U.S. at 479.

Pioneer Park, the park before the Court in *Summum*, consists of 2.5 acres. *Id.* at 464. The National Forest System contains 193 million acres, an area the size of Texas. www.fs.fed.us/aboutus/meetfs.shtml. Unlike the typical public park, it is capable of accommodating a large number of permanent monuments without defeating its essential functions. The Court's assumption, therefore, that the scarcity of land on which to place permanent monuments implies that they reflect the views of the landowner simply does not apply to a forum this large. The Court explicitly acknowledged that public "forum doctrine might properly be applied to a permanent monument" under different circumstances. 555 U.S. at 480. This case presents those different circumstances.

E. FFRF's allegations that the Forest Service gave preferential treatment to the Knights' permit reissuance application are unfounded

FFRF repeatedly suggests that the Forest Service did not administer its special use permit program neutrally, but instead gave preferential treatment to the Knights of Columbus. FFRF alleges that the Forest Service

acted improperly in three ways: by reissuing this permit while turning down proposals from other parties for new monuments on Forest Service lands; by withdrawing its decision to deny the Knights' permit reauthorization request; and by finding that the statue is eligible for listing on the National Register of Historic Places. None of FFRF's allegations of preferential treatment withstands scrutiny.

1. The Forest Service did not engage in favoritism by applying the regulations governing reauthorization of existing uses to the reauthorization of an existing use, while applying the regulations governing new proposals to new proposals.

FFRF alleges that the Forest Service gave preferential treatment to the Knights' application for permit reissuance. FFRF's principal support for that allegation appears to be two record documents indicating that a proposal to erect a statue similar to Big Mountain Jesus would not be approved today, and that other proposals to install various types of monuments have been denied. ER228 ("Note we discussed we would not entertain one of these permit request[s] today"); ER226 ("The Flathead has rejected proposals from other groups to put monuments, grave markers, crosses, etc. on the Forest Service land"). There is no question that the Forest Service would be unlikely to approve a proposal to place a privately-owned statue on National Forest System lands today, but that does not

reflect favoritism towards the Knights; it reflects the fact that the regulations have changed since the Knights' original permit was granted. *See supra*, pp. 4-7. It is likewise no evidence of favoritism that the Forest Service has rejected proposals to install "monuments, grave markers, crosses, etc." on National Forest System lands, because that is what the regulations have required the Forest Service to do for the past 16 years. To the contrary, it is evidence that the Forest Service is evenhandedly applying the revised regulations to secular and religious proposed uses alike.

Reauthorizations of existing special uses are not subject to the screening criteria that generally require the denial of proposals to install new monuments on National Forest System lands. 63 Fed. Reg. 65953 (Add.9); FSH 2709.11, Ch. 10, sec. 11.2. The Forest Service did not give the Knights "preferential" treatment by applying the rules and directives governing the reauthorization of existing uses to the Knights' application for reauthorization of an existing use.

2. The Forest Service withdrew its decision to deny reissuance of the permit because it was flawed

In FFRF's telling of this case, the Forest Service initially issued a correct decision to deny reissuance of the Knights' permit, but then withdrew it in response to public outcry, and relied on invented reasons to reissue the permit. In reality, however, the Forest Service's initial denial

was flawed both procedurally and substantively. Apparently concerned about the implied threat of litigation in FFRF's FOIA request, ER225, the Forest Service denied reissuance of the permit based on an incomplete and incorrect understanding of the Establishment Clause, and failed to follow its own regulations and policies governing reauthorization of existing uses. While it is true that the denial was followed by a public outcry, it was also followed by a formal administrative appeal, which the Forest Service is not free to ignore.

The denial relied on screening criteria applicable only to proposals for new special uses, not reauthorizations of existing special uses. The denial stated that "the statue is an inappropriate use of NFS lands and must be removed," ER84, and further that "Forest Service policy at FSM 2703.2 limits authorized use of NFS lands to those that " . . . cannot be reasonably accommodated on non-National Forest System lands." ER85. Both statements reflect second-level screening criteria, *see* FSH 2709.11, Ch. 10 , secs. 12.32 & 12.32a, which should not have been applied to an application for reauthorization of an existing use. *See* 63 Fed. Reg. 65953 (Add.9) (stating that screening process "applies only to applications for new or substantially changed uses.") FFRF does not allege – nor could it credibly

do so– that the Knights' application for permit reissuance was requesting a "new or substantially changed use."

Even more seriously, the denial was explicitly based on the fact that the statue is religious in nature. As the Knights vigorously argued in their administrative appeal, the stated reasons for the denial raised serious legal issues about whether the Forest Service was "treating religious and nonreligious uses differently" and "patently discriminating" against religious uses. ER89.

In light of those issues, the Forest Service's decision to withdraw its initial denial cannot reasonably be viewed in the light that FFRF tries to cast on it. To the contrary, the record demonstrates that it was a good-faith and rational agency response to an administrative appeal of a flawed agency decision.

3. The Forest Service did not deny the statue's religious nature nor its association with the 10th Mountain Division in finding it eligible for listing in the National Register of Historic Places

FFRF accuses the Forest Service of relying on "contrived justifications" (Br. at 31) or "disingenuous tactics" (Br. at 40) in finding that the statue qualifies for listing in the National Register of Historic Places. FFRF starts from the false premise that religious and commemorative properties are categorically ineligible for listing on the National Register,

see Br. at 40, 41, and further asserts that the Forest Service "acknowledged" that false premise to be true. Br. at 6. FFRF then claims that, in order to avoid that supposed bar to listing, the Forest Service "asked the Historic Preservation Office to agree that the Jesus Statue has no association with Jesus or WW II veterans." Br. at 6; *see also* Br. at 41 ("knowing the tightrope it had to walk, the Forest Service coached personnel to make the remarkable argument that the Statue of Jesus has neither religious significance, nor is it a war memorial.") The record reveals, however, that Forest Service did no such thing, and the documents on which FFRF relies belie its absurd spin.

The Forest Service correctly acknowledged that "[m]onuments and religious properties are generally not eligible for listing on the National Register of Historic Places for either their association with important persons or events nor for any religious values. Therefore, this statue of Jesus cannot be considered eligible for its association either with the soldiers who fought in WWII nor for its association with Jesus." ER91. That correct acknowledgement that an association with World War II soldiers or with Jesus is not *sufficient* for listing a property on the National Register, however, does not indicate agreement with FFRF's insupportable view that

those associations *disqualify* an otherwise eligible property from listing, nor does it constitute a claim that those associations do not exist.

The Forest Service's archaeologist noted that the ski area "had a significant influence on the history of Whitefish playing a significant role in the transition of Whitefish from a town heavily dependent on the lumber industry to a community built around tourism, skiing, and outdoor recreation." ER91. Because "so little remains intact of that early history," the archaeologist concluded that the statue, which has "integrity of location, setting materials, workmanship, feeling, and association and is a part of the early history of the ski area" is "probably eligible for listing on the National Register of Historic Places under criteria 'a' – associated with events important to local history." ER92.

The Montana State Historic Preservation Officer (SHPO) agreed, adding that the statue "is close enough to the third example of an Eligible property description presented in National Register Bulletin #15 on page 40." ER93. National Register Bulletin #15, entitled "How to Apply the National Register Criteria for Evaluation," is an official publication of the National Park Service, which maintains the National Register. On page 40 is a list of three types of commemorative properties that would qualify for listing on the National Register. The third example states that "a

commemorative marker erected early in the settlement or development of an area will qualify if it is demonstrated that, because of its relative great age, the property has long been a part of the historic identity of the area." Add.71. The SHPO's conclusion that the statue falls into that category is eminently reasonable. There is no sound basis for FFRF's allegation that the finding of eligibility was "contrived."

CONCLUSION

In *Van Orden*, Justice Breyer quoted Justice Goldberg's reminder that courts must "distinguish between real threat and mere shadow" of establishment of religion. *Van Orden*, 545 U.S. at 704, *quoting Schempp*, 374 US at 308. If ever a government action presented no more than the mere shadow of a threat of an Establishment Clause violation, it is the Forest Service's reissuance of the Knights of Columbus's special use permit to maintain this privately-owned local historical landmark.

Therefore, for the reasons explained above, this Court should remand this case with instructions to dismiss because FFRF has failed to identify an individual member who would have standing and a cause of action to bring this suit on their own behalf. In the alternative, the District Court's order granting summary judgment for the Forest Service should be affirmed.

Respectfully submitted,

ROBERT G. DREHER
Acting Assistant Attorney General

Of Counsel:
ALAN J. CAMPBELL
ELLEN R. HORNSTEIN
U.S. Department of Agriculture
Office of the General Counsel

JENNIFER SCHELLER NEUMANN
DAVID B. GLAZER
JOAN M. PEPIN
Attorneys, U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 7415
Washington, D.C. 20044
(202) 305-4626
joan.pepin@usdoj.gov

APRIL 2014
90-1-0-13634

STATEMENT OF RELATED CASES

The Federal Defendants-Appellees are not aware of any related cases pending in this or any other court.

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

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

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13953 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Joan M. Pepin

9th Circuit Case Number(s) 13-35770

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) 4/30/2014 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Joan M. Pepin

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

ADDENDUM

CUMULATIVE SUPPLEMENT

TO THE

CODE OF FEDERAL REGULATIONS

OF THE

UNITED STATES OF AMERICA

Containing a codification of documents of general applicability and legal effect issued by Federal Agencies and filed with the Division of the Federal Register during the period June 2, 1938, to June 1, 1943, inclusive, including Presidential proclamations, Executive orders, and other Presidential documents in full text

WITH ANCILLARIES AND INDEX

TITLE 33—TITLE 45

Published by the
Division of the Federal Register, The National Archives
Pursuant to Section 11 of the Federal Register
Act as Amended

●

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1944

TABLE OF CONTENTS

Additional copies of this volume may be procured from the Superintendent of Documents, Government Printing Office, Washington 25, D. C.

Cherokee National Forest, Tennessee, under permits issued by the Supervisor of the Cherokee National Forest, in accordance with instructions received by him from the Chief of the Forest Service, Washington, D. C., which permits shall state the place and time of fishing, the fee, and the number and size of fish that may be taken.

§ 241.6 *Noontootly National Game Refuge, Georgia.* Fishing is hereby authorized within Noontootly National Game Refuge, Chattahoochee National Forest, Georgia, under permits issued by the Supervisor of the Chattahoochee National Forest, in accordance with instructions received by him from the Chief of the Forest Service, Washington, D. C., which permits shall state the place and time of fishing, the fee, and the number and size of fish that may be taken. [Regs., Sec. Agric., Dec. 30, 1941; 6 F.R. 6856]

PART 251—LAND USES

SPECIAL USE PERMITS

RIGHTS OF GRANTOR

DESIGNATION OF AREAS

PETERSBURG WATERSHED

RIGHTS-OF-WAY FOR ELECTRIC POWER TRANSMISSION LINES

NOTE: For the text of sections listed in the above table and not appearing in this supplement, see 36 CFR Part 251.

SPECIAL USE PERMITS

AUTHORITY: §§ 251.1 to 251.9, inclusive, issued under 30 Stat. 35, 33 Stat. 628; 16 U.S.C. 551, 472.

SOURCE: §§ 251.1 to 251.9, inclusive, contained in Regulations U–10 to U–18, inclusive, Secretary of Agriculture, Sept. 9, 1942; 7 F.R. 7178. Exception is noted in brackets following section affected.

§ 251.1 *Special use permits; general conditions.* All uses of national forest lands, improvements, and resources, including the uses authorized by the Act of March 4, 1915 (38 Stat. 1101; 16 U.S.C. 497), and excepting those provided for in the regulations governing the disposal of timber and the grazing of livestock or specifically authorized by acts of Congress, shall be designated "special uses," and shall be authorized by "Special Use Permits."

The temporary use or occupancy of national forest lands by individuals for camping, picnicking, hiking, fishing, hunting, riding, and similar purposes, may be allowed without a special use permit; provided, permits may be required for such uses when in the judgment of the Chief of the Forest Service the public interest or the protection of

the national forest requires the issuance of permits.

Special use permits shall be issued by the Chief of the Forest Service or, upon authorization from him, by the regional forester, forest supervisor, or forest ranger, except as herein provided, and shall be in such form and contain such terms, stipulations, conditions and agreements as may be required by the regulations of the Secretary of Agriculture and the instructions of the Chief of the Forest Service.

Special use permittees shall comply with all State and Federal laws and all regulations of the Secretary of Agriculture relating to the national forests and shall conduct themselves in an orderly manner.

A special use permit may be terminated with the consent of the permittee, or because of nonpayment of fees, by the officer by whom it was issued or his successor, but may be revoked or cancelled only by the Secretary of Agriculture or by an officer of the Forest Service superior in rank to the one by whom it was issued, except that a term permit may be revoked only for breach of its terms or violation of law or regulation. Appeals from action relating to special use permits may be made as provided in § 211.2 of this chapter.

A special use permit may be transferred with the approval of the issuing forest officer, his successor or superior.

Special use permits authorizing the operation of public service enterprises, such as hotels and resorts, shall require that the permittee charge reasonable rates and furnish such services as may be necessary in the public interest.

Special use permits for the excavation of antiquities under the act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 432), and leases of land under the act of February 28, 1899 (30 Stat. 908; 16 U.S.C. 495), shall be granted only by the Secretary of Agriculture.

Rights-of-way for electric power transmission, telephone, and telegraph lines granted under the act of March 4, 1911 (36 Stat. 1253; 16 U.S.C. 523), shall be subject to the condition that the grantee execute such stipulations as may be required by the regional forester for the protection of the national forests, pay such charges, furnish such facilities, and permit such reasonable use of its poles and lines for official purposes as may be required by the regional forester.

Nothing herein shall be construed to prohibit the temporary occupancy of national forest lands without permit for the protection of life or property in emergencies, provided a special use permit for such use be obtained at the earliest opportunity.

§ 251.2 *Free special use permits.* The Chief of the Forest Service may authorize the issuance of special use permits without charge when the use is (a) by a governmental agency, (b) of a public or semi-public nature, (c) for noncommercial purposes, (d) in connection with an authorized utilization of national forest resources, (e) of benefit to the Government in the administration of the national forests, or for similar purposes compatible with the public interest, and when authorized and directed so to be issued by acts of Congress.

§ 251.3 *Charge for special use permits.* Special use permits, except as provided in § 251.2 or specifically authorized by the Secretary of Agriculture, shall require the payment of a fee or charge commensurate with the value of the use authorized by the permit, the amount of which shall be prescribed by the Chief of the Forest Service.

Special use permits involving government-owned buildings or improvements and facilities which require caretakers' services, or the furnishing of special services such as water, electric lights, and clean-up, may require the payment of an additional fee or charge to cover the costs of such services.

§ 251.4 *Prospecting and mining permits.* Special use permits pursuant to the act of March 4, 1917 (39 Stat. 1150; 16 U.S.C. 520), for the prospecting and mining of mineral resources, except oil and gas, on land acquired under the act of March 1, 1911 (36 Stat. 961; 16 U.S.C. 513ff), or the act of June 7, 1924 (43 Stat. 653; 16 U.S.C. 569), or the act of March 3, 1925 (43 Stat. 1215; 16 U.S.C. 516), may be issued to citizens of the United States, or corporations organized and existing under the laws of the United States or any State thereof: *Provided,* That the use of the land for prospecting and mining shall not be incompatible with the purposes for which the lands are being administered.

Prospecting and mining permits shall not exceed 20 years' duration and shall provide for an annual rental payable in

Monday
November 30, 1998

Part IV

Department of Agriculture

Forest Service

36 CFR Part 251
Special Uses; Final Rule

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596–AB35

Special Uses

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: The Department is adopting amendments to regulations governing the use and occupancy of National Forest System lands to streamline and make more efficient the process for obtaining special use authorizations, to provide for the use of one-time payments for easements as presently used in the market place, to limit certain liability requirements to amounts determined by a risk assessment, to clarify definitions of certain terms, and to clarify requirements related to renewal of existing special use authorizations. The intent is to improve service and reduce costs to proponents and applicants for and holders of National Forest System special use authorizations, to expedite decisionmaking, and to permit more "user-friendly" administration of such authorizations by removing certain requirements deemed unnecessary and outdated.

EFFECTIVE DATE: This rule is effective December 30, 1998.

FOR FURTHER INFORMATION CONTACT: Randall Karstaedt, Lands Staff, (202) 205–1256, or Ken Karkula, Recreation, Heritage, and Wilderness Resources Management Staff, (202) 205–1426, Forest Service, USDA.

SUPPLEMENTARY INFORMATION:

Background

Approximately 72,000 special use authorizations are in effect on National Forest System lands. These uses cover a variety of activities, ranging from individual private uses to large-scale commercial facilities, and public services. Examples of authorized land uses include road rights-of-way serving private residences, apiaries, domestic water supply conveyance systems, telephone and electric service rights-of-way, oil and gas pipeline rights-of-way, hydroelectric power generating facilities, ski areas, resorts, marinas, municipal sewage treatment plants, and public parks and playgrounds. The agency receives about 6,000 applications for special use authorizations each year. These applications are subjected to a rigorous, time-consuming, and costly review and decisionmaking process in determining whether to approve or reject them.

There are 14 statutes authorizing special uses on National Forest System lands. These authorities, which are listed at 36 CFR 251.53, include statutes of broad application, such as the Mineral Leasing Act of 1920, the Federal Land Policy and Management Act of 1976, and the Bankhead-Jones Farm Tenant Act of 1937, as well as statutes focusing on a specific use of Federal lands, such as the National Forest Ski Area Permit Act. The basic authority of the Secretary of Agriculture to regulate the occupancy and use of National Forest System lands is the Act of June 4, 1897 (16 U.S.C. 551).

Additionally, the Independent Offices Appropriations Act of 1952, as amended, (31 U.S.C 9701) and the Office of Management and Budget (OMB) Circular A–25 require holders of authorizations to pay for the use of the Federal land. The Federal Land Policy and Management Act of 1976 requires holders of rights-of-way authorizations to pay annually, in advance, the fair market value of the use of the Federal land and its resources. The 1976 Act also provides that fees may be waived, in whole or in part, under specified conditions when equitable and in the public interest.

Requirements of the National Environmental Policy Act, the Wilderness Act of 1964, the Endangered Species Act, the Archaeological Resources Protection Act of 1979, additional requirements of the Federal Land Policy and Management Act of 1976, and Executive Order Nos. 11990 (Floodplains) and 11998 (Wetlands) also bear directly on the issuance of special use authorizations. These directives and statutory authorities require extensive analysis and documentation of the impacts of use and occupancy on a wide array of environmental, cultural, and historical resources. The practical effect of these requirements has been to greatly lengthen the time required and the costs involved in processing applications for special use authorizations or reissuing authorizations for existing uses. The time and cost impacts weigh on both the Forest Service and applicants and holders of authorizations. The significance of these impacts has been a principal factor in the development of these amendments to the special use regulations.

On August 14, 1992, the Forest Service published a proposed rule (57 FR 36618) and sought public comment to amend regulations governing the use and occupancy of National Forest System lands at 36 CFR Part 251, subpart B. Such use and occupancy is authorized by "special use authorizations," which include permits, term permits, easements, licenses, and leases. The proposed revisions had several purposes: to (1) streamline the application process for special use authorizations, (2) enhance efficiency of review of special use proposals, (3) authorize one-time payments of rental fees for certain types of special use authorizations, (4) limit certain liability requirements, (5) clarify certain definitions, and (6) clarify direction on renewal of special use authorizations.

A total of 25 responses were received on the proposed rule. Identity of the respondents is as follows:

Respondent category	Number	Percent
Individuals	3	12
Electric Utilities	6	24
Oil & Gas Companies	4	16
Telephone Company	1	4
Permit Holder Associations	8	32
Government Agencies	3	12
Total	25	100

Readers are advised that a major revision to this subpart was made subsequent to the August 14, 1992, proposed rule. On August 30, 1995, the agency adopted a final rule revising those portions of subpart B governing noncommercial group uses and noncommercial distribution of printed material within the National Forest System (60 FR 45293). The 1995 revisions, referred to in this rulemaking as the "noncommercial group use regulations," ensure that the authorization procedures for these activities comply with First Amendment requirements of freedom of speech, assembly, and religion. They did not directly impact the concurrent effort to streamline and make more efficient the process for obtaining special use authorizations. However, the 1995 revisions added new provisions and revised existing text which required redesignation of several sections and paragraphs throughout the subpart. In the narrative which follows, the terms "current rules" or "current regulations" refer to the regulations at 36 CFR part 251, subpart B, as published in the current volume of Title 36 of the Code of Federal Regulations, revised as of July 1, 1997.

General Comments

Respondents to the 1992 streamlining proposed rule generally supported the Forest Service's effort to streamline the permit application process and to make the administration of special use

authorizations more user friendly, although most asked that the final rule clarify that the revisions apply to new permits only. These respondents felt that the proposed regulations would reduce unnecessary paperwork burdens on applicants and, thereby, reduce costs for both the applicant and the agency. Indicating that the proposed revisions would improve the agency's performance, a number of respondents cited examples of the poor quality of service, the lack of experienced field personnel, and the length of time taken by the agency's field offices in responding to and processing special use permit applications. Further, these respondents urged the agency to quickly adopt final regulations that implement statutory authorities that have been available to the agency for several years, particularly amendments made to the Federal Land Policy and Management Act of 1976 by the Act of October 27, 1986.

Several respondents suggested that the agency institute a land and resource planning procedure or incorporate into its Forest planning activity a process that would pre-authorize certain types of land uses and thus avoid or minimize time consuming and costly analysis of individual applications for authorizations. These respondents suggested the process could be built around standards and guidelines in a national forest's land and resource management plan (forest plan). One respondent suggested the U.S. Army Corps of Engineers Nationwide Permit Program could serve as a model for this process. The types of special uses that would be subject to this pre-authorization process are described by the respondents as routine activities serving the public, such as electric and telephone rights-of-way.

Three respondents expressed concern that the agency's efforts to improve its administration of special use authorizations and make those regulations more user friendly will not be successful unless and until funding for this activity is dramatically improved. These respondents pointed out that the lack of adequate funding at the field office level is the biggest single factor responsible for poor service and delays in processing applications experienced by permit applicants.

The Department of the Interior (DOI) urged that Forest Service regulations for permitting and administering uses on National Forest System lands be more compatible with those of the land-managing agencies in the Department of the Interior, particularly the Bureau of Land Management (BLM). Because both the Forest Service and the BLM derive much of their authority for administering land uses from the Federal Land Policy and Management Act of 1976, the DOI believes any regulations of the two agencies should be very similar. Further, the DOI urged a coordinated effort to review and revise regulations promulgated under the 1976 Act.

The DOI also expressed concern that the proposed delay in consideration of the environmental effects of the proposed use could result in environmentally unsound projects passing screens only to be rejected in later stages of development after substantial time and investment have been made by the agency and the proponent. In the same context, the DOI suggested that notification of adjacent land-managing agencies should be made earlier in the application review process so that the concerns of the affected agencies could be made known sooner.

The U.S. Small Business Administration advised the Forest Service that the proposed rule was not in compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612). That Act requires Federal Government agencies promulgating rules to describe the impact of the rulemaking on small entities through preparation of a regulatory flexibility analysis. Despite the agency's acknowledgment that the proposed rule would have a beneficial impact on a substantial number of small entities, the U.S. Small Business Administration stated that the aforementioned analysis must nevertheless be prepared.

Response to the General Comments. The Forest Service and the Department are pleased that most respondents generally viewed the proposed rule as a positive step toward improving the administration of special use authorizations. The agency is aware that its performance in responding to applications and administering existing authorizations often is inadequate and its service to permit applicants and holders—its "customers"—needs to be significantly improved. The Department is also mindful of the President's direction to improve service to the public. Executive Order No. 12866, dated September 30, 1993, directed agencies to reform and make more efficient their regulatory processes. The Forest Service initiated this effort with the goal of streamlining and making more user friendly its special use regulations and will, through the adoption of a final rule, ensure that this goal is met in part. Since beginning this particular rulemaking, the Forest Service has undertaken a major project to re-engineer special uses administration. A team of agency employees is currently at work to implement the re-engineering recommendations, which are focused on agency procedures. Implementation of these recommendations may lead to further changes in rules and will certainly result in additional revisions in agency directives governing special uses administration. Any revisions to rules or directives will be fully coordinated with the revisions made by these final rules.

The agency agrees with the suggestion that broad guidance for considering applications for special use authorizations be made a part of its land and resource planning processes. This guidance would allow decisions to be made on routine permit activities without further analysis. Such a procedure would require that the requisite environmental documentation be made in the Forest plan and that the documentation be specific enough to cover the proposed use.

However, the agency believes that such a procedure can be implemented without additional regulatory guidance. The forest planning process described in the agency's administrative manual (Forest Service Manual, Chapter 1920) prescribes the format and content of each Forest plan. The initial plans were completed in the early to mid 1980's and currently remain in effect. Almost without exception, these plans lack any detail regarding authorizations for use and occupancy of National Forest System lands. The life of these plans is generally 10–15 years and most of the plans for the 123 National Forest planning units of the agency are now or soon will be undergoing revision. The Forest Service recognizes the need to address land use and occupancy generally in the forest plans. The forest plan revision process offers the opportunity for units to consider the need for more specific guidance on land uses. The Department further notes that public participation is a fundamental ingredient in the preparation and revision of Forest plans. Thus, this will allow holders of or applicants for authorizations to participate directly in the development of the plan and, thereby, identify specific opportunities for addressing land use authorizations at the Forest level.

The Department fully agrees with respondents' concerns that sufficient funding for administration of special use authorizations must be considered along with revisions to the regulations. The Forest Service is addressing this matter in a variety of ways. However, the Department must emphasize that the budgeting and appropriation process

takes a much larger view of the management of National Forest System lands, balancing the funding of a wide variety of Forest Service programs and activities in the context of constraints imposed on the Department of Agriculture and the Federal Government as a whole. Thus, while the Department agrees that improving funding for this activity is desirable, it cannot unilaterally support respondents' urging of greater funding for the administration of special use authorizations. Instead, the Forest Service will seek recognition in its budget requests of the importance of efficient and cost-effective administration of land use authorizations and service to its customers.

The Forest Service concurs with the DOI suggestion that regulations governing administration of land uses on Federal lands should be more consistent. The Forest Service and the BLM are taking actions to bring their regulations into closer agreement, albeit in the context of individual uses. The two agencies have agreed that more comprehensive action is needed and are undertaking joint examination and coordination of regulations. While this action was prompted in part by the publication of the proposed special use regulations, additional motivation has been provided by the National Performance Review effort and Executive Order No. 12866. To the extent that statutory authorities permit, the two agencies have embarked on a course to adopt common regulatory approaches to land use and occupancy.

The Department acknowledges the DOI concern that the effort to streamline the permit application process may allow environmentally unsound projects to be initially considered, only to be rejected later after substantial investment of time and money by proponents and the agency. The Forest Service has examined the "screening" process set forth in the proposed regulations (§ 251.54(a)) and made appropriate revisions to respond to the DOI concern.

With regard to the DOI's suggestion that Federal agencies managing lands adjacent to the National Forest System land being considered for a land use authorization be notified sooner in the application process so that those agencies' views can be made known, the Department suggests that such notification may counteract the intent to streamline the application process by inserting a step that is unnecessary. Analysis of an application generally requires, as part of environmental documentation, a "scoping" of the proposal to learn of the concerns of other agencies and the public. This process of advising the public and affected parties of a proposal provides timely notice to adjacent landowners, whether public or private, and allows those landowners to bring forth any concerns.

The Department's response to the U.S. Small Business Administration's advice that a regulatory flexibility analysis be prepared is found at the conclusion of this supplementary information statement.

Specific Comments on Proposed Rule and Response

The following analysis of and response to comments on the proposed rule is organized by the section of the current special use regulations.

Section 251.51 Definitions. The proposed rule combined definitions found in other sections of the current regulations into this section and added four new definitions intended to improve the implementation of the regulations.

Comment. Three respondents were concerned that the proposed definition for "termination" would be confusing, because the new definition is a reversal of past usage and incorporates the expiration of a permit and ending of a permitted use. They noted that termination of a permit occurred by the direct action of the authorized officer and not by the expiration of a stated period of time.

Response. New definitions for revocation and termination are proposed because over the years the two terms have come to be used interchangeably, even though they have distinctly different usages. This lack of precision has caused confusion among holders of permits and agency personnel. The purpose in adding these two definitions to the regulations is to differentiate between cessation of a special use permit by action of an authorized officer (revocation) and cessation of a special use permit under its own terms without any action by an authorized officer (termination). Terms of a permit which would result in termination could include: (1) Expiration of the term authorized, and (2) transfer of the improvement to another party. Nothing further is intended. Adoption of these definitions will in no way bear upon reissuance of a permit. There will be no change in policy for reissuing a permit that terminates as a result of the application of these definitions. Consequently, the definition of "termination" will remain as defined in the proposed rule, but it has been clarified by listing examples of permit terms and conditions that would cause a permit to terminate.

Comment. Three respondents commented that the revised definition for "revocation" must be revised to limit use of the "reasons in the public interest" standard to special use permits only, not to easements, for consistency with existing laws and regulations.

Response. Provisions for termination, revocation, and suspension of an easement are contained in § 251.60 (g) and (h). Therefore, the Department has not included easements under the revocation and suspension provisions in § 251.60(a)(2)(i). Moreover, the Department disagrees with the respondents concerning leases. Leases may be revoked for reasons that are in the public interest, and leases are compensable according to their terms as defined in § 251.51. Therefore, leases are not exempted from revocation and suspension criteria in § 251.60(a)(2)(i). To avoid redundancy in the regulations, the definition does not repeat criteria for revoking an authorization that are listed in § 251.60(a)(2)(i), but the provision has been amended to require that revocation in the public interest must be for reasons that are "specific and compelling."

Comment. One respondent suggested that the definition of "sound business management principle" be expanded to include "an accepted *industry* practice or method * * *," as this would clarify that one individual's or company's practice or method is not necessarily more correct than others.

Response. The Department agrees with this suggestion and has made this change in the final rule.

Other Changes. In preparing this final rule, the Department discovered that the proposed definition of the word "lease" was not consistent with the use of that word in the private rental market, and as proposed could have led to confusion when applied in the field. Specifically, a lease conveys a conditional and limited interest in land that may be revocable and compensable according to its terms. Accordingly, the final rule reflects this clarification in the definition of the word "lease."

In analyzing the comments on and the adequacy of the definitions included in § 251.51, the Department considered whether or not to include a definition for the word "license." This term is often used in connection with the word "permit" and may be confused with the words "easement" and "lease." A separate definition could imply the two terms have separate meaning and, thus, that separate rights in the land may be conveyed, when, in fact, both permits and licenses convey only a privilege to

use and occupy the land, rather than an interest in the land. Therefore, a definition of the term "license" is not included in the final rule.

In preparing this final rule, the Department also concluded that the goal of clarifying when environmental analysis is conducted on proposals for special use authorizations would be enhanced by defining the term "NEPA procedures" as used in several places in the rule. Thus, the term has been added to the definitions included in § 251.51 and refers to the agency's written compliance with the National Environmental Policy Act.

Section 251.54 Special use application procedure and authorization. This section of the current regulations describes the procedures by which the agency accepts and acts upon applications for special use authorizations. This section includes direction on holding advance discussions with a proponent before an application is submitted, where to submit applications, the content of applications, and agency response to applications. The current regulations make it difficult to deny an application for a special use authorization that does not meet certain minimum requirements imposed by law or regulation as they lack specific direction guiding the consideration of and decision on applications for authorizations. The current regulations also result in unnecessary paperwork and expense being imposed on both the proponent and the agency.

The proposed rule would expand this section, adding step-by-step procedures that enumerate required activities and outcomes through the proposal, application, and authorization phases. Specifically, the proposed rule would establish a two-level screening process before a formal application is accepted by the agency.

This section of the proposed rule received the most attention from respondents, and consideration of these responses has resulted in extensive revision of this section in the final rule.

General Comments. Several respondents expressed concern that the new procedures described in this section could be interpreted to apply to reissuance of authorizations for existing uses as well as to issuance of new authorizations. While endorsing the initial screening process, several respondents also cautioned that any efficiencies that might be gained through this process could be lost, unless the agency imposed a time limit on itself, such as 30 days, in which to complete the proposed screening process and respond to the proponent.

Some respondents observed that the organization of this section was difficult to follow in the proposed rule, noting that the sequence of events described by the rule did not seem to correspond with the actions taken by the agency's field officers when receiving and processing requests for special use authorizations.

Response. This section applies only to applications for new or substantially changed uses. Renewal of special use authorizations is covered in § 251.64. To remove the confusion, the title of this section has been revised in the final rule to read "Proposal and application requirements and procedures."

The Department agrees that the initial screening process should be completed as expeditiously as possible. However, because of the number, variety, and complexity of special use proposals, it does not believe a specified time limit should be imposed on the screening process. The Forest Service policy on customer service in combination with proponent expression of interest should provide necessary encouragement to field offices to act promptly on proposals. Thus, the final rule does not specify a time limit on the proposal screening process.

The Department agrees with those respondents who found the organization of this section hard to follow. In considering the respondents' comments, and in revising the section to respond to those comments and to its own concerns, the Department determined that an overall reorganization of the section was needed. The intent of the reorganization is to make the process that defines the agency's consideration of proposals and applications more logical and sequential, and fully consistent with regulations implementing the procedural provisions of the National Environmental Policy Act at 40 CFR Parts 1500–1508 and guidance issued by the Council of Environmental Quality.

Readers are advised that the reorganization of this section requires that a clearer distinction be made between actions by proponents and actions by the agency during the process by which a request for an authorization is considered. Hence, a "proponent" makes a "proposal" for a special use authorization. That proposal is subjected to the screening processes described in paragraph (e). Upon meeting the criteria in the initial and second-level screenings, the proposal becomes an "application" and the proponent becomes an "applicant."

Because of the extensiveness of the revisions to the proposed rule, readers are advised that § 251.54 has been presented in the final rule in its entirety, thus including provisions not revised in the proposed rule. Presentation of the entire section, therefore, includes amendments made by the adoption in 1995 of the noncommercial group use regulations. The following table displays the provisions of § 251.54 in the final rule with the same provisions as located in the proposed rule:

Final rule	Proposed rule
(a) Early notice	(a)(1) (Untitled).
(b) Filing proposals	(b) Filing applications.
(c) Rights of proponents	(d) Rights of applicants.
(d) Proposal content	(e) Application content.
(1) Proponent identification	(1) Applicant identification.
(2) Required information.	
(i) Noncommercial group uses.	
(ii) All other special uses.	
(3) Technical and financial capability	(2) Technical and financial capability.
(4) Project description	(3) Project description.
(5) Additional information	(4) Additional information.
(e) Pre-application actions	(f) Receipt and denial of applications for uses.
(1) Initial screening	(a) Initial screening.
(2) Results of initial screening.	
(3) Guidance and information to proponents	(a)(3) (Untitled).
(4) Confidentiality	(a)(4) (Untitled).
(5) Second-level screening of proposed uses	(i) Response to applications for all other special uses.

Final rule	Proposed rule
(6) NEPA compliance for second-level screening process.	
(f) Special requirements for certain proposals	(h) Special application procedures.
(1) Oil and gas pipeline rights-of-way	(1) Oil and gas pipeline rights-of-way.
(2) Electric power transmission lines 66 KV or over	(2) Electric power transmission lines 66 KV or over.
(3) Major development	(3) Major resort development.
(g) Application processing and response.	
(1) Acceptance of applications	(f)(1).
(2) Processing applications	(g) Processing applications, and (c) Coordination of applications.
(3) Response to applications for non-commercial group uses.	
(4) Response to all other applications	(j) Action taken on accepted applications.
(5) Authorization of a special use	(k) Authorization and reauthorization of a special use.

Comments on specific provisions of § 251.54 as proposed and the Departmental response follow.

Section 251.54, Paragraph (a)—Initial screening. In a general comment on this paragraph of the proposed rule, a number of respondents stated a concern that the initial screening process would add another step to the already lengthy process of evaluating an application, which would place an additional burden on the applicant. Respondents suggested that paragraph (a)(1) should make clear that the initial screening begins only with a *written* notice or application.

Response. The Department does not agree that the screening process would impose additional burdens on a proponent. In fact, the screening process is expected to reduce the burden by preventing unsuitable or inconsistent projects from proceeding to full-scale applications. The screening process would require only a very simple abstract of the proposed use and would not require a lengthy analysis by the authorized officer. The purpose of the screening is to eliminate those proposed uses which are obviously unsuitable on National Forest System (NFS) lands. The initial screening process appears as paragraph (e)(1) of § 251.54 in the final rule.

The Department also does not agree that any proposal for use of NFS lands that would trigger the screening process must be in writing. Currently, many requests to use National Forest System lands begin with a verbal request by a proponent to the District Ranger's staff. The final rule has been clarified to state that a written notice is not required until a proposal has cleared the initial and second-level screening processes and is ready to be considered as an application for a special use authorization. However, for more complex special use proposals, proponents may be advised to prepare a brief written summary to ensure that the Forest Service has a full understanding of the scope of the proposal.

Readers are also advised that the final rule makes a technical modification to language adopted by the noncommercial group use amendments to this subpart on August 30, 1995, to ensure consistency with the overall intent of this revision to subpart B. The proposed rule would have established nine minimum requirements (or criteria) to be applied at the initial screening stage. These were listed in paragraph (a)(1) of the proposed rule. Comments received on these requirements and the Department's response follow.

Minimum requirement (i). A suggestion was made that this criterion, requiring all special uses to be consistent with laws, regulations, orders, and policies, should state that the agency has an obligation to protect the environmental integrity of the area proposed for a special use. Another respondent commented that under the Federal Power Act, the Federal Energy Regulatory Commission (FERC) determines whether proposed hydroelectric uses on NFS lands are consistent and that FERC's authority should not be prejudiced by the agency authorizing official.

Response. The Forest Service obligation to protect the environment is adequately covered, since laws pertaining to environmental protection are included in the laws, regulations, and policies referred to in this criterion. All special uses must comply with environmental law. Thus, this suggested revision has not been adopted in the final rule.

FERC does not have sole responsibility for determining the consistency of hydroelectric uses on NFS lands. As part of its responsibility under Section 4(e) of the Federal Power Act, the Forest Service must make a consistency determination on proposed hydroelectric uses. The FERC determines whether the proposed hydroelectric project should be licensed, based in part on the consistency determination by the Forest Service. That consistency determination is based on the direction found in the applicable forest plan, as set forth in minimum requirement (ii). Therefore, the text of this requirement (a)(1)(i) is unchanged in the final rule, but now appears at paragraph (e)(1)(i).

Minimum requirement (ii). No comments were received recommending revision or change to this criterion, which would require the proposed use to be consistent with the applicable forest plan for the area. The intent of this requirement is to capture the provision in section 6(i) of the National Forest Management Act of 1976 (90 Stat. 2955). The agency did streamline the language of this requirement from that in the proposed rule but made no substantive change in the text of the requirement, which now appears at paragraph (e)(1)(ii) in the final rule.

Minimum requirement (iii). A respondent suggested that this criterion, which would require that the proposed use not pose a serious or substantial risk to public health and safety, include a list of examples which are considered acceptable from a health and safety standpoint.

Response. The Department agrees that examples would clarify the intent of this criterion, but believes that it would be more appropriate to include such examples in the Forest Service's internal procedural handbooks. This possibility will be explored following adoption of this final rule. Further, the agency believes that the phrase "serious and substantial risk" will limit the discretion of the authorized officer to findings of genuine risk to public health and safety. Therefore, no changes were made to this requirement in the final rule, which appears at paragraph (e)(1)(iii).

Minimum requirement (iv). Several respondents stated that utility companies seeking rights-of-way across NFS lands should be exempted from this criterion, which would cause rejection of a proposed use if it created an exclusive or perpetual right of use or occupancy. The respondents contended

that a perpetual right of use is the basis under which all utility service is provided. Another respondent asked that the language be revised to ensure that applications for permanent easements, such as those authorized by the Forest Roads and Trails Act of 1964, would be accepted. Finally, a respondent suggested that the language of the proposed rule could be interpreted to mean that a proponent, after having an application approved and expending capital to implement the use, would not have an exclusive right to receive the proceeds resulting from the use.

Response. The Department recognizes the concerns of these respondents but rejects the suggestions that utility companies should be exempted from this criterion because they must have an exclusive and perpetual use of Federal land. To grant such use would, in effect, grant fee title to Federal land to an authorization holder. Longstanding Congressional and Executive Branch policy dictates that authorizations to use NFS lands cannot grant a permit holder an exclusive or perpetual right of occupancy in lands owned by the public. The direction contained in this requirement is no different from that contained in the current regulations at § 251.55(b). Similarly, the respondent's assertion that a proponent without exclusive right would not have the exclusive right to receive the proceeds from the use is without merit since such rights are provided by the terms of an easement or lease. Accordingly, the recommendation that the criterion allow automatic acceptance of an application for a permanent road easement is not adopted. Such applications should be subjected to the same screening as all other applications. The language of this requirement remains unchanged in the final rule and appears at paragraph (e)(1)(iv).

Minimum requirement (v). Three comments were received on this criterion, which would prohibit approval of proposed uses that would unreasonably conflict or interfere with administrative use by the agency, with other existing uses, or with use of adjacent non-NFS lands. These respondents were concerned that this criterion was overly broad and would lead to abuses by local agency officials when reviewing applications and recommended that clarifying guidelines be added. Additionally, the respondents suggested that proposals that may have an effect on adjacent non-NFS lands, whether unreasonable or not, should prompt local Forest Service officials to inform adjacent landowners, including land-managing government agencies, of the proposal and possible impacts on adjoining lands.

Response. The criterion is limited to unreasonable conflicts or interference; some conflict or interference with existing uses would still be allowed. Therefore, the Department does not agree that additional guidance is needed in the rule and has retained the text of this requirement in the final rule (paragraph (e)(1)(v)) without change. The appropriate place for more detailed, cautionary guidance is in the agency's administrative Manual and Handbooks. Upon adoption of this final rule, the applicable Manual and Handbooks will be reviewed to determine if there is a need for additional guidance to prevent overly broad application of this requirement.

Minimum requirement (vi). This criterion stated that proposals will not be considered if the proponent has outstanding debts owed to the Forest Service under a prior authorization. Seven respondents suggested that an exception to this criterion be allowed if the delinquent debt is the result of an administrative appeal decision, a fee review, or similar legal or administrative process. By contrast, another respondent suggested that the authorized officer check with the BLM to determine if a proponent owes any debts to that agency. Finally, a respondent suggested that the criterion not be interpreted to include obligations of a proponent who is a cooperator with the agency through a road cost-share and use agreement.

Response. Without this requirement, a proponent's bad faith under a prior authorization could not be used to disqualify the applicant from receiving another authorization. To reward an applicant with a delinquent debt with a new authorization is not a prudent management practice and would be unacceptable on privately owned lands. The Department agrees with the suggestion that debts owed the Government as a result of an administrative appeal or similar legal process, including that involving a review of annual rental fees, should not be considered in applying this criterion and has revised the rule to specify that debts owed as a result of decisions in administrative appeals or fee reviews will not be included under this criterion. However, such debts must be current and the proponent in good standing on a payment schedule.

While the Department agrees that debts owed other Federal agencies are important, requiring authorized officers to check with other agencies could lengthen the time involved in the initial screening process. Indebtedness in general, and delinquent debts owed to the Federal government in particular, should be revealed at the second-level screening process.

Finally, road cost-share and use agreements are not special use authorizations; outstanding obligations existing under these agreements are not considered debts for the purpose of applying this criterion. Therefore, this requirement does not need to be revised to respond to this concern. For this reason, no changes were made to this provision in the final rule, which appears as paragraph (e)(1)(vi).

Minimum requirement (vii). This criterion would prohibit consideration of a proposed use that involves gambling or providing sexually oriented services. No comments were received on this requirement which has been long-standing agency administrative policy. It is retained in the final rule without change as paragraph (e)(1)(vii).

Minimum requirement (viii). This criterion would codify longstanding agency policy to prohibit consideration of a proposed use if it involves military or paramilitary training or exercises by private organizations or individuals, unless the training is federally funded. No comments were received on this criterion, and it is retained without change in the final rule as paragraph (e)(1)(viii).

Minimum requirement (ix). This criterion would prohibit consideration of a proposed use if it involves disposal of solid waste or storage or disposal of radioactive or other hazardous material. Two responses were received on this criterion. One respondent suggested that the term "hazardous material" be changed to "hazardous substances" to conform to the definitions in the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act. The other respondent suggested that the reference to "storage" of hazardous materials be deleted because it would prohibit storage at an authorized use area of crude oil and chemicals necessary to maintain oil and gas production.

Response. The Department agrees that the terms used in this rule should conform to definitions set forth in other Federal statutes and has, therefore, revised the wording of this requirement in the final rule. The Department also agrees that materials to be used in conducting activities at the use area, even though considered hazardous, should not be cause to reject a proposed use. Since controls prescribed by other Federal statutes should ensure that proper care is taken, the term "storage" has not been included in this

requirement in the final rule, which appears as paragraph (e)(1)(ix) in the final rule.

Other Changes. No comments were received on paragraphs (a)(2) and (3) of § 251.54 of the proposed rule.

Paragraph (a)(2) stated that if a proposed use did not meet all the minimum requirements, as set forth in paragraphs (a)(1)(i)–(ix), it would not be considered further and the applicant would be notified of this action in writing. Paragraph (a)(2) does not appear in the current regulation. The text of paragraph (a)(2) is included in the final rule as paragraph (e)(2) and it has been revised to state that the authorized officer would not have to notify in writing a proponent who makes an oral request that the proposal will not receive further consideration. Requests for special use authorizations are frequently made orally to local agency officials, and, as such, would not require a written response.

Paragraph (a)(3) of the proposed rule stated that if a proposed use appears to meet the minimum requirements, the authorized officer would provide the applicant with information relevant to obtaining a special use authorization. The content of paragraph (a)(3) of the proposed rule was unchanged from that already in effect, § 251.54(a)(1)–(8). However, when reviewing paragraph (a)(3) of the proposed rule in the context of the overall public review and comment, the Department determined that the phrase "appear to" might suggest the possibility of arbitrary action and, therefore, removed the words in the final rule. This material appears at paragraphs (e)(3)(i)–(viii) in the final rule.

In addition, minor editing changes have been made to paragraphs (e)(2) and (3) in the final rule for clarity and to incorporate changed terminology.

Section 251.54, Paragraph (a)(4). This paragraph of the proposed rule would have directed the agency, if requested by the proponent, and to the extent reasonable and authorized by law, not to disclose project and program information revealed during pre-application consideration and screening. Respondents stated their concern that this provision could prevent public scrutiny of a proposal, particularly one involving large commercial projects, thus giving the proponent an inside track on approval.

Response. The Department disagrees that maintaining confidentiality, to the extent reasonable and authorized by law, at the pre-application stage of a proposal having commercial application would preclude public scrutiny. Confidentiality would be maintained only prior to the agency's acceptance of a formal written application that has cleared the screening processes, and only to the extent it is reasonable and authorized by law. Once an application is accepted and initial review determines that an environmental assessment or environmental impact statement must be prepared, law and agency policy require public disclosure in the review and approval process. Applications for relatively minor proposals which a review indicates can be categorically excluded from documentation in an environmental assessment or environmental impact statement under current rules, generally do not include the public review and disclosure of information envisioned by this paragraph.

This paragraph appears in the final rule at paragraph (e)(4) under the heading "Confidentiality." The text has been revised in the final rule to substitute the word "shall" for "will" in the direction regarding the disclosure of project and program information, and the paragraph has also been edited to improve clarity of the provision's intent.

Section 251.54,Paragraph (b)—Filing applications. Paragraph (b) of current § 251.54 gives direction on where and with whom applications for authorizations should be filed. This paragraph appears at § 251.54(b), entitled "Filing proposals," in this final rule. The text has been revised to conform to changed terminology; namely, to change "application" to "proposal" and "applicant" to "proponent," or the plural forms of these words.

Section 251.54, Paragraph (c)—Coordination of applications. The proposed change to this paragraph would have eliminated the requirement that proponents of projects requiring use of National Forest System (NFS) lands who must obtain a license or permit from a State, county, or other Federal agencies for that project must simultaneously file an application with the Forest Service. The proposed rule stated that the Forest Service may require in its authorization that the applicant obtain licenses, permits, certificates, or similar approval documents from other entities or agencies.

Comment. Four respondents suggested that this provision describes a requirement in an authorization and thus should not be included in this section describing the proposal and application process. Instead, the respondents recommended that the provision be placed in § 251.56(a).

Response. The Department agrees that revision and relocation of this provision is appropriate and has placed it at § 251.56(a)(2) in the final rule. This action will benefit the applicant by not requiring that other approval documents be obtained until a decision is made on the application to use NFS lands. However, the provision has been revised in the final rule to make clear to holders that such licenses, permits, certificates, or other approval documents must be obtained prior to commencement of any activities on NFS lands.

No revision was proposed to paragraph (d), "Rights of applicants," of section 251.54 of the regulations. While the text remains unchanged, this paragraph has been redesignated as paragraph (c), "Rights of proponents," in the final rule.

Section 251.54, Paragraph (e)—Application content. This paragraph of the proposed rule defined the minimum content of an application for a special use authorization. In the proposed rule, the agency proposed revising paragraph (e)(3), "Project description," to make it consistent with the proposed addition which addresses the issuance of planning permits for major commercial developments. Paragraph (e)(4) in the current rules also required an applicant to describe the impact of the proposed use on the environment. However, to streamline the proposal/application process, the proposed rule would have moved this requirement to paragraph (j), which described actions to be taken by the agency after an application has been accepted.

Comment. Some respondents were concerned with the removal from paragraph (e)(3) of the requirement that applicants address the proposed uses's impact on the environment, and with a companion provision in paragraph (e)(5) that the application include a plan for protection and rehabilitation of the environment during the life of the proposed project. These respondents believe early consideration of environmental effects is essential to ensure that environmentally unacceptable projects do not proceed to the application stage and recommended that all of the provisions in paragraphs (e)(3) and (4) be retained.

Response. Paragraph (e) was extensively revised by the noncommercial group use amendments of August 30, 1995 (60 FR 45294). As revised by those amendments, this paragraph distinguishes between noncommercial group uses (paragraph (e)(2)(i)) and all other special uses (paragraph (e)(2)(ii)), in describing the information required for an application for a special use authorization. This final rule redesignates this paragraph as (d), retitles it as "Proposal content," and

makes additional changes. Changes in terminology are made throughout paragraph (d) to be consistent with changes made earlier in this section. Paragraph (e)(3), "Technical and financial capability," is redesignated as (d)(3), but is unchanged in the final rule. Paragraph (e)(4), "Project description," has been redesignated as (d)(4) in the final rule and revised to make the exception in the first sentence applicable to all major developments, rather than just to "major resort development." This revision is consistent with the revision to paragraph (f)(3) of the final rule which describes the requirements for requesting authorizations for major developments.

The Department recognizes respondents' concern with paragraph (e)(5), "Environmental protection plan." It emphasizes that it does not seek to avoid consideration of environmental effects when evaluating proposals. However, the removal of environmental analysis requirements in this paragraph is consistent with the overall objective of streamlining the regulation. It will save the proponent and the agency the time and expense of conducting an environmental analysis on proposals that would be rejected on other grounds. For example, the agency has found that applications often are not approved because the proponent lacks sufficient technical or financial capability to operate the proposal successfully, or because the Forest plan for the area precludes the proposed use. Readers are reminded that the procedure proposed in the rule to screen proposals is intended to screen out those proposals which do not meet minimum requirements/criteria before they become proposals as defined by the National Environmental Policy Act (NEPA) and its implementing regulations, which would require environmental analysis and documentation. Once an application has been accepted by the agency, analysis of the proposed use's environmental effects must be considered (§ 251.54(g)(2) of the final rule).

Section 251.54, Paragraph (f)—Receipt and denial of applications for special uses. This paragraph of the proposed regulation, which has been paragraph (i) in the previous regulations describing agency response to applications, would mark the point in processing requests for special use authorizations at which the proposal is considered received by the agency.

Comment. Respondents suggested that a time limit be set for completion of the application analysis set forth in paragraph (f)(2): 30 days was suggested. One respondent stated that proposals for hydroelectric projects, which are also governed by the Federal Power Act, would not be subject to the criteria listed in paragraph (f)(2), since the ultimate approval of these projects lies with the FERC. A respondent suggested that subjecting an application for reissuance of an authorization for an existing use to this second-level screening seemed unfair and inconsistent with due process requirements.

Response. The Department does not agree that a rigid time limit should be applied to analysis of applications. The wide variation in scope and complexity of applications requires flexibility in response time. Thus, while the Department recognizes the appropriateness of prompt action, it will not impose time limits on its decisionmaking responsibility. Also, the Forest Service has affirmative responsibility with respect to applications for hydroelectric projects. Section 4(e) of the Federal Power Act requires the agency to provide the FERC a determination of whether the project is consistent with the purpose for which the National Forest is established. This statutory requirement, coupled with the agency's internal policy on hydroelectric projects, serves as sufficient guidance in recognizing the unique actions necessary for these projects.

The screening/analysis process described in paragraph (f)(2) (now (e)(5) in the final rule) is tiered to the initial screening process and thus applies only to applications for new authorizations, not renewals for existing uses, which are covered by § 251.64. Therefore, the criteria in proposed paragraph (f)(2) have been retained in the final rule as paragraph (e)(5)(i)–(v) since this second-level screening is intended to apply to proposals that have met the criteria of the initial screening and which would be subjected to additional scrutiny and consideration. This shift presents the agency's process for considering requests for special use authorizations in a more logical sequence than that of the proposed rule.

No comments were received on proposed paragraphs (f)(1) and (3) of this section of the proposed rule. Proposed paragraph (f)(1) of the proposed rule was a new provision stating that an application that passes the initial screening set forth in paragraph (a) would be received but not accepted by the agency for consideration. The paragraph appears in the final rule as (g)(1), "Acceptance of applications," but has been revised to state that a proposal meeting the criteria of both the initial and second-level screening processes (paragraphs (e)(1) and (e)(5)) would be accepted by the agency as a formal application for the use. If the request does not meet the criteria for the screening processes, it is not accepted as a formal application. Proposed paragraph (f)(3), also a new provision, stated that the decision to deny a special use application based on the factors listed in paragraph (f)(2) would not constitute a "proposal" as defined by Council on Environmental Quality regulations and thus would not require the agency to conduct an environmental analysis. This paragraph applies to proposals which have been screened under the second-level screening process. It is retained as paragraph (e)(6) in the final rule, but edited to clarify its intent.

Other comments relevant to Section 251.54(f).

Four respondents objected to the removal of an unnumbered paragraph which has been at the end of § 251.54(i) requiring the authorized officer, when denying an application under two conditions, to offer the applicant an alternative site or time for the proposed use. These respondents believed that removal of this provision would alter the agency's obligation to consider alternatives to the proposed use under current Council on Environmental Quality regulations and the agency's own policies for environmental analysis and documentation. The respondents urged that the provision be retained to provide applicants additional flexibility in obtaining authorizations to use NFS lands. However, one respondent supported the elimination of this provision, stating that it avoided unnecessary duplication in the application process and thus would be helpful to applicants.

Response. The removal of the provision requiring that an alternative site be offered when denying an application does not circumvent NEPA requirements to consider reasonable alternatives to a proposed action when documenting environmental impacts. The Forest Service believes that it has no affirmative duty to provide alternative sites for a proposed use when a use is denied because it is inconsistent or incompatible with the purposes for which the lands are managed, or because the applicant is not qualified. Therefore, this provision has not been included in the final rule.

This determination on the offering of an alternative site for special use authorizations in general differs from that in the recently adopted revisions to this subpart concerning noncommercial group uses and noncommercial

distribution of printed material. Constitutional requirements concerning ample alternatives for communication of information dictated that an alternative site provision be included in the noncommercial group use regulations.

Section 251.54, Paragraph (g)—Processing Applications. Paragraph (g) of the proposed rule, which has until now appeared as paragraph (f) of § 251.54, describes the procedure to be followed when an application is accepted for processing. The proposed rule revised this paragraph to be consistent with revisions made elsewhere in the regulations. Central to these revisions was the removal of those provisions in paragraph (f)(1) that required the authorized officer to complete environmental documentation requirements, consult with other agencies and interested parties, hold public meetings, and take other actions necessary to evaluate an application. These provisions were moved to paragraph (i) of the proposed rule to achieve the consistency sought by the overall revision to subpart B.

A new paragraph (3) was proposed to provide guidance on processing applications for planning permits, principally those for major resort developments. This addition was tied to a revision in paragraph (h) of this section describing major commercial developments. This proposed new provision would limit application information to that needed to make a decision on issuance of a planning permit; that is, a permit authorizing only minor disturbance of the proposed site in order to gather information and data to prepare an application for the development project which would be submitted later. If the planning resulted in an application to develop the project, the detailed information and requisite environmental documentation would be completed.

There were no comments received on proposed paragraph (g). Nevertheless, as noted in the discussion of and comments on proposed paragraph (f), this paragraph has been revised extensively in the final rule to conform to the overall reorganization of this section. In particular, it should be noted that this paragraph was reformatted to accommodate the August 30, 1995, noncommercial group use regulations which are redesignated as paragraph (g)(3) in the final rule.

In the final rule, paragraph (g)(2) requires the authorized officer to evaluate formal applications for special use authorizations, including evaluation of effects on the environment, and, where required by NEPA procedures, to provide notice to the public with an opportunity to comment on the application. This provision appeared in paragraph (j) of the proposed rule. Paragraph (g)(2) represents the point of the special use proposal/application process at which the proposal becomes an application as defined by 40 CFR 1508.23, and thus requires environmental analysis and documentation. In the final rule, paragraph (g)(2) also incorporates provisions previously found elsewhere in the rule regarding notice to and consideration of findings of other Federal, State, and local government agencies concerning the application.

Section 251.54, Paragraph (h)—Special application procedures. This paragraph of the proposed rule described special requirements and procedures for handling applications for oil and gas pipelines and large electric transmission line rights-of-way. In the proposal, a third type of special use requiring special procedures when applying for an authorization would have been added—that is, proponents for a major resort development on NFS lands could apply for a 5-year planning permit.

This provision would substantially change the way proposals for major commercial recreation development would be considered. Previously, an application for this use would trigger full-scale economic and environmental analysis—before the proponent has fully defined the project and prepared a master development plan. Once a project is fully defined in a development plan, a project different from that described in the application often results, thus requiring reconsideration of the original analysis and decision and sometimes requiring a supplemental environmental impact statement. This supplemental analysis can impose considerable additional cost on the proponent and the agency. Under the proposed rule, a proponent who passed the initial screening criteria would apply for a planning permit. This application would be subjected to the established procedures for review and decision by the agency. Approval of the planning permit application would allow the proponent to complete the master development plan, which would then become the basis for an application for an authorization to construct and operate the major resort development. The second application would be subject to separate analysis and decision.

Comment. Respondents generally endorsed the proposed 2-part permitting process for major commercial recreation development. However, they urged that the process be available for all large-scale commercial developments. The respondents suggested that oil and gas pipelines or hydroelectric projects, for example, would qualify for this procedure. The respondents believed that this procedure would further reduce the regulatory burden on both the applicant and the agency.

Response. The Department agrees that the proposed planning permit for major resort developments should be available for all types of major developments on NFS lands and has adopted this change in the final rule. Further, the Department believes that a fixed term of five years for the planning permit may not be adequate for some types of major development, which are subject to separate licensing/approval actions by other Federal and State agencies. Accordingly, the final rule states that planning permits may be issued for up to 10 years.

Paragraph (h) of the proposed rule has been redesignated as (f) in the final rule, with the new provision concerning major developments appearing as paragraph (f)(3). This redesignation places this paragraph ahead of the regulations on processing applications; thus it occupies a more logical location in the sequence of processing requests for authorizations. The title of paragraph (f) has been revised to read "Special requirements for certain proposals," to more accurately reflect the paragraph's purpose.

Section 251.54, Paragraph (j)—Action taken on accepted applications. This provision of the proposed rule would require the authorized officer to evaluate the effects of the accepted application, including effects on the environment, and to make a decision on whether to approve or disapprove the application. The proposed paragraph described the three types of action that could be taken by the authorized officer on an accepted application: (1) approval; (2) denial; or (3) approval with modification. By specifying the range of decisions available, this provision would enable the agency to define more clearly in the environmental documentation the purpose of and need for the project to which the agency is responding.

Comment. Respondents stated that the agency needed to describe in greater detail the review and analysis process that culminates in a decision on the application. For example, respondents suggested that this paragraph address the backgrounds, or areas of expertise, of those who will review the application and the regulations, policies, and agency procedures that will apply to the review. This suggestion was offered in the belief that a more complete decision record is needed. Respondents also

urged the agency to include a time limit in this paragraph for making a decision on an application. If a decision was not made within the time specified, the application would be considered approved under standard permit terms and conditions.

One respondent suggested that due to the magnitude of the revisions proposed in its comments on this and other sections of the proposed rule, the agency should reissue proposed regulations and provide for an additional comment period.

Two respondents objected to the sentence in this paragraph that would allow several similar special use applications to be approved in one decision and its documentation. These respondents felt that an application's approval could be delayed by incomplete applications for similar projects of others and suggested that this provision be amended to require that a combined decision be made only with the concurrence of the applicants. Another respondent believed that all applications need to be considered individually to give adjacent land managers adequate opportunity to consider a proposed use.

Response. Expanding paragraph (j) to describe in detail the process for reaching a decision on an application is not necessary or appropriate to a regulation. While no change will be made in this regard in the final regulations, upon adoption of final regulations, the Forest Service will review its Manual and Handbook direction to determine if revision is necessary to improve consistent interpretation among field units.

It also would be inappropriate to place a time limit on the authorized officer to render a decision on an accepted application. Such a provision could prevent the authorized officer from reaching a sound decision, particularly where unforeseen events, such as an extended period of forest fire emergency, prevent the authorized officer from performing the administrative duties involved in evaluating a special use application. Thus, this suggestion is not adopted in the final regulation.

Similarly, it is not appropriate to reissue proposed regulations reflecting the Department's response to respondents' suggestions. Comments of all respondents were carefully considered and their appropriateness and applicability determined. Acknowledgment of the Department's response to those comments, as explained in this supplementary information section, is considered to be sufficient explanation of the rulemaking decision.

The Department recognizes respondents' concerns about combining applications into one decision. However, it is the agency's intent that uses that could be grouped under one decision would be homogeneous and have relatively minor impact. Applications for complex proposals could not be grouped due to the variations in impacts and the resulting variation in the depth of analysis required for each proposal. An example of how this provision could be used occurs in the Pacific Northwest, where a large number of applications are received each year to place bee hives temporarily on NFS lands where timber harvest activities have recently occurred. While the hives may be scattered over an area of several hundred acres, the impact of each hive is essentially the same as that of all others. Thus, a single decision could authorize placement of all hives. Therefore, the Department has decided to retain the language of this provision as § 251.54(g)(4) in the final rule, but has added clarifying guidance limiting the application of this provision to those uses having minor impacts.

The Department disagrees with the respondent who believes each application must be considered individually to ensure that it does not adversely affect management of adjoining land. Even if several applications were acted upon in one decision, the impacts of each proposed use, including those on adjacent lands, would have to be considered. Further, where an environmental assessment or environmental impact statement is prepared, the public, including the adjacent landowner, would have the opportunity to be involved in the analysis of the proposed use.

Paragraph (j) has been relocated in the final rule as part of the overall reorganization of this section to achieve a more logical sequential process. A portion of the first sentence of proposed paragraph (j) concerning evaluation of the proposed use has been moved to paragraph (g)(2), while the remainder of the paragraph has been moved to paragraph (g)(4) in the final rule. These provisions have been edited in the final regulation to improve clarity.

As part of the overall reorganization of § 251.54, the rules applicable to noncommercial group uses are now codified as paragraph (g)(3). A provision previously in paragraph (f)(5) stating that applications for noncommercial group uses are automatically granted unless denied within 48 hours of receipt has been moved to paragraph (g)(3) in the final rule since the provision concerns the response to rather than the processing of the application. Also, the text of paragraph (g)(3) has been revised to correct citations to other parts of this subpart which have been revised in the final rule and to correct incorrect uses of the word "shall"; however, the Department emphasizes that no substantive changes have been made.

Section 251.54, Paragraph (k)—Authorization and reauthorization of a special use. This proposed paragraph would govern issuance of a special use authorization after a decision is made to authorize the use. The use thus authorized may be reauthorized as long as it remains consistent with the original decision. However, if new information becomes available, or new circumstances have developed, new analysis must support a decision to reauthorize the use.

Comment. Eight respondents commented on paragraph (k). These respondents suggested that the direction regarding reauthorizing uses is not appropriate since § 251.54 applies only to new authorizations. Respondents also stated that the language on reauthorizations does not provide sufficient protection from an arbitrary decision not to reissue an authorization. One respondent suggested that reauthorizations should be allowed at any time, not just upon expiration of the authorization.

Response. The Department agrees that this language concerning reauthorization of the special use authorization is out of place. Thus, the second sentence of proposed paragraph (k) has been moved to § 251.64(a) in the final rule, which deals with renewals of special use authorizations. The heading of § 251.54 has been revised to make clear that this section deals solely with the special use proposal and application process. Further, the agency believes that placement of the language concerning reauthorization in § 251.64 responds to respondent concerns that decisions disallowing reauthorization may be arbitrary. The language in § 251.64(a), as modified by the final rule, prescribes additional requirements that must be observed when reauthorization is considered. These requirements will help prevent arbitrary decisions.

The adoption of the noncommercial group use regulations on August 30, 1995, to this subpart did not affect proposed paragraph (k). However, the first sentence of proposed paragraph (k) has been redesignated as (g)(5) in the final rule in keeping with the placement of all actions related to processing and responding to applications in paragraph

(g)—Application processing and response.

Because of the complexity of the screening and application processes, the Department has prepared Exhibit 1 to display the entire special use authorization approval process defined in § 251.54. Exhibit 1 is set out at the end of this rule but will not appear in the Code of Federal Regulations.

Section 251.56 Terms and conditions. This section of the current regulations sets forth the terms and conditions to be included in each special use authorization. Paragraph (d) prescribes the liability requirements to be imposed on a holder of an authorization. The proposed rule would have revised only paragraph (d)(2) of this section. The revision was intended to clarify that the maximum limit of liability for certain high hazard authorized uses would be determined by an assessment of the risk associated with the use rather than an amount set by the authorized officer. This is usually $1,000,000, the maximum liability amount previously established by the regulations at § 251.56(d)(2).

Comment. Most respondents commenting on this revision agreed with the proposal to require risk assessments in order to establish liability limits for a specific use. Several respondents suggested factors to be included in the risk assessment, such as the holder's past performance and the historical frequency of incidents where negligence associated with the holder's use and occupancy has contributed to the liability of the Forest Service. Some respondents proposed that holders of authorizations with a lower risk of accidents and negative impacts on the land should not pay the same fee as holders of authorizations with a higher risk use.

Three respondents objected to the current provision, for which revision was not proposed, that requires holders of authorizations for high-risk uses to be liable for all injury, loss, or damage without regard to the holder's negligence. These respondents stated that since the holder does not have exclusive use of the lands and cannot control the activities of others on those lands, the holder should not be liable for the actions of third parties.

Finally, one respondent recommended that the regulations be revised to allow the agency to obtain restitution in excess of the amount established by a risk assessment, or $1,000,000 as authorized by law, should special circumstances arise or actual costs incurred by the agency exceed the established amount. This respondent further suggested that the regulations provide that damages paid to the agency under the liability provision be made available to adjacent landowners who suffer losses as a result of a holder's activities on Federal lands.

Response. Factors to be included in a risk assessment to determine the maximum limit of liability should be identified, in order to avoid standardizing the liability and thus creating inequities among holders of authorizations involving high-risk uses. However, this type of information is more appropriately included in the Forest Service's internal directive system; namely, the Special Uses Handbook (FSH 2709.11). The agency will add direction on how to conduct liability risk assessment to the Special Uses Handbook. Factors to be included in this risk assessment will recognize uses having less risk of damage to National Forest System resources and improvements.

The Department does not agree with those respondents who object to placing liability for all injury, loss, or damage on holders without regard to the holders' negligence. Placing the burden of risk on the holder of the authorization rather than the landowner is an established practice in transactions involving private lands and is justified as a reasonable requirement to insure against potential liability from any cause. Therefore, no change has been made to this provision in the final rule.

State laws governing rules of ordinary negligence allow the agency to litigate to seek damages in excess of an amount established by law or regulation for strict liability. These State laws offer sufficient protection to the Federal Government, and these same laws allow adjacent landowners the opportunity to seek damages from the holder, instead of claiming a share of damages received by the Forest Service. Thus, no change was made in the final regulations to respond to this comment.

Paragraph (a) of § 251.56 has been reformatted and slightly revised in the final rule to clarify the content of a special use authorization. A new paragraph (a)(2) has been added to this section, which states that authorizations may be conditioned to require approvals from other government agencies. This paragraph was previously at § 251.54(c).

Section 251.57 Rental fees. This section of the regulations currently requires that holders of authorizations pay an annual rental fee in advance based on the fair market value of the rights and privileges authorized. In addition, this section prescribes the conditions under which all or a part of those annual fees may be waived and the circumstances under which additional fees may be assessed.

The proposed rule incorporated into paragraph (a) of the regulation an amendment made to the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1701 *et seq.*) by the Act of October 27, 1986 (Pub. L. 99–545). That amendment allows the Secretary of Agriculture to require payment of fees either annually or for more than one year at a time. The 1986 amendment also gives private individuals (holders of authorizations who are not commercial or governmental entities and are acting in an individual capacity) whose annual rental fees are greater than $100 the option of paying annually or for more than one year at a time.

The supplementary information section for the proposed rule explained that in accordance with Title V of FLPMA, the agency is authorized to issue easements and leases, instead of annual permits, when authorizing certain types of special uses, particularly those involving large-scale commercial operations but that this authority had not been implemented in agency practice. (See the definitions for "easement" and "lease" in § 251.51.) The agency can provide an extended authorization period by using easements or leases to authorize commercial land uses, such as communication sites, utility rights-of-way, and roads. In the case of easements, the commonly accepted practice in the private marketplace is to receive a onetime payment when the easement is negotiated that recognizes the fair market value of the rights and privileges granted, as determined by appraisal or other sound business management practices. The proposed rule indicated that if the Forest Service uses this approach when authorizing use of NFS lands by an easement, considerable cost-savings could accrue to the agency and to the holder of the authorization through avoidance of annual administrative costs and the costs of permit renewal activities. It is also possible (although uncommon in the private market) that the acquisition of an easement could be accomplished by periodic payments, in which case the purchase value would be amortized over an agreed-upon timeframe, and an appropriate interest rate on the unpaid balance would be applied.

Comment. Eleven respondents commented on this section. Five respondents suggested that the option of annual versus multi-year payments not be limited to private individuals, suggesting that partnerships and corporations be given this option as

well. Five respondents supported the agency's proposal to allow use of easements and leases, but suggested that the conversion of permits be made at the request of the holder rather than upon expiration of the permit. Some respondents expressed concern that allowing a one-time payment would not allow the agency to keep pace with inflation, thus preventing receipt of fair market value. Finally, some respondents asked how the proposed revisions to this section would be implemented by the agency, suggesting that modification of the agency's directive system would be necessary.

Response. The provision in the proposed rule allowing private individuals the option of paying fees annually or for more than one year at a time if their annual fees are more than $100 precisely tracks with the language in the 1986 amendment to FLPMA. Thus, since the law limits the revision to private individuals, the suggestion to allow partnerships, corporations, and governmental entities the same privilege in the final rule cannot be adopted. However, the language of proposed paragraph (a)(2) of this section has been revised in the final rule to simplify and clarify the provision.

Allowing immediate use of easements and leases would be desirable; however, the workload imposed on the agency's field staff should this occur could be overwhelming. Thus, the agency will revise its current administrative direction to indicate that conversion to easements and leases will be made as permits expire, or as mutually agreed upon between the holder and the authorized officer, in order to spread out the workload of conversion. Also, it should be noted that many of the authorizations that would be affected by this provision can be terminated annually by mutual agreement of the agency and the holder, thus accomplishing what has been suggested by the respondents.

The Department disagrees with those respondents who suggest that the effects of inflation should be a part of the fee calculation process when providing for a one-time payment of fees. The fair market value of an easement is indicated by comparable transactions in the private market place. The agency assumes that inflation is considered by the grantor in determining the value of the easement in the same manner that the additional rights granted are recognized in determining value. For example, an easement could convey additional rights to the holder, such as tenure, transferability, and compensation in the event of termination. In addition, the holder could treat the easement as a capital asset, thereby gaining favorable financial treatment. The value of these additional rights would be realized in increased fees, providing increased returns to the Treasury. Thus, a one-time payment can represent fair market value for the entire term of the authorization, and no loss to the Government will occur. Upon adoption of this final rule, the agency's directives will be amended to reflect this regulatory revision.

The proposed regulation would have removed paragraph (g) of § 251.57. Subsequently redesignated as paragraph (h) by the 1995 noncommercial group use rule, this paragraph provides special authority to the Supervisor of the Mark Twain National Forest to waive fees under certain specified conditions. This provision was added to the regulations to test a procedure to reduce costs to the agency and contained an expiration date of December 31, 1990. Thus, the provision is no longer in effect and should be removed from the section. No comments were received on the removal of this paragraph, and no additional information has come to light bearing on this provision. Therefore, this provision is removed by adoption of this final rule.

Section 251.59 Transfer of special use privileges. This section sets forth the requirements for transferring a special use authorization from the current holder to a new holder. No change was proposed to this section in the 1992 proposed rule. However, as a result of its review of public comments and the overall analysis of subpart B, the Department has determined that this section contains incorrect and misleading requirements. Specifically, the language of this section can be interpreted to contradict itself by stating in the first sentence that a permit may be transferred and, then, by stating in the last sentence that, if the holder through transfer of the authorized improvements ceases to be the owner, the permit is subject to termination.

Section 504(c) of FLPMA (90 Stat. 2778) provides discretionary authority to the agency (delegated through the Secretary of Agriculture) to specify the terms and conditions applicable to authorizations it grants. The Department's longstanding position has been and remains that, with the exception of easements, an authorization itself has no value. To allow transfer of the authorization would simply imply that it is a valuable asset to the owner of the improvements. Accordingly, the Forest Service requires as a provision of the authorizing document that new owners of improvements covered by a special use authorization must first obtain a new authorization. Therefore, except for certain types of easements and leases, the agency does not actually transfer an authorization when the authorized improvements are sold or otherwise transferred between parties. Rather, upon a change of ownership, the agency deems the original authorization terminated and issues a new authorization to the new owner of the improvements upon a determination that the new owner is eligible to hold a special use authorization.

Therefore, the agency has revised the title and the text of this section to remove the current ambiguity and to reflect more accurately its purpose and intent. In the final rule, the title reads "Transfer of authorized improvements." The text of the section has been reorganized and edited for precision and clarity. It now states that a special use authorization terminates when the holder of the authorization ceases to be the owner of the authorized improvements. A new owner of the improvements may be issued an authorization upon applying for and receiving approval from the authorized officer.

The Department considers this change to be a technical correction that reflects longstanding policy and practice and that it has no substantial effect on administration of current special use authorizations.

Section 251.60 Termination, revocation, and suspension. This section of the regulation prescribes the conditions under which a special use authorization may be suspended, terminated, or revoked. Revisions to paragraphs (b), (e), (f), and (h) of this section were proposed to be consistent with proposed definitions of these terms in § 251.51. Revision to paragraphs (g) and (i) of this section was necessary to correct identification of regulations pertaining to administrative appeals of decisions relating to special use authorizations.

Comment. Five respondents commented on the proposed revisions to this section. These respondents noted that the use of the word "termination" in paragraph (a) implies an action by the authorized officer, which is inconsistent with the proposed definition in § 251.51. One respondent recommended that the proposed revision require the authorized officer to follow agency policy and procedures when decisions to terminate, revoke, or suspend a permit are under consideration. Another respondent recommended that decisions to suspend or revoke a permit not be delegated to agency officials below the

Regional Forester. Two respondents suggested that the on-site review set forth in paragraph (f), proposed to be conducted within 10 days following the request of the holder when a permit is suspended, is too long a period for public utilities such as hydroelectric facilities or electric or gas transmission lines. These respondents suggested that the review be conducted within 24 hours of a suspension.

One respondent suggested that the proposed regulation be revised to require that all authorizations issued to holders providing public utilities must be renewed as long as the holder is in compliance with all laws and regulations affecting the authorization. One respondent suggested that the proposed definition for "termination" would require review of all related laws, regulations, and policies and revision of many individual permits to make them conform to the proposed definition. As a result, the agency would face a major increase in regulatory burden and costs.

Response. Readers are advised that the adoption of the noncommercial group use amendments on August 30, 1995, resulted in extensive revision to paragraphs (a) and (b) of § 251.60. The amendments, in specifying the grounds for termination, revocation, and suspension of special use authorizations, distinguished between noncommercial group uses (paragraph (a)(1)) and all other special uses (paragraph (a)(2)). In responding to comments to this section of the proposed rule, the agency was required to take special consideration of the August 30, 1995, amendments. The revisions also caused paragraph (b), as amended in 1995, to be reorganized to be consistent with paragraph (a). The revision of paragraphs (a) and (b) of this section resulted in the elimination in the final rule of paragraph (g), concerning appeals of termination, revocation, and suspension decisions by an authorized officer. This provision has been incorporated into both paragraphs (a) and (b).

The Department agrees that the language of paragraph (a) of the proposed regulations (previously paragraph (a)(2)) was inconsistent with the new definition for "termination" in § 251.51 and has revised this paragraph to remove the inconsistency. The agency disagrees that additional language should be added in the final rule to ensure that authorized officers follow policy and procedures when considering decisions to terminate, revoke, or suspend permits. The delegation of authority to agency officials carries with it the responsibility to follow agency policies and procedures; therefore, no additional regulatory guidance is necessary. The suggestion that decisions to suspend or revoke permits not be delegated below the Regional Forester has not been adopted. Decisions by authorized officers below the Regional Forester are reviewable by line officers one level above the deciding officers under current administrative appeal regulations. The Department believes that this procedure offers sufficient protection for holders.

In response to the concern about the proposed 10-day period to review conditions leading to suspension of a permit, readers should be aware that paragraph (f) would be invoked only in an emergency to protect the public health and safety or the environment. In a normal situation where suspension of a permit is contemplated, written notice would be given and a reasonable time to cure the condition leading to the suspension would be provided. However, the Department agrees that 10 days is too long to respond in an emergency situation and has revised the provision in the final rule to provide for a 48-hour response period.

The Department disagrees with the respondent who suggested that all authorizations for utility rights-of-way must be renewed, if the holder is in compliance with applicable laws and regulations. This proposal would inappropriately restrict the actions of the authorized officer responsible for protecting and managing the NFS lands.

The Department also disagrees with the respondent who believed that the definition of the word "termination" would increase regulatory burden and agency costs. Upon adoption of this final rule, the agency will make necessary revision to its internal directives to ensure consistency and conformity with the regulations. Conformance of these directives with the use of the terms adopted by this rule will be a part of this effort. Thus, no change has been made to this provision in the final rule.

The agency determined during its analysis of the proposed rule and the public comments that the regulation does not clearly identify the agency official who may initiate termination, revocation, or suspension of authorizations. Thus, the final rule provides that for the purposes of section 251.60 the authorized officer is the officer who issues the authorization or that officer's successor.

In addition to the revisions and new language included in this section, the final rule also reflects some minor editing to clarify and simplify the text.

Section 251.61 Modifications. This section of the regulation describes those actions which a holder is required to undertake when it becomes necessary to modify an existing authorization and the information which the holder must supply to the authorized officer when modification becomes necessary. The proposed rule would have clarified paragraph (c) of this section, to provide that modifications to an authorization requiring the approval of the authorized officer include all activities that would impact the environment, other users, or the public, not just those involving "maintenance or other activities."

Three respondents were concerned that the wording of the proposed revision would apply to all activities that would impact the environment, other users, or the public, not just those activities for which modification is proposed. They suggested that the language be clarified to allow implementation of activities already approved in the permit that are not subject to modification to proceed without further approval.

Response. The Department agrees that the language of proposed paragraph (c) was overly broad. In response to respondents' concerns, the Department has revised paragraph (c) to require the holder to obtain prior approval for all *modifications* to approved uses that will impact the environment, other users, or the public.

Section 251.64 Renewals. This section of the regulation enumerates the criteria for renewing an authorization when it provides for renewal and when it does not. There were no changes proposed to this section, nor did the adoption of the noncommercial group use regulations on August 30, 1995, to this subpart, affect this section. However, the agency has revised this section to incorporate a provision moved from § 251.54(k) into paragraph (a) of this section which respondents had indicated was out of place in that section.

Section 251.65 Information collection requirements. This section of the regulation describes the requirements imposed on the agency when collecting information from applicants. The regulation sets forth in paragraph (b) the agency's estimate of the time required for a proponent/applicant to provide the information requested in an application for a special use authorization, which is estimated to range from 30 minutes for simple projects (or uses) to several months for complex ones with an average of four hours for each project (or use). There were no changes proposed to this section.

The Department notes it is no longer required to set forth the information

contained in paragraph (b) of § 251.65 concerning estimates of the information collection requirement burden. Thus, this paragraph has been removed in the final rule as a technical revision to the section. The text of former paragraph "(a)" is retained but as an undesignated paragraph.

Summary

This final rule responds to direction from the President to reduce the regulatory burden imposed on those entities holding or seeking to obtain authorizations to use and occupy National Forest System (NFS) lands. The current special use regulations at 36 CFR Part 251, Subpart B addresses the rights of all citizens regarding uses of National Forest System lands are protected. The regulations provide the means to protect the health and safety of the public when using the services of commercial entities authorized to use the Federal lands; ensure that the services or facilities authorized are operated in compliance with Title VI of the Civil Rights Act of 1964; and ensure that environmental safeguards are employed and that authorized uses do not have adverse environmental effects on National Forest System lands.

This final rule will retain these basic safeguards. The rule will enhance efficiency in the review of applications, the approval/denial process, and the administration of authorizations, thereby providing significant cost savings to applicants, holders, and the Federal Government. The intent of the final rule is to make the issuance and administration of special use authorizations a less cumbersome and costly process, thereby reducing the burden on that segment of the public making use of these Federal lands, improving productivity of agency employees, and streamlining operations of the agency. Screening a proposed use will permit review of the proposal before the proponent invests time and expense in providing detailed information to accompany the application or the Forest Service invests time and expense in performing a detailed evaluation of the proposed use, including an analysis of the impacts on the environment. By eliminating time-consuming and costly processing of proposals that cannot meet minimum requirements, a faster agency response on those applications that pass the initial screening would result.

The final rule also incorporates into regulation statutory authority that has been available to the Forest Service that expands its authority to administer special use authorizations. The final rule underscores that the agency may issue long-term easements instead of annual or short-term permits and that those easements may allow for a one-time fee payment rather than annual fee payments. Holders of authorizations for high-risk uses such as electric transmission lines will be subject to strict liability for damage or loss that will be determined by a risk assessment rather than a fixed dollar amount specified in regulations. Finally, the agency has made the regulations more "user-friendly" by clarifying certain provisions and removing unnecessary language, and carefully reorganizing the text to flow in a logical sequence.

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this is not a significant rule. This rule will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this final rule is not subject to OMB review under Executive Order 12866. To the contrary, adoption of this final rule will have positive effects on the economy by creating efficiencies for the Forest Service and special use proponents and holders. The expected benefits of this rule outweigh the expected costs to society, the rule is fashioned to maximize net benefits to society, and the rule provides clarity to the regulated community.

Moreover, this final rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been certified that this action will not have a significant economic impact on a substantial number of small entities as defined by that Act. Therefore, contrary to the views of the Small Business Administration, a regulatory flexibility analysis is not required. The efficiencies and cost savings to be achieved by the rule will benefit both small entities who apply for or hold special use authorizations as well as large-scale entities.

No Taking Implications

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, and it has been determined that the rule does not pose the risk of a taking of constitutionally protected private property rights. This rule applies to the discretionary use of Federally owned land.

Unfunded Mandates Reform

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

Civil Justice Reform Act

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

Environmental Impact

Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43180; September 18, 1992) excludes from documentation in an environmental assessment or impact statement "rules, regulations, or policies to establish Service-wide administrative procedures, program processes or instructions." Based on consideration of the comments received and the nature and scope of this rulemaking, the Department has determined that this rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Controlling Paperwork Burdens on the Public

This rule will not result in additional paperwork not already required by law or not already approved for use. Therefore, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and implementing regulations at 5 CFR 1320 do not apply.

List of Subjects in 36 CFR Part 251

Electric power, Mineral resources, National forests, Rights-of-way, and Water resources.

Therefore, for the reasons set forth in the preamble, subpart B of part 251 of title 36 of the Code of Federal Regulations is amended as follows:

PART 251—LAND USES

Subpart B—Special Uses

1. The authority citation for subpart B continues to read as follows:

Authority: 16 U.S.C. 472, 497b, 551, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761–1771.

2. In § 251.51, revise the definitions for "Easement" and "Lease," and add definitions for "NEPA procedures," "Revocation," "Sound business management principles," "Suspension," and "Termination" in the appropriate alphabetical order to read as follows:

§ 251.51 Definitions.

* * * * *

Easement—a type of special use authorization (usually granted for linear rights-of-way) that is utilized in those situations where a conveyance of a limited and transferable interest in National Forest System land is necessary or desirable to serve or facilitate authorized long-term uses, and that may be compensable according to its terms.

* * * * *

Lease—a type of special use authorization (usually granted for uses other than linear rights-of-way) that is used when substantial capital investment is required and when conveyance of a conditional and transferable interest in National Forest System lands is necessary or desirable to serve or facilitate authorized long-term uses, and that may be revocable and compensable according to its terms.

* * * * *

NEPA procedures—the rules, policies, and procedures governing agency compliance with the National Environmental Policy Act set forth in 50 CFR parts 1500–1508, 7 CFR part 1b, Forest Service Manual Chapter 1950, and Forest Service Handbook 1909.15.

* * * * *

Revocation—the cessation of a special use authorization by action of an authorized officer before the end of the specified period of occupancy or use for reasons set forth in § 251.60(a)(1)(i), (a)(2)(i), (g), and (h) of this subpart.

* * * * *

Sound business management principles—a phrase that refers to accepted industry practices or methods of establishing fees and charges that are used or applied by the Forest Service to help establish the appropriate charge for a special use. Examples of such practices and methods include, but are not limited to, appraisals, fee schedules, competitive bidding, negotiation of fees, and application of other economic factors, such as cost efficiency, supply and demand, and administrative costs.

* * * * *

Suspension—a temporary revocation of a special use authorization.

* * * * *

Termination—the cessation of a special use authorization by operation of law or by operation of a fixed or agreed-upon condition, event, or time as specified in an authorization without the necessity for any decision or action by the authorized officer; for example, expiration of the authorized term or transfer of the authorized improvement to another party.

3. Revise § 251.54 to read as follows:

§ 251.54 Proposal and application requirements and procedures.

(a) *Early notice.* When an individual or entity proposes to occupy and use National Forest System lands, the proponent is required to contact the Forest Service office(s) responsible for the management of the affected land as early as possible in advance of the proposed use.

(b) *Filing proposals.* Proposals for special uses must be filed in writing with or presented orally to the District Ranger or Forest Supervisor having jurisdiction over the affected land (§ 200.2 of this chapter), except as follows:

(1) Proposals for projects on lands under the jurisdiction of two or more administrative units of the Forest Service may be filed at the most convenient Forest Service office having jurisdiction over part of the project, and the proponent will be notified where to direct subsequent communications;

(2) Proposals for cost-share and other road easements to be issued under § 251.53(j) must be filed in accordance with regulations in § 212.10(c) and (d) of this chapter; and

(3) Proposals for oil and gas pipeline rights-of-way crossing Federal lands under the jurisdiction of two or more Federal agencies must be filed with the State Office, Bureau of Land Management, pursuant to regulations at 43 CFR part 2882.

(c) *Rights of proponents.* A proposal to obtain a special use authorization does not grant any right or privilege to use National Forest System lands. Rights or privileges to occupy and use National Forest System lands under this subpart are conveyed only through issuance of a special use authorization.

(d) *Proposal content*—(1) *Proponent identification.* Any proponent for a special use authorization must provide the proponent's name and mailing address, and, if the proponent is not an individual, the name and address of the proponent's agent who is authorized to receive notice of actions pertaining to the proposal.

(2) *Required information*—(i) *Noncommercial group uses.* Paragraphs (d)(3) through (d)(5) of this section do not apply to proposals for noncommercial group uses. A proponent for noncommercial group uses shall provide the following:

(A) A description of the proposed activity;

(B) The location and a description of the National Forest System lands and facilities the proponent would like to use;

(C) The estimated number of participants and spectators;

(D) The starting and ending time and date of the proposed activity; and

(E) The name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the proponent.

(ii) *All other special uses.* At a minimum, proposals for special uses other than noncommercial group uses must include the information contained in paragraphs (d)(3) through (d)(5) of this section. In addition, if requested by an authorized officer, a proponent in one of the following categories must furnish the information specified for that category:

(A) If the proponent is a State or local government agency: a copy of the authorization under which the proposal is made;

(B) If the proponent is a public corporation: the statute or other authority under which it was organized;

(C) If the proponent is a Federal Government agency: the title of the agency official delegated the authority to file the proposal;

(D) If the proponent is a private corporation:

(*1*) Evidence of incorporation and its current good standing;

(*2*) If reasonably obtainable by the proponent, the name and address of each shareholder owning three percent or more of the shares, together with the number and percentage of any class of voting shares of the entity which such shareholder is authorized to vote;

(*3*) The name and address of each affiliate of the entity;

(*4*) In the case of an affiliate which is controlled by the entity, the number of shares and the percentage of any class of voting stock of the affiliate that the

entity owns either directly or indirectly; or

(5) In the case of an affiliate which controls that entity, the number of shares and the percentage of any class of voting stock of that entity owned, either directly or indirectly by the affiliate; or

(E) If the proponent is a partnership, association, or other unincorporated entity: a certified copy of the partnership agreement or other similar document, if any, creating the entity, or a certificate of good standing under the laws of the State.

(3) *Technical and financial capability.* The proponent is required to provide sufficient evidence to satisfy the authorized officer that the proponent has, or prior to commencement of construction will have, the technical and financial capability to construct, operate, maintain, and terminate the project for which an authorization is requested, and the proponent is otherwise acceptable.

(4) *Project description.* Except for requests for planning permits for a major development, a proponent must provide a project description, including maps and appropriate resource information, in sufficient detail to enable the authorized officer to determine the feasibility of a proposed project or activity, any benefits to be provided to the public, the safety of the proposal, the lands to be occupied or used, the terms and conditions to be included, and the proposal's compliance with applicable laws, regulations, and orders.

(5) *Additional information.* The authorized officer may require any other information and data necessary to determine feasibility of a project or activity proposed; compliance with applicable laws, regulations, and orders; compliance with requirements for associated clearances, certificates, permits, or licenses; and suitable terms and conditions to be included in the authorization. The authorized officer shall make requests for any additional information in writing.

(e) *Pre-application actions.* (1) *Initial screening.* Upon receipt of a request for any proposed use other than for noncommercial group use, the authorized officer shall screen the proposal to ensure that the use meets the following minimum requirements applicable to all special uses:

(i) The proposed use is consistent with the laws, regulations, orders, and policies establishing or governing National Forest System lands, with other applicable Federal law, and with applicable State and local health and sanitation laws.

(ii) The proposed use is consistent or can be made consistent with standards and guidelines in the applicable forest land and resource management plan prepared under the National Forest Management Act and 36 CFR part 219.

(iii) The proposed use will not pose a serious or substantial risk to public health or safety.

(iv) The proposed use will not create an exclusive or perpetual right of use or occupancy.

(v) The proposed use will not unreasonably conflict or interfere with administrative use by the Forest Service, other scheduled or authorized existing uses of the National Forest System, or use of adjacent non-National Forest System lands.

(vi) The proponent does not have any delinquent debt owed to the Forest Service under terms and conditions of a prior or existing authorization, unless such debt results from a decision on an administrative appeal or from a fee review and the proponent is current with the payment schedule.

(vii) The proposed use does not involve gambling or providing of sexually oriented commercial services, even if permitted under State law.

(viii) The proposed use does not involve military or paramilitary training or exercises by private organizations or individuals, unless such training or exercises are federally funded.

(ix) The proposed use does not involve disposal of solid waste or disposal of radioactive or other hazardous substances.

(2) *Results of initial screening.* Any proposed use other than a noncommercial group use that does not meet all of the minimum requirements of paragraphs (e)(1)(i)-(ix) of this section shall not receive further evaluation and processing. In such event, the authorized officer shall advise the proponent that the use does not meet the minimum requirements. If the proposal was submitted orally, the authorized officer may respond orally. If the proposal was made in writing, the authorized officer shall notify the proponent in writing that the proposed use does not meet the minimum requirements and shall simultaneously return the request.

(3) *Guidance and information to proponents.* For proposals for noncommercial group use as well as for those proposals that meet the minimum requirements of paragraphs (e)(1)(i)-(ix), the authorized officer, to the extent practicable, shall provide the proponent guidance and information on the following:

(i) Possible land use conflicts as identified by review of forest land and resource management plans, landownership records, and other readily available sources;

(ii) Proposal and application procedures and probable time requirements;

(iii) Proponent qualifications;

(iv) Applicable fees, charges, bonding, and/or security requirements;

(v) Necessary associated clearances, permits, and licenses;

(vi) Environmental and management considerations;

(vii) Special conditions; and

(viii) identification of on-the-ground investigations which will require temporary use permits.

(4) *Confidentiality.* If requested by the proponent, the authorized officer, or other Forest Service official, to the extent reasonable and authorized by law, shall hold confidential any project and program information revealed during pre-application contacts.

(5) *Second-level screening of proposed uses.* A proposal which passes the initial screening set forth in paragraph (e)(1) and for which the proponent has submitted information as required in paragraph (d)(2)(ii) of this section, proceeds to second-level screening and consideration. In order to complete this screening and consideration, the authorized officer may request such additional information as necessary to obtain a full description of the proposed use and its effects. An authorized officer shall reject any proposal, including a proposal for commercial group uses, if, upon further consideration, the officer determines that:

(i) The proposed use would be inconsistent or incompatible with the purposes for which the lands are managed, or with other uses; or

(ii) The proposed use would not be in the public interest; or

(iii) The proponent is not qualified; or

(iv) The proponent does not or cannot demonstrate technical or economic feasibility of the proposed use or the financial or technical capability to undertake the use and to fully comply with the terms and conditions of the authorization; or

(v) There is no person or entity authorized to sign a special use authorization and/or there is no person or entity willing to accept responsibility for adherence to the terms and conditions of the authorization.

(6) *NEPA compliance for second-level screening process.* A request for a special use authorization that does not meet the criteria established in paragraphs (e)(5)(i) through (e)(5)(v) of this section does not constitute an agency proposal as defined in 40 CFR

1508.23 and, therefore, does not require environmental analysis and documentation.

(f) *Special requirements for certain proposals.* (1) *Oil and gas pipeline rights-of-way.* These proposals must include the citizenship of the proponent(s) and disclose the identity of its participants as follows:

(i) Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of the United States, shall not own an appreciable interest in any oil and gas pipeline right-of-way or associated permit; and

(ii) The authorized officer shall notify the House Committee on Resources and the Senate Committee on Energy and Natural Resources promptly upon receipt of a proposal for a right-of-way for a pipeline twenty-four (24) inches or more in diameter, and no right-of-way for such a pipeline shall be granted until sixty (60) days (not counting days on which the House of Representatives or the Senate has adjourned for more than three (3) days) after a notice of intention to grant the right-of-way, together with the authorized officer's detailed findings as to terms and conditions the officer proposes to impose, has been submitted to such committees, unless each committee by resolution waives the waiting period.

(2) *Electric power transmission lines 66 KV or over.* Any proposal for authority to construct and maintain a facility for the generation of electric power and energy or for the transmission or distribution of electric power and energy of 66 kilovolts or higher under this section must be referred to the Secretary of Energy for consultation.

(3) *Major development.* Proponents of a major development may submit a request for a planning permit of up to 10 years in duration. Requests for a planning permit must include the information contained in paragraphs (d)(1) through (d)(3) of this section. Upon completion of a master development plan developed under a planning permit, proponents may then submit a request for a long-term authorization to construct and operate the development. At a minimum, a request for a long-term permit for a major development must include the information contained in paragraphs (d)(1) and (d)(2)(ii) through (d)(5) of this section. Issuance of a planning permit does not prejudice approval or denial of a subsequent request for a special use permit for the development.

(g) *Application processing and response.* (1) *Acceptance of applications.* Except for proposals for noncommercial group uses, if a request does not meet the criteria of both screening processes or is subsequently denied, the proponent must be notified with a written explanation of the rejection or denial and any written proposal returned to the proponent. If a request for a proposed use meets the criteria of both the initial and second-level screening processes as described in paragraph (e) of this section, the authorized officer shall notify the proponent that the agency is prepared to accept a written formal application for a special use authorization and shall, as appropriate or necessary, provide the proponent guidance and information of the type described in paragraphs (e)(3)(i) through (e)(3)(viii) of this section.

(2) *Processing applications.* (i) Upon acceptance of an application for a special use authorization other than a planning permit, the authorized officer shall evaluate the proposed use for the requested site, including effects on the environment. The authorized officer may request such additional information as necessary to obtain a full description of the proposed use and its effects.

(ii) Federal, State, and local government agencies and the public shall receive adequate notice and an opportunity to comment upon a special use proposal accepted as a formal application in accordance with Forest Service NEPA procedures.

(iii) The authorized officer shall give due deference to the findings of another agency such as a Public Utility Commission, the Federal Regulatory Energy Commission, or the Interstate Commerce Commission in lieu of another detailed finding. If this information is already on file with the Forest Service, it need not be refiled, if reference is made to the previous filing date, place, and case number.

(iv) Applications for noncommercial group uses must be received at least 72 hours in advance of the proposed activity. Applications for noncommercial group uses shall be processed in order of receipt, and the use of a particular area shall be allocated in order of receipt of fully executed applications, subject to any relevant limitations set forth in this section.

(v) For applications for planning permits, including those issued for a major development as described in paragraph (f)(3) of this section, the authorized officer shall assess only the applicant's financial and technical qualifications and determine compliance with other applicable laws, regulations, and orders. Planning permits may be categorically excluded from documentation in an environmental assessment or environmental impact statement pursuant to Forest Service Handbook 1909.15 (36 CFR 200.4).

(3) *Response to applications for noncommercial group uses.* (i) All applications for noncommercial group uses shall be deemed granted and an authorization shall be issued for those uses pursuant to the determination as set forth below, unless applications are denied within 48 hours of receipt. Where an application for a noncommercial group use has been granted or is deemed to have been granted and an authorization has been issued under this paragraph, an authorized officer may revoke that authorization only as provided under § 251.60(a)(1)(i).

(ii) An authorized officer shall grant an application for a special use authorization for a noncommercial group use upon a determination that:

(A) Authorization of the proposed activity is not prohibited by the rules at 36 CFR part 261, subpart B, or by Federal, State, or local law unrelated to the content of expressive activity;

(B) Authorization of the proposed activity is consistent or can be made consistent with the standards and guidelines in the applicable forest land and resource management plan required under the National Forest Management Act and 36 CFR part 219;

(C) The proposed activity does not materially impact the characteristics or functions of the environmentally sensitive resources or lands identified in Forest Service Handbook 1909.15, chapter 30;

(D) The proposed activity will not delay, halt, or prevent administrative use of an area by the Forest Service or other scheduled or existing uses or activities on National Forest System lands, including but not limited to uses and activities authorized under parts 222, 223, 228, and 251 of this chapter;

(E) The proposed activity does not violate State and local public health laws and regulations as applied to the proposed site. Issues addressed by State and local public health laws and regulations as applied to the proposed site include but are not limited to:

(*1*) The sufficiency of sanitation facilities;

(*2*) The sufficiency of waste-disposal facilities;

(*3*) The availability of sufficient potable drinking water;

(*4*) The risk of disease from the physical characteristics of the proposed site or natural conditions associated with the proposed site; and

(5) The risk of contamination of the water supply;

(F) The proposed activity will not pose a substantial danger to public safety. Considerations of public safety must not include concerns about possible reaction to the users' identity or beliefs from non-members of the group that is seeking an authorization and shall be limited to the following:

(1) The potential for physical injury to other forest users from the proposed activity;

(2) The potential for physical injury to users from the physical characteristics of the proposed site or natural conditions associated with the proposed site;

(3) The potential for physical injury to users from scheduled or existing uses or activities on National Forest System lands; and

(4) The adequacy of ingress and egress in case of an emergency;

(G) The proposed activity does not involve military or paramilitary training or exercises by private organizations or individuals, unless such training or exercises are federally funded; and

(H) A person or persons 21 years of age or older have been designated to sign and do sign a special use authorization on behalf of the applicant.

(iii) If an authorized officer denies an application because it does not meet the criteria in paragraphs (g)(3)(ii)(A) through (g)(3)(ii)(H) of this section, the authorized officer shall notify the applicant in writing of the reasons for the denial. If an alternative time, place, or manner will allow the applicant to meet the eight evaluation criteria, an authorized officer shall offer that alternative. If an application is denied solely under paragraph (g)(3)(ii)(C) of this section and all alternatives suggested are unacceptable to the applicant, the authorized officer shall offer to have completed the requisite environmental and other analyses for the requested site. A decision to grant or deny the application for which an environmental assessment or an environmental impact statement is prepared is subject to the notice and appeal procedures at 36 CFR part 215 and shall be made within 48 hours after the decision becomes final under that appeal process. A denial of an application under paragraphs (g)(3)(ii)(A) through (g)(3)(ii)(H) of this section constitutes final agency action and is immediately subject to judicial review.

(4) *Response to all other applications.* Based on evaluation of the information provided by the applicant and other relevant information such as environmental findings, the authorized officer shall decide whether to approve the proposed use, approve the proposed use with modifications, or deny the proposed use. A group of applications for similar uses having minor environmental impacts may be evaluated with one analysis and approved in one decision.

(5) *Authorization of a special use.* Upon a decision to approve a special use or a group of similar special uses, the authorized officer may issue one or more special use authorizations as defined in § 251.51 of this subpart.

4. In § 251.56, revise paragraphs (a) and (d)(2), to read as follows:

§ 251.56 Terms and conditions.

(a) *General.* (1) Each special use authorization must contain:

(i) Terms and conditions which will:

(A) Carry out the purposes of applicable statutes and rules and regulations issued thereunder;

(B) Minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment;

(C) Require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and

(D) Require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance if those standards are more stringent than applicable Federal standards.

(ii) Such terms and conditions as the authorized officer deems necessary to:

(A) Protect Federal property and economic interests;

(B) Manage efficiently the lands subject to the use and adjacent thereto;

(C) Protect other lawful users of the lands adjacent to or occupied by such use;

(D) Protect lives and property;

(E) Protect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes;

(F) Require siting to cause the least damage to the environment, taking into consideration feasibility and other relevant factors; and

(G) Otherwise protect the public interest.

(2) Authorizations for use of National Forest System lands may be conditioned to require State, county, or other Federal agency licenses, permits, certificates, or other approval documents, such as a Federal Communication Commission license, a Federal Energy Regulatory Commission license, a State water right, or a county building permit.

* * * * *

(d) * * *

(2) Holders of special use authorizations for high risk use and occupancy, such as, but not limited to, powerlines and oil and gas pipelines, shall be held liable for all injury, loss, or damage, including fire suppression costs, caused by the holder's use or occupancy, without regard to the holder's negligence, provided that maximum liability shall be specified in the special use authorization as determined by a risk assessment, prepared in accordance with established agency procedures, but shall not exceed $1,000,000 for any one occurrence. Liability for injury, loss, or damage, including fire suppression costs, in excess of the specified maximum shall be determined by the laws governing ordinary negligence of the jurisdiction in which the damage or injury occurred.

* * * * *

5. In § 251.57, remove paragraph (h), redesignate paragraph (i) as (h), and revise paragraph (a) to read as follows:

§ 251.57 Rental fees.

(a) Except as otherwise provided in this part or when specifically authorized by the Secretary of Agriculture, special use authorizations shall require the payment in advance of an annual rental fee as determined by the authorized officer.

(1) The fee shall be based on the fair market value of the rights and privileges authorized, as determined by appraisal or other sound business management principles.

(2) Where annual fees of one hundred dollars ($100) or less are assessed, the authorized officer may require either annual payment or a payment covering more than one year at a time. If the annual fee is greater than one hundred dollars ($100), holders who are private individuals (that is, acting in an individual capacity), as opposed to those who are commercial, other corporate, or business or government entities, may, at their option, elect to make either annual payments or payments covering more than one year.

* * * * *

6. Revise § 251.59 to read as follows:

§ 251.59 Transfer of authorized improvements.

If the holder, through death, voluntary sale, transfer, or through enforcement of a valid legal proceeding or operation of law, ceases to be the owner of the authorized improvements, the authorization terminates upon change of ownership. Except for easements issued under authorities other than § 251.53(e) and leases and easements under § 251.53(l) of this subpart, the new

owner of the authorized improvements must apply for and receive a new special use authorization. The new owner must meet requirements under applicable regulations of this subpart and agree to comply with the terms and conditions of the authorization and any new terms and conditions warranted by existing or prospective circumstances.

7. Amend § 251.60 as follows:

a. Remove paragraph (g);

b. Redesignate paragraphs (h), (i), and (j) as (g), (h), and (i), respectively; and

c. Revise paragraphs (a)(2), (b), (e), (f), and newly redesignated (g), (h), and (i) to read as follows:

§ 251.60 Termination, revocation, and suspension.

(a) * * *

(2) *All other special uses.* (i) *Revocation or suspension.* An authorized officer may revoke or suspend a special use authorization for all other special uses, except an easement issued pursuant to § 251.53 (e) and (l):

(A) For noncompliance with applicable statutes, regulations, or the terms and conditions of the authorization;

(B) For failure of the holder to exercise the rights or privileges granted;

(C) With the consent of the holder; or

(D) At the discretion of the authorized officer for specific and compelling reasons in the public interest.

(ii) *Administrative review.* Except for revocation or suspension of an easement issued pursuant to § 251.53 (e) and (l) of this subpart, a suspension or revocation of a special use authorization under this paragraph is subject to administrative appeal and review in accordance with 36 CFR part 251, subpart C, of this chapter.

(iii) *Termination.* For all special uses except noncommercial group uses, a special use authorization terminates when, by its terms, a fixed or agreed-upon condition, event, or time occurs. Termination of a special use authorization under this paragraph does not involve agency action and is not subject to administrative or judicial review.

(b) For purposes of this section, the authorized officer is that person who issues the authorization or that officer's successor.

* * * * *

(e) Except when immediate suspension pursuant to paragraph (f) of this section is indicated, the authorized officer shall give the holder written notice of the grounds for suspension or revocation under paragraph (a) of this section and reasonable time to cure any noncompliance, prior to suspension or revocation pursuant to paragraph (a) of this section,

(f) Immediate suspension of a special use authorization, in whole or in part, may be required when the authorized officer deems it necessary to protect the public health or safety or the environment. In any such case, within 48 hours of a request of the holder, the superior of the authorized officer shall arrange for an on-site review of the adverse conditions with the holder. Following this review, the superior officer shall take prompt action to affirm, modify, or cancel the suspension.

(g) The authorized officer may suspend or revoke easements issued pursuant to § 251.53 (e) and (l) of this subpart under the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings instituted by the Secretary under 7 CFR 1.130 through 1.151. No administrative proceeding shall be required if the easement, by its terms, provides that it terminates on the occurrence of a fixed or agreed-upon condition, event, or time.

(h)(1) The Chief may revoke any easement granted under the provisions of the Act of October 13, 1964, 78 Stat. 1089, 16 U.S.C. 534:

(i) By consent of the owner of the easement;

(ii) By condemnation; or

(iii) Upon abandonment after a 5-year period of nonuse by the owner of the easement.

(2) Before any such easement is revoked for nonuse or abandonment, the owner of the easement shall be given notice and, upon the owner's request made within 60 days after receipt of the notice, an opportunity to present relevant information in accordance with the provisions of 36 CFR part 251, subpart C, of this chapter.

(i) Upon revocation or termination of a special use authorization, the holder must remove within a reasonable time the structures and improvements and shall restore the site to a condition satisfactory to the authorized officer, unless the requirement to remove structures or improvements is otherwise waived in writing or in the authorization. If the holder fails to remove the structures or improvements within a reasonable period, as determined by the authorized officer, they shall become the property of the United States, but holder shall remain liable for the costs of removal and site restoration.

8. In § 251.61, revise paragraph (c) to read as follows:

§ 251.61 Modifications.

* * * * *

(c) A holder shall obtain prior approval from the authorized officer for modifications to approved uses that involve any activity impacting the environment, other users, or the public.

9. In § 251.64, add two sentences at the end of paragraph (a) to read as follows:

§ 251.64 Renewals.

(a) * * * Special uses may be reauthorized upon expiration so long as such use remains consistent with the decision that approved the expiring special use or group of uses. If significant new information or circumstances have developed, appropriate environmental analysis must accompany the decision to reauthorize the special use.

* * * * *

10. Revise § 251.65 to read as follows:

§ 251.65 Information collection requirements.

The rules of this subpart governing special use applications (§ 251.54 and § 251.59), terms and conditions (§ 251.54), rental fees (§ 251.57), and modifications (§ 251.61) specify the information that proponents or applicants for special use authorizations or holders of existing authorizations must provide in order for an authorized officer to act on a request or administer the authorization. As such, these rules contain information requirements as defined in 5 CFR part 1320. These information requirements are assigned OMB Control Number 0596–0082.

Dated: October 31, 1998.

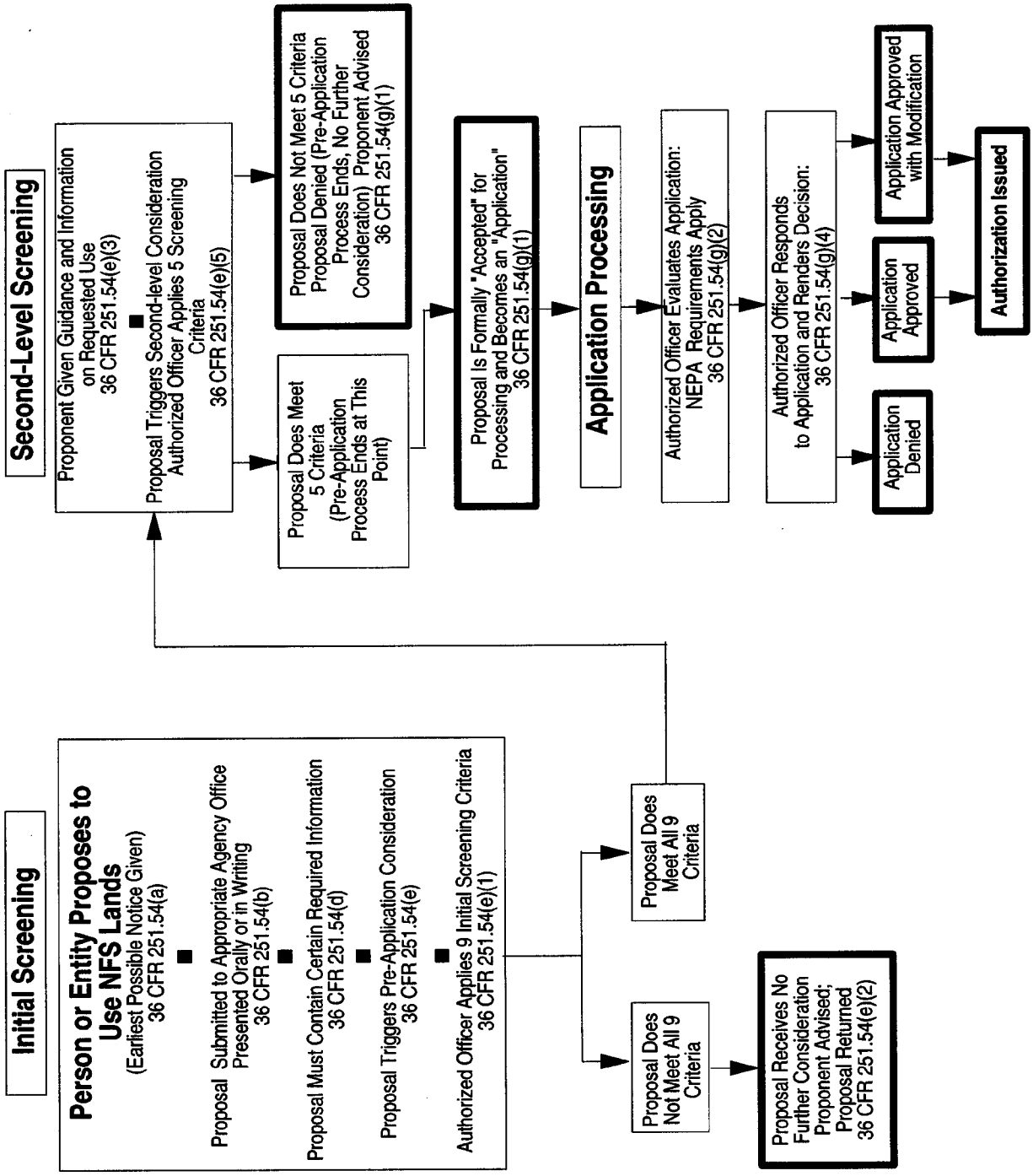
Anne Kennedy,

Deputy Under Secretary, Natural Resources and Environment.

Note: The following exhibit will not appear in the Code of Federal Regulations.

BILLING CODE 3410–11–P

Special Use Authorization Approval Process
Exhibit 1



[FR Doc. 98–31564 Filed 11–30–98; 8:45 am]
BILLING CODE 3410–11–C

NATIONAL REGISTER BULLETIN

Technical information on the the National Register of Historic Places: survey, evaluation, registration, and preservation of cultural resources

U.S. Department of the Interior
National Park Service
Cultural Resources
National Register, History and Education

How to Apply the National Register Criteria for Evaluation

The mission of the Department of the Interior is to protect and provide access to our Nation's natural and cultural heritage and honor our trust responsibilities to tribes.

The National Park Service preserves unimpaired the natural and cultural resources and values of the National Park System for the enjoyment, education, and inspiration of this and future generations. The Park Service cooperates with partners to extend the benefits of natural and cultural resource conservation and outdoor recreation throughout this country and the world.

This material is partially based upon work conducted under a cooperative agreement with the National Conference of State Historic Preservation Officers and the U.S. Department of the Interior.

Date of publication: 1990; revised 1991, 1995, 1997. Revised for Internet 1995.

Cover

(Top Left) ***Criterion B - Frederick Douglass Home,*** *Washington, D.C. From 1877-1899, this was the home of Frederick Douglass, the former slave who rose to become a prominent author, abolitionist, editor, orator, and diplomat. (Walter Smalling, Jr.)*

(Top Right) ***Criterion D - Francis Canyon Ruin,*** *Blanco vicinity, Rio Arriba County, New Mexico. A fortified village site composed of 40 masonry-walled rooms arranged in a cluster of four house blocks. Constructed ca. 1716-1742 for protection against raiding Utes and Comanches, the site has information potential related to Navajo, Pueblo, and Spanish cultures. (Jon Samuelson)*

(Bottom Left) ***Criterion C - Bridge in Cherrytree Township****, Venago County, Pennsylvania. Built in 1882, this Pratt through truss bridge is significant for engineering as a well preserved example of a type of bridge frequently used in northwestern Pennsylvania in the late 19th century. (Pennsylvania Department of Transportation)*

(Bottom Right) ***Criterion A - Main Street/Market Square Historic District****, Houston, Harris County, Texas. Until well into the 20th century this district marked the bounds of public and business life in Houston. Constructed between the 1870s and 1920s, the district includes Houston's municipal and county buildings, and served as the city's wholesale, retail, and financial center. (Paul Hester)*

PREFACE

Preserving historic properties as important reflections of our American heritage became a national policy through passage of the Antiquities Act of 1906, the Historic Sites Act of 1935, and the National Historic Preservation Act of 1966, as amended. The Historic Sites Act authorized the Secretary of the Interior to identify and recognize properties of national significance (National Historic Landmarks) in United States history and archeology. The National Historic Preservation Act of 1966 authorized the Secretary to expand this recognition to properties of local and State significance in American history, architecture, archeology, engineering, and culture, and worthy of preservation. The National Register of Historic Places is the official list of these recognized properties, and is maintained and expanded by the National Park Service on behalf of the Secretary of the Interior.[1]

The National Register of Historic Places documents the appearance and importance of districts, sites, buildings, structures, and objects significant in our prehistory and history. These properties represent the major patterns of our shared local, State, and national experience. To guide the selection of properties included in the National Register, the National Park Service has developed the National Register Criteria for Evaluation. These criteria are standards by which every property that is nominated to the National Register is judged. In addition, the National Park Service has developed criteria for the recognition of nationally significant properties, which are designated National Historic Landmarks and prehistoric and historic units of the National Park System. Both these sets of criteria were developed to be consistent with the Secretary of the Interior's *Standards and Guidelines for Archeology and Historic Preservation*, which are uniform, national standards for preservation activities.[2]

This publication explains how the National Park Service applies these criteria in evaluating the wide range of properties that may be significant in local, State, and national history.

It should be used by anyone who must decide if a particular property qualifies for the National Register of Historic Places.

Listing properties in the National Register is an important step in a nationwide preservation process. The responsibility for the identification, initial evaluation, nomination, and treatment of historic resources lies with private individuals, State historic preservation offices, and Federal preservation offices, local governments, and Indian tribes. The final evaluation and listing of properties in the National Register is the responsibility of the Keeper of the National Register.

This bulletin was prepared by staff of the National Register Branch, Interagency Resources Division, National Park Service, with the assistance of the History Division. It was originally issued in draft form in 1982. The draft was revised into final form by Patrick W. Andrus, Historian, National Register, and edited by Rebecca H. Shrimpton, Consulting Historian.

Beth L. Savage, National Register and Sarah Dillard Pope, National Register, NCSHPO coordinated the latest revision of this bulletin. Antionette J. Lee, Tanya Gossett, and Kira Badamo coordinated earlier revisions.

[1]Properties listed in the National Register receive limited Federal protection and certain benefits. For more information concerning the effects of listing, and how the National Register may be used by the general public and Certified Local Governments, as well as by local, State, and Federal agencies, and for copies of National Register Bulletins, contact the National Park Service, National Register, 1849 C Street, NW, NC400, Washington, D.C., 20240. Information may also be obtained by visiting the National Register Web site at **www.cr.nps.gov/nr** or by contacting any of the historic preservation offices in the States and territories.

[2]The *Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation* are found in the *Federal Register*, Vol. 48, No. 190 (Thursday, September 29, 1983). A copy can be obtained by writing the National Park Service, Heritage Preservation Services (at [illegible]).

TABLE OF CONTENTS

I. INTRODUCTION

The National Register is the nation's inventory of historic places and the national repository of documentation on the variety of historic property types, significance, abundance, condition, ownership, needs, and other information. It is the beginning of a national census of historic properties. The National Register Criteria for Evaluation define the scope of the National Register of Historic Places; they identify the range of resources and kinds of significance that will qualify properties for listing in the National Register. The Criteria are written broadly to recognize the wide variety of historic properties associated with our prehistory and history.

Decisions concerning the significance, historic integrity, documentation, and treatment of properties can be made reliably only when the resource is evaluated within its historic context. The historic context serves as the framework within which the National Register Criteria are applied to specific properties or property types. (See *Part V* for a brief discussion of historic contexts. Detailed guidance for developing and applying historic contexts is contained in *National Register Bulletin: How to Complete the National Register Registration Form* and *National Register Bulletin: How to Complete the National Register Multiple Property Documentation Form*)

The guidelines provided here are intended to help you understand the National Park Service's use of the Criteria for Evaluation, historic contexts, integrity, and Criteria Considerations, and how they apply to properties under consideration for listing in the National Register. Examples are provided throughout, illustrating specific circumstances in which properties are and are not eligible for the National Register. This bulletin should be used by anyone who is:

- Preparing to nominate a property to the National Register,
- Seeking a determination of a property's eligibility,
- Evaluating the comparable significance of a property to those listed in the National Register, or
- Expecting to nominate a property as a National Historic Landmark in addition to nominating it to the National Register.

This bulletin also contains a summary of the National Historic Landmarks Criteria for Evaluation (see *Part IX*). National Historic Landmarks are those districts, sites, buildings, structures, and objects designated by the Secretary of the Interior as possessing national significance in American history, architecture, archeology, engineering, and culture. Although National Register documentation includes a recommendation about whether a property is significant at the local, State, or national level, the only official designation of national significance is as a result of National Historic Landmark designation by the Secretary of the Interior, National Monument designation by the President of the United States, or establishment as a unit of the National Park System by Congress. These properties are automatically listed in the National Register.

II. THE NATIONAL REGISTER CRITERIA FOR EVALUATION

CRITERIA FOR EVALUATION:[3]

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

A. That are associated with events that have made a significant contribution to the broad patterns of our history; or

B. That are associated with the lives of persons significant in our past; or

C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

D. That have yielded, or may be likely to yield, information important in prehistory or history.

CRITERIA CONSIDERATIONS:

Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties *will qualify* if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

a. A religious property deriving primary significance from architectural or artistic distinction or historical importance; or

b. A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or

c. A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his or her productive life; or

d. A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or

e. A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or

f. A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or

g. A property achieving significance within the past 50 years if it is of exceptional importance.

[3]The Criteria for Evaluation are found in the *Code of Federal Regulations, Title 36, Part 60*, and are reprinted here in full.

III. HOW TO USE THIS BULLETIN TO EVALUATE A PROPERTY

For a property to qualify for the National Register it must meet one of the National Register Criteria for Evaluation by:

- **Being associated with an important historic context** *and*
- **Retaining historic integrity of those features necessary to convey its significance.**

Information about the property based on physical examination and documentary research is necessary to evaluate a property's eligibility for the National Register. Evaluation of a property is most efficiently made when following this sequence:

1. Categorize the property (Part IV). A property must be classified as a district, site, building, structure, or object for inclusion in the National Register.
2. **Determine which prehistoric or historic context(s) the property represents** (Part V). A property must possess significance in American history, architecture, archeology, engineering, or culture when evaluated within the historic context of a relevant geographic area.
3. Determine whether the property is significant under the National Register Criteria (Part VI). This is done by identifying the links to important events or persons, design or construction features, or information potential that make the property important.
4. Determine if the property represents a type usually excluded from the National Register (Part VII). If so, determine if it meets any of the Criteria Considerations.
5. Determine whether the property retains integrity (Part VIII). Evaluate the aspects of location, design, setting, workmanship, materials, feeling, and association that the property must retain to convey its historic significance.

If, after completing these steps, the property appears to qualify for the National Register, the next step is to prepare a written nomination. (Refer to *National Register Bulletin: How to Complete the National Register Registration Form.*)

IV. HOW TO DEFINE CATEGORIES OF HISTORIC PROPERTIES

The National Register of Historic Places includes significant properties, classified as buildings, sites, districts, structures, or objects. It is not used to list intangible values, except in so far as they are associated with or reflected by historic properties. The National Register does not list cultural events, or skilled or talented individuals, as is done in some countries. Rather, the National Register is oriented to recognizing physically concrete properties that are relatively fixed in location.

For purposes of National Register nominations, small groups of properties are listed under a single category, using the primary resource. For example, a city hall and fountain would be categorized by the city hall (building), a farmhouse with two outbuildings would be categorized by the farmhouse (building), and a city park with a gazebo would be categorized by the park (site). Properties with large acreage or a number of resources are usually considered districts. Common sense and reason should dictate the selection of categories.

BUILDING

A building, such as a house, barn, church, hotel, or similar construction, is created principally to shelter any form of human activity. "Building" may also be used to refer to a historically and functionally related unit, such as a courthouse and jail or a house and barn.

Buildings eligible for the National Register must include all of their basic structural elements. Parts of buildings, such as interiors, facades, or wings, are not eligible independent of the rest of the existing building. The whole building must be considered, and its significant features must be identified.

If a building has lost any of its basic structural elements, it is usually considered a "ruin" and is categorized as a site.

Examples of buildings include:

administration building
carriage house
church
city or town hall
courthouse
detached kitchen, barn, and privy
dormitory
fort
garage
hotel
house
library
mill building
office building
post office
school
social hall
shed
stable
store
theater
train station

STRUCTURE

The term "structure" is used to distinguish from buildings those functional constructions made usually for purposes other than creating human shelter.

Structures nominated to the National Register must include all of the extant basic structural elements. Parts of structures can not be considered eligible if the whole structure remains. For example, a truss bridge is composed of the metal or wooden truss, the abutments, and supporting piers, all of which, if extant, must be included when considering the property for eligibility.

If a structure has lost its historic configuration or pattern of organization through deterioration or demolition, it is usually considered a "ruin" and is categorized as a site.

Examples of structures include:

aircraft
apiary
automobile
bandstand
boats and ships
bridge
cairn
canal
carousel
corncrib
dam
earthwork
fence
gazebo
grain elevator
highway
irrigation system
kiln
lighthouse
railroad grade
silo
trolley car
tunnel
windmill

OBJECT

The term "object" is used to distinguish from buildings and structures those constructions that are primarily artistic in nature or are relatively small in scale and simply constructed. Although it may be, by nature or design, movable, an object is associated with a specific setting or environment.

Small objects not designed for a specific location are normally not eligible. Such works include transportable sculpture, furniture, and other decorative arts that, unlike a fixed outdoor sculpture, do not possess association with a specific place.

Objects should be in a setting appropriate to their significant historic use, roles, or character. Objects relocated to a museum are inappropriate for listing in the National Register.

Examples of objects include:

boundary marker
fountain
milepost
monument
scupture
statuary

SITE

A site is the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself possesses historic, cultural, or archeological value regardless of the value of any existing structure.

A site can possess associative significance or information potential or both, and can be significant under any or all of the four criteria. A site need not be marked by physical remains if it is the location of a prehistoric or historic event or pattern of events and if no buildings, structures, or objects marked it at the time of the events. However, when the location of a prehistoric or historic event cannot be conclusively determined because no other cultural materials were present or survive, documentation must be carefully evaluated to determine whether the traditionally recognized or identified site is accurate.

A site may be a natural landmark strongly associated with significant prehistoric or historic events or patterns of events, if the significance of the natural feature is well documented through scholarly research. Generally, though, the National Register excludes from the definition of "site" natural waterways or bodies of water that served as determinants in the location of communities or were significant in the locality's subsequent economic development. While they may have been "avenues of exploration," the features most appropriate to document this significance are the properties built in association with the waterways.

Examples of sites include:

battlefield
campsite
cemeteries significant for information potential or historic association
ceremonial site
designed landscape
habitation site
natural feature (such as a rock formation) having cultural significance
petroglyph
rock carving
rock shelter
ruins of a building or structure
shipwreck
trail
village site

DISTRICT

A district possesses a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united historically or aesthetically by plan or physical development.

CONCENTRATION, LINKAGE, & CONTINUITY OF FEATURES

A district derives its importance from being a unified entity, even though it is often composed of a wide variety of resources. The identity of a district results from the interrelationship of its resources, which can convey a visual sense of the overall historic environment or be an arrangement of historically or functionally related properties. For example, a district can reflect one principal activity, such as a mill or a ranch, or it can encompass several interrelated activities, such as an area that includes industrial, residential, or commercial buildings, sites, structures, or objects. A district can also be a grouping of archeological sites related primarily by their common components; these types of districts often will not visually represent a specific historic environment.

SIGNIFICANCE

A district must be significant, as well as being an identifiable entity. It must be important for historical, architectural, archeological, engineering, or cultural values. Therefore, districts that are significant will usually meet the last portion of Criterion C plus Criterion A, Criterion B, other portions of Criterion C, or Criterion D.

TYPES OF FEATURES

A district can comprise both features that lack individual distinction and individually distinctive features that serve as focal points. It may even be considered eligible if all of the components lack individual distinction, provided that the grouping achieves significance as a whole within its historic context. In either case, the majority of the components that add to the district's historic character, even if they are individually undistinguished, must possess integrity, as must the district as a whole.

A district can contain buildings, structures, sites, objects, or open spaces that do not contribute to the significance of the district. The number of noncontributing properties a district can contain yet still convey its sense of time and place and historical development depends on how these properties affect the district's integrity. In archeological districts, the primary factor to be considered is the effect of any disturbances on the information potential of the district as a whole.

GEOGRAPHICAL BOUNDARIES

A district must be a definable geographic area that can be distinguished from surrounding properties by changes such as density, scale, type, age, style of sites, buildings, structures, and objects, or by documented differences in patterns of historic development or associations. It is seldom defined, however, by the limits of current parcels of ownership, management, or planning boundaries. The boundaries must be based upon a shared relationship among the properties constituting the district.

DISCONTIGUOUS DISTRICTS

A district is usually a single geographic area of contiguous historic properties; however, a district can also be composed of two or more definable significant areas separated by nonsignificant areas. A discontiguous district is most appropriate where:

- Elements are spatially discrete;
- Space between the elements is not related to the significance of the district; and
- Visual continuity is not a factor in the significance.

In addition, a canal can be treated as a discontiguous district when the system consists of man-made sections of canal interspersed with sections of river navigation. For scattered archeological properties, a discontiguous district is appropriate when the deposits are related to each other through cultural affiliation, period of use, or site type.

It is not appropriate to use the discontiguous district format to include an isolated resource or small group of resources which were once connected to the district, but have since been separated either through demolition or new construction. For example, do not use the discontiguous district format to nominate individual buildings of a downtown commerical district that have become isolated through demolition.

Examples of districts include:

business districts
canal systems
groups of habitation sites
college campuses
estates and farms with large acreage/ numerous properties
industrial complexes
irrigation systems
residential areas
rural villages
transportation networks
rural historic districts

***Ordeman-Shaw Historic District**, Montgomery, Montgomery County, Alabama. Historic districts derive their identity from the interrationship of their resources. Part of the defining characteristics of this 19th century residential district in Montgomery, Alabama, is found in the rhythmic pattern of the rows of decorative porches. (Frank L. Thiermonge, III)*

V. HOW TO EVALUATE A PROPERTY WITHIN ITS HISTORIC CONTEXT

UNDERSTANDING HISTORIC CONTEXTS

To qualify for the National Register, a property must be significant; that is, it must represent a significant part of the history, architecture, archeology, engineering, or culture of an area, and it must have the characteristics that make it a good representative of properties associated with that aspect of the past. This section explains how to evaluate a property within its historic context.[4]

The significance of a historic property can be judged and explained only when it is evaluated within its historic context. Historic contexts are those patterns or trends in history by which a specific occurrence, property, or site is understood and its meaning (and ultimately its significance) within history or prehistory is made clear. Historians, architectural historians, folklorists, archeologists, and anthropologists use different words to describe this phenomena such as trend, pattern, theme, or cultural affiliation, but ultimately the concept is the same.

The concept of historic context is not a new one; it has been fundamental to the study of history since the 18th century and, arguably, earlier than that. Its core premise is that resources, properties, or happenings in history do not occur in a vacuum but rather are part of larger trends or patterns.

In order to decide whether a property is significant within its historic context, the following five things must be determined:

- The facet of prehistory or history of the local area, State, or the nation that the property represents;
- Whether that facet of prehistory or history is significant;
- Whether it is a type of property that has relevance and importance in illustrating the historic context;
- How the property illustrates that history; and finally
- Whether the property possesses the physical features necessary to convey the aspect of prehistory or history with which it is associated.

These five steps are discussed in detail below. If the property being evaluated does represent an important aspect of the area's history or prehistory *and* possesses the requisite quality of integrity, then it qualifies for the National Register.

HOW TO EVALUATE A PROPERTY WITHIN ITS HISTORIC CONTEXT

Identify what the property represents: the theme(s), geographical limits, and chronological period that provide a perspective from which to evaluate the property's significance.

Historic contexts are historical patterns that can be identified through consideration of the history of the property and the history of the surrounding area. Historic contexts may have already been defined in your area by the State historic preservation office, Federal agencies, or local governments. In accordance with the National Register Criteria, the historic context may relate to one of the following:

- An event, a series of events or activities, or patterns of an area's development (Criterion A);
- Association with the life of an important person (Criterion B);
- A building form, architectural style, engineering technique, or artistic values, based on a stage of physical development, or the use of a material or method of construction that shaped the historic identity of an area (Criterion C); or
- A research topic (Criterion D).

[4] For a complete discussion of historic contexts, see *National Register Bulletin: Guidelines for Completing National Register of Historic Places Registration Forms*.

Determine how the theme of the context is significant in the history of the local area, the State, or the nation.

A theme is a means of organizing properties into coherent patterns based on elements such as environment, social/ethnic groups, transportation networks, technology, or political developments that have influenced the development of an area during one or more periods of prehistory or history. A theme is considered significant if it can be demonstrated, through scholarly research, to be important in American history. Many significant themes can be found in the following list of Areas of Significance used by the National Register.

AREAS OF SIGNIFICANCE

Agriculture
Architecture
Archeology
  Prehistoric
  Historic—Aboriginal
  Historic—Non-Aboriginal
Art
Commerce
Communications
Community Planning and Development
Conservation
Economics
Education
Engineering
Entertainment/Recreation
Ethnic Heritage
  Asian
  Black
  European
  Hispanic
  Native American
  Pacific Islander
  Other
Exploration/Settlement
Health/Medicine
Industry
Invention
Landscape Architecture
Law
Literature
Maritime History
Military
Performing Arts
Philosophy
Politics/Government
Religion
Science
Social History
Transportation
Other

Determine what the property type is and whether it is important in illustrating the historic context.

A context may be represented by a variety of important property types. For example, the context of "Civil War Military Activity in Northern Virginia" might be represented by such properties as: a group of mid-19th century fortification structures; an open field where a battle occurred; a knoll from which a general directed troop movements; a sunken transport ship; the residences or public buildings that served as company headquarters; a railroad bridge that served as a focal point for a battle; and earthworks exhibiting particular construction techniques.

Because a historic context for a community can be based on a distinct period of development, it might include numerous property types. For example, the context "Era of Industrialization in Grand Bay, Michigan, 1875 - 1900" could be represented by important property types as diverse as sawmills, paper mill sites, salt refining plants, flour mills, grain elevators, furniture factories, workers housing, commercial buildings, social halls, schools, churches, and transportation facilities.

A historic context can also be based on a single important type of property. The context "Development of County Government in Georgia, 1777 - 1861" might be represented solely by courthouses. Similarly, "Bridge Construction in Pittsburgh, 1870 - 1920" would probably only have one property type.

Determine how the property represents the context through specific historic associations, architectural or engineering values, or information potential (the Criteria for Evaluation).

For example, the context of county government expansion is represented under Criterion A by historic districts or buildings that reflect population growth, development patterns, the role of government in that society, and political events in the history of the State, as well as the impact of county government on the physical development of county seats. Under Criterion C, the context is represented by properties whose architectural treatments reflect their governmental functions, both practically and symbolically. (See *Part VI: How to Identify the Type of Significance of a Property.*)

Determine what physical features the property must possess in order for it to reflect the significance of the historic context.

These physical features can be determined after identifying the following:

- Which types of properties are associated with the historic context,
- The ways in which properties can represent the theme, and
- The applicable aspects of integrity.

Properties that have the defined characteristics are eligible for listing. (See *Part VIII: How to Evaluate the Integrity of a Property.*)

PROPERTIES SIGNIFICANT WITHIN MORE THAN ONE HISTORIC CONTEXT

A specific property can be significant within one or more historic contexts, and, if possible, all of these should be identified. For example, a public building constructed in the 1830s that is related to the historic context of Civil War campaigns in the area might also be related to the theme of political developments in the community during the 1880s. A property is only required, however, to be documented as significant in one context.

COMPARING RELATED PROPERTIES

Properties listed in the National Register must possess significance when evaluated in the perspective of their historic context. Once the historic context is established and the property type is determined, it is not necessary to evaluate the property in question against other properties *if*:

- It is the sole example of a property type that is important in illustrating the historic context or
- It clearly possesses the defined characteristics required to strongly represent the context.

If these two conditions do not apply, then the property will have to be evaluated against other examples of the property type to determine its eligibility. The geographic level (local, State, or national) at which this evaluation is made is the same as the level of the historic context. (See *Part V: How to Evaluate a Property Within Its Historic Context*.)

LOCAL, STATE, AND NATIONAL HISTORIC CONTEXTS

Historic contexts are found at a variety of geographical levels or scales. The geographic scale selected may relate to a pattern of historical development, a political division, or a cultural area. Regardless of the scale, the historic context establishes the framework from which decisions about the significance of related properties can be made.

LOCAL HISTORIC CONTEXTS

A local historic context represents an aspect of the history of a town, city, county, cultural area, or region, or any portions thereof. It is defined by the importance of the property, not necessarily the physical location of the property. For instance, if a property is of a type found throughout a State, or its boundaries extend over two States, but its importance relates only to a particular county, the property would be considered of local significance.

The level of context of archeological sites significant for their information potential depends on the scope of the applicable research design. For example, a Late Mississippian village site may yield information in a research design concerning one settlement system on a regional scale, while in another research design it may reveal information of local importance concerning a single group's stone tool manufacturing techniques or house forms. It is a question of how the available information potential is likely to be used.

STATE HISTORIC CONTEXTS

Properties are evaluated in a State context when they represent an aspect of the history of the State as a whole (or American Samoa, the District of Columbia, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the Virgin Islands). These properties do not necessarily have to belong to property types found throughout the entire State: they can be located in only a portion of the State's present political boundary. It is the property's historic context that must be important statewide. For example, the "cotton belt" extends through only a portion of Georgia, yet its historical development in the antebellum period affected the entire State. These State historic contexts may have associated properties that are statewide or locally significant representations. A cotton gin in a small town might be a locally significant representation of this context, while one of the largest cotton producing plantations might be of State significance.

A property whose historic associations or information potential appears to extend beyond a single local area might be significant at the State level. A property can be significant to more than one community or local area, however, without having achieved State significance.

A property that overlaps several State boundaries can possibly be significant to the State or local history of each of the States. Such a property is not necessarily of national significance, however, nor is it necessarily significant to all of the States in which it is located.

Prehistoric sites are not often considered to have "State" significance, per se, largely because States are relatively recent political entities and usually do not correspond closely to Native American political territories or cultural areas. Numerous sites, however, may be of significance to a large region that might geographically encompass parts of one, or usually several, States. Prehistoric resources that might be of State significance include regional sites that provide a diagnostic assemblage of artifacts for a particular cultural group or time period or that provide chronological control (specific dates or relative order in time) for a series of cultural groups.

NATIONAL HISTORIC CONTEXTS

Properties are evaluated in a national context when they represent an aspect of the history of the United States and its territories as a whole. These national historic contexts may have associated properties that are locally or statewide significant representations, as well as those of national significance.

Properties designated as nationally significant and listed in the National Register are the prehistoric and historic units of the National Park System and those properties that have been designated National Historic Landmarks. The National Historic Landmark criteria are the standards for nationally significant properties; they are found in the *Code of Federal Regulations, Title 36, Part 65* and are summarized in this bulletin in *Part IX: Summary of National Historic Landmarks Criteria for Evaluation.*

A property with national significance helps us understand the history of the nation by illustrating the nationwide impact of events or persons associated with the property, its architectural type or style, or information potential. It must be of exceptional value in representing or illustrating an important theme in the history of the nation.

Nationally significant properties do not necessarily have to belong to a property type found throughout the entire country: they can be located in only a portion of the present political boundaries. It is their historic context that must be important nationwide. For example, the American Civil War was fought in only a portion of the United States, yet its impact was nationwide. The site of a small military skirmish might be a locally significant representation of this national context, while the capture of the State's largest city might be a statewide significant representation of the national context.

When evaluating properties at the national level for designation as a National Historic Landmark, please refer to the National Historic Landmarks outline, *History and Prehistory in the National Park System and the National Historic Landmarks Program 1987.* (For more information about the National Historic Landmarks program, please write to the Department of the Interior, National Park Service, National Historic Landmarks, 1849 C Street, NW, NC400, Washington, DC 20240.)

VI. HOW TO IDENTIFY THE TYPE OF SIGNIFICANCE OF A PROPERTY

INTRODUCTION

When evaluated within its historic context, a property must be shown to be significant for *one or more of the four Criteria for Evaluation - A, B, C, or D* (listed earlier in *Part II*). The Criteria describe how properties are significant for their association with important events or persons, for their importance in design or construction, or for their information potential.

The basis for judging a property's significance and, ultimately, its eligibility under the Criteria is *historic context*. The use of historic context allows a property to be properly evaluated in a nearly infinite number of capacities. For instance, Criterion C: Design/Construction can accommodate properties representing construction types that are unusual or widely practiced, that are innovative or traditional, that are "high style" or vernacular, that are the work of a famous architect or an unknown master craftsman. *The key to determining whether the characteristics or associations of a particular property are significant is to consider the property within its historic context.*

After identifying the relevant historic context(s) with which the property is associated, the four Criteria are applied to the property. Within the scope of the historic context, the National Register Criteria define the kind of significance that the properties represent.

For example, within the context of "19th Century Gunpowder Production in the Brandywine Valley," Criterion A would apply to those properties associated with important events in the founding and development of the industry. Criterion B would apply to those properties associated with persons who are significant in the founding of the industry or associated with important inventions related to gunpowder manufacturing. Criterion C would apply to those buildings, structures, or objects whose architectural form or style reflect important design qualities integral to the industry. And Criterion D would apply to properties that can convey information important in our understanding of this industrial process. If a property qualifies under more than one of the Criteria, its significance under each should be considered, if possible, in order to identify all aspects of its historical value.

NATIONAL REGISTER CRITERIA FOR EVALUATION*

The National Register Criteria recognize different types of values embodied in districts, sites, buildings, structures, and objects. These values fall into the following categories:

Associative value (Criteria A and B): Properties significant for their association or linkage to events (Criterion A) or persons (Criterion B) important in the past.

Design or Construction value (Criterion C): Properties significant as representatives of the manmade expression of culture or technology.

Information value (Criterion D): Properties significant for their ability to yield important information about prehistory or history.

*For a complete listing of the Criteria for Evaluation, refer to Part II of this bulletin.

CRITERION A: EVENT

Properties can be eligible for the National Register if they are associated with events that have made a significant contribution to the broad patterns of our history.

UNDERSTANDING CRITERION A: EVENT

To be considered for listing under Criterion A, a property must be associated with one or more events important in the defined historic context. Criterion A recognizes properties associated with single events, such as the founding of a town, or with a pattern of events, repeated activities, or historic trends, such as the gradual rise of a port city's prominence in trade and commerce. The event or trends, however, must clearly be important within the associated context: settlement, in the case of the town, or development of a maritime economy, in the case of the port city. Moreover, the property must have an important association with the event or historic trends, and it must retain historic integrity. (See *Part V: How to Evaluate a Property Within its Historic Context.)*

Several steps are involved in determining whether a property is significant for its associative values:

- Determine the nature and origin of the property,
- Identify the historic context with which it is associated, and
- Evaluate the property's history to determine whether it is associated with the historic context in any important way.

APPLYING CRITERION A: EVENT

TYPES OF EVENTS

A property can be associated with either (or both) of two types of events:

- A specific event marking an important moment in American prehistory or history and
- A pattern of events or a historic trend that made a significant contribution to the development of a community, a State, or the nation.

Refer to the sidebar on the right for a list of specific examples.

ASSOCIATION OF THE PROPERTY WITH THE EVENTS

The property you are evaluating must be documented, through accepted means of historical or archeological research (including oral history), to have existed at the time of the event or pattern of events *and* to have been associated with those events. A property is *not* eligible if its associations are speculative. For archeological sites, well reasoned inferences drawn from data recovered at the site can be used to establish the association between the site and the events.

SIGNIFICANCE OF THE ASSOCIATION

Mere association with historic events or trends is not enough, in and of itself, to qualify under Criterion A: the property's specific association must be considered important as well. For example, a building historically in commercial use must be shown to have been significant in commercial history.

EXAMPLES OF PROPERTIES ASSOCIATED WITH EVENTS

Properties associated with specific events:

- *The site of a battle.*
- *The building in which an important invention was developed.*
- *A factory district where a significant strike occurred.*
- *An archeological site at which a major new aspect of prehistory was discovered, such as the first evidence of man and extinct Pleistocene animals being contemporaneous.*
- *A site where an important facet of European exploration occurred.*

Properties associated with a pattern of events:

- *A trail associated with western migration.*
- *A railroad station that served as the focus of a community's transportation system and commerce.*
- *A mill district reflecting the importance of textile manufacturing during a given period.*
- *A building used by an important local social organization.*
- *A site where prehistoric Native Americans annually gathered for seasonally available resources and for social interaction.*
- *A downtown district representing a town's growth as the commercial focus of the surrounding agricultural area.*

TRADITIONAL CULTURAL VALUES

Traditional cultural significance is derived from the role a property plays in a community's historically rooted beliefs, customs, and practices. Properties may have significance under Criterion A if they are associated with events, or series of events, significant to the cultural traditions of a community.[5]

Eligible

- A hilltop associated in oral historical accounts with the founding of an Indian tribe or society is eligible.
- A rural community can be eligible whose organization, buildings, or patterns of land use reflect the cultural traditions valued by its long-term residents.
- An urban neighborhood can be eligible as the traditional home of a particular cultural group and as a reflection of its beliefs and practices.

Not Eligible

- A site viewed as sacred by a recently established utopian or religious community does not have traditional cultural value and is not eligible.

Criterion A - The Old Brulay Plantation, *Brownsville vicinity, Cameron county, Texas. Historically significant for its association with the development of agriculture in southeast Texas, this complex of 10 brick buildings was constructed by George N. Brulay, a French immigrant who introduced commercial sugar production and irrigation to the Rio Grande Valley. (Photo by Texas Historical Commission).*

[5] For more information, refer to *National Register Bulletin: Guidelines for Evaluating and Documenting Traditional Cultural Properties.*

CRITERION B: PERSON

Properties may be eligible for the National Register if they are associated with the lives of persons significant in our past.

UNDERSTANDING CRITERION B: PERSON[6]

Criterion B applies to properties associated with individuals whose specific contributions to history can be identified and documented. Persons "significant in our past" refers to individuals whose activities are demonstrably important within a local, State, or national historic context. The criterion is generally restricted to those properties that illustrate (rather than commemorate) a person's important achievements. (The policy regarding commemorative properties, birthplaces, and graves is explained further in *Part VIII: How to Apply the Criteria Considerations.)*

Several steps are involved in determining whether a property is significant for its associative values under Criterion B. First, determine the importance of the individual. Second, ascertain the length and nature of his/her association with the property under study and identify the other properties associated with the individual. Third, consider the property under Criterion B, as outlined below.

EXAMPLES OF PROPERTIES ASSOCIATED WITH PERSONS

Properties associated with a Significant Person:

- *The home of an important merchant or labor leader.*
- *The studio of a significant artist.*
- *The business headquarters of an important industrialist.*

Criterion B - The William Whitney House, *Hinsdale, DuPage County, Illinois. This building is locally significant for its historical association with William Whitney, the founder of the town of Hinsdale, Illinois. Whitney, a citizen of New York State, moved to Illinois, established the town, and while living here between 1870 and 1879 was a prominent local businessman and politician. (Photo by Frederick C. Cue).*

[6] For further information on properties eligible under Criterion B, refer to *National Register Bulletin: Guidelines for Evaluating and Documenting Properties Associated with Significant Persons.*

APPLYING CRITERION B: PERSON

SIGNIFICANCE OF THE INDIVIDUAL

The persons associated with the property must be *individually* significant within a historic context. A property is not eligible if its only justification for significance is that it was owned or used by a person who is a member of an identifiable profession, class, or social or ethnic group. It must be shown that the person gained importance within his or her profession or group.

Eligible

- The residence of a doctor, a mayor, or a merchant is eligible under Criterion B if the person was significant in the field of medicine, politics, or commerce, respectively.

Not Eligible

- A property is not eligible under Criterion B if it is associated with an individual about whom no scholarly judgement can be made because either research has not revealed specific information about the person's activities and their impact, or there is insufficient perspective to determine whether those activities or contributions were historically important.

ASSOCIATION WITH THE PROPERTY

Properties eligible under Criterion B are usually those associated with a person's *productive* life, reflecting the time period when he or she achieved significance. In some instances this may be the person's home; in other cases, a person's business, office, laboratory, or studio may best represent his or her contribution. Properties that pre- or post-date an individual's significant accomplishments are usually not eligible. (See *Comparison to Related Properties*, below, for exceptions to this rule.)

The individual's association with the property must be documented by accepted methods of historical or archeological research, including written or oral history. Speculative associations are not acceptable. For archeological sites, well reasoned inferences drawn from data recovered at the site are acceptable.

COMPARISON TO RELATED PROPERTIES

Each property associated with an important individual should be compared to other associated properties to identify those that best represent the person's historic contributions. The best representatives usually are properties associated with the person's adult or *productive* life. Properties associated with an individual's formative or later years may also qualify if it can be demonstrated that the person's activities during this period were historically significant *or* if no properties from the person's productive years survives. Length of association is an important factor when assessing several properties with similar associations.

A community or State may contain several properties eligible for associations with the same important person, if each represents a different aspect of the person's productive life. A property can also be eligible if it has brief but consequential associations with an important individual. (Such associations are often related to specific events that occurred at the property and, therefore, it may also be eligible under Criterion A.)

ASSOCIATION WITH GROUPS

For properties associated with several community leaders or with a prominent family, it is necessary to identify specific individuals and to explain their significant accomplishments.

Eligible

- A residential district in which a large number of prominent or influential merchants, professionals, civic leaders, politicians, etc., lived will be eligible under Criterion B if the significance of one or more specific individual residents is explicitly justified.
- A building that served as the seat of an important family is eligible under Criterion B if the significant accomplishments of one or more individual family members is explicitly justified.

Not Eligible

- A residential district in which a large number of influential persons lived is not eligible under Criterion B if the accomplishments of a specific individual(s) cannot be documented. If the significance of the district rests in the cumulative importance of prominent residents, however, then the district might still be eligible under Criterion A. Eligibility, in this case, would be based on the broad pattern of community development, through which the neighborhood evolved into the primary residential area for this class of citizens.
- A building that served as the seat of an important family will not be eligible under Criterion B if the significant accomplishments of individual family members cannot be documented. In cases where a succession of family members have lived in a house and collectively have had a demonstrably significant impact on the community, as a family, the house is more likely to be significant under Criterion A for association with a pattern of events.

ASSOCIATION WITH LIVING PERSONS

Properties associated with living persons are usually not eligible for inclusion in the National Register. Sufficient time must have elapsed to assess both the person's field of endeavor and his/her contribution to that field. Generally, the person's active participation in the endeavor must be finished for this historic perspective to emerge. (See Criteria Considerations C and G in *Part VII: How to Apply the Criteria Considerations.)*

ASSOCIATION WITH ARCHITECTS/ARTISANS

Architects, artisans, artists, and engineers are often represented by their works, which are eligible under Criterion C. Their homes and studios, however, can be eligible for consideration under Criterion B, because these usually are the properties with which they are most personally associated.

NATIVE AMERICAN SITES

The known major villages of individual Native Americans who were important during the contact period or later can qualify under Criterion B. As with all Criterion B properties, the individual associated with the property must have made some specific important contribution to history. Examples include sites significantly associated with Chief Joseph and Geronimo.[7]

[7] For more information, refer to *National Register Bulletin: Guidelines for Evaluating and Documenting Traditional Cultural Properties.*

CRITERION C: DESIGN/CONSTRUCTION

Properties may be eligible for the National Register if they embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction.

Richland Plantation, *East Feliciana Parish, Louisiana. Properties can qualify under Criterion C as examples of high style architecture. Built in the 1830s, Richland is a fine example of a Federal style residence with a Greek Revival style portico. (Photo by Dave Gleason).*

UNDERSTANDING CRITERION C: DESIGN/ CONSTRUCTION

This criterion applies to properties significant for their physical design or construction, including such elements as architecture, landscape architecture, engineering, and artwork. To be eligible under Criterion C, a property must meet *at least one* of the following requirements:

- Embody distinctive characteristics of a type, period, or method of construction.
- Represent the work of a master.
- Possess high artistic value.
- Represent a significant and distinguishable entity whose components may lack individual distinction.

The first requirement, that properties "embody the distinctive characteristics of a type, period, or method of construction," refers to the way in which a property was conceived, designed, or fabricated by a people or culture in past periods of history. "The work of a master" refers to the technical or aesthetic achievements of an architect or craftsman. "High artistic values" concerns the expression of aesthetic ideals or preferences and applies to aesthetic achievement.

Resources "that represent a significant and distinguishable entity whose components may lack individual distinction" are called "districts." In the Criteria for Evaluation (as published in the *Code of Federal Regulations* and reprinted here in Part II), districts are defined within the context of Criterion C. *Districts, however, can be considered for eligibility under all the Criteria,* individually or in any combination, as is appropriate. For this reason, the full discussion of districts is contained in *Part IV: How to Define Categories of Historic Properties.* Throughout the bulletin, however, districts are mentioned within the context of a specific subject, such as an individual Criterion.

Grant Family House*, Saco vicinity, York County, Maine. Properties possessing high artistic value meet Criterion C through the expression of aesthetic ideals or preferences. The Grant Family House, a modest Federal style residence, is significant for its remarkably well-preserved stenciled wall decorative treatment in the entry hall and parlor. Painted by an unknown artist ca. 1825, this is a fine example of 19th century New England regional artistic expression. (Photo by Kirk F. Mohney).*

EXAMPLES OF PROPERTIES ASSOCIATED WITH DESIGN/ CONSTRUCTION

Properties associated with design and construction:

- *A house or commercial building representing a significant style of architecture.*
- *A designed park or garden associated with a particular landscape design philosophy.*
- *A movie theater embodying high artistic value in its decorative features.*
- *A bridge or dam representing technological advances.*

APPLYING CRITERION C: DESIGN/ CONSTRUCTION

DISTINCTIVE CHARACTERISTICS OF TYPE, PERIOD, AND METHOD OF CONSTRUCTION

This is the portion of Criterion C under which most properties are eligible, for it encompasses all architectural styles and construction practices. To be eligible under this portion of the Criterion, a property must clearly illustrate, through "distinctive characteristics," the following:

- The pattern of features common to a particular class of resources,
- The individuality or variation of features that occurs within the class,
- The evolution of that class, or
- The transition between classes of resources.

Distinctive Characteristics: "Distinctive characteristics" are the physical features or traits that commonly recur in individual types, periods, or methods of construction. To be eligible, a property must clearly contain enough of those characteristics to be considered a true representative of a particular type, period, or method of construction.

Characteristics can be expressed in terms such as form, proportion, structure, plan, style, or materials. They can be general, referring to ideas of design and construction such as basic plan or form, or they can be specific, referring to precise ways of combining particular kinds of materials.

Eligible

- A building eligible under the theme of Gothic Revival architecture must have the distinctive characteristics that make up the vertical and picturesque qualities of the style, such as pointed gables, steep roof pitch, board and batten siding, and ornamental bargeboard and veranda trim.
- A late Mississippian village that illustrates the important concepts in prehistoric community design and planning will qualify.
- A designed historic landscape will qualify if it reflects a historic trend or school of theory and practice, such as the City Beautiful Movement, evidencingdistinguished design, layout, and the work of skilled craftsmanship.

Not Eligible

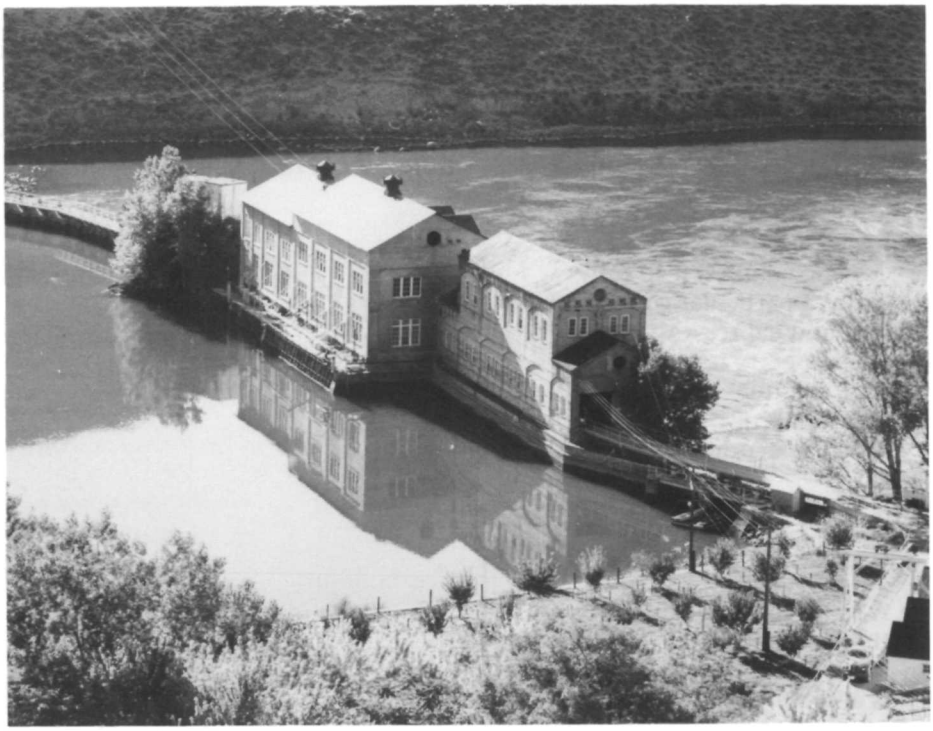
- A commercial building with some Art Deco detailing is not eligible under Criterion C if the detailing was added merely as an afterthought, rather than fully integrated with overall lines and massing typical of the Art Deco style or the transition between that and another style.
- A designed landscape that has had major changes to its historic design, vegetation, original boundary, topography/ grading, architectural features, and circulation system will not qualify.

Type, Period, and Method of Construction: "Type, period, or method of construction" refers to the way certain properties are related to one another by cultural tradition or function, by dates of construction or style, or by choice or availability of materials and technology.

A structure is eligible as a specimen of its type or period of construction if it is an important example (within its context) of building practices of a particular time in history. For properties that represent the variation, evolution, or transition of construction types, it must be demonstrated that the variation, etc., was an important phase of the architectural development of the area or community in that it had an impact as evidenced by later buildings. A property is not eligible, however, simply because it has been identified as the only such property ever fabricated; it must be demonstrated to be significant as well.

Eligible

- A building that has some characteristics of the Romanesque Revival style and some characteristics of the Commercial style can qualify if it illustrates the transition of architectural design and the transition itself is considered an important architectural development.
- A Hopewellian mound, if it is an important example of mound building construction techniques, would qualify as a method or type of construction.
- A building which illustrates the early or the developing technology of particular structural systems, such as skeletal steel framing, is eligible as an example of a particular method of construction.



Swan Falls Dam and Power Plant, *Murphy vicinity, Ada County, Idaho. Significant works of engineering can qualify under Criterion C. Built between 1900-1907 the Swan Falls Dam and Power Plant across the Snake River is one of the early hydroelectric plants in the State of Idaho. (Photo by H.L. Hough).*

Looney House, *Asheville vicinity, St. Clair County, Alabama. Examples of vernacular styles of architecture can qualify under Criterion C. Built ca. 1818, the Looney House is significant as possibly the State's oldest extant two-story dogtrot type of dwelling. The defining open center passage of the dogtrot was a regional building response to the southern climate. (Photo by Carolyn Scott).*

HISTORIC ADAPTATION OF THE ORIGINAL PROPERTY

A property can be significant not only for the way it was originally constructed or crafted, but also for the way it was adapted at a later period, or for the way it illustrates changing tastes, attitudes, and uses over a period of time.

A district is eligible under this guideline if it illustrates the evolution of historic character of a place over a particular span of time.

Eligible

- A Native American irrigation system modified for use by Europeans could be eligible if it illustrates the technology of either or both periods of construction.
- An early 19th century farmhouse modified in the 1880s with Queen Anne style ornamentation could be significant for the modification itself, if it represented a local variation or significant trend in building construction or remodelling, was the work of a local master (see *Works of a Master* on page 20), or reflected the tastes of an important person associated with the property at the time of its alteration.
- A district encompassing the commercial development of a town between 1820 and 1910, characterized by buildings of various styles and eras, can be eligible.

WORKS OF A MASTER

A master is a figure of generally recognized greatness in a field, a known craftsman of consummate skill, or an anonymous craftsman whose work is distinguishable from others by its characteristic style and quality. The property must express a particular phase in the development of the master's career, an aspect of his or her work, or a particular idea or theme in his or her craft.

A property is not eligible as the work of a master, however, simply because it was designed by a prominent architect. For example, not every building designed by Frank Lloyd Wright is eligible under this portion of Criterion C, although it might meet other portions of the Criterion, for instance as a representative of the Prairie style.

The work of an unidentified craftsman is eligible if it rises above the level of workmanship of the other properties encompassed by the historic context.

PROPERTIES POSSESSING HIGH ARTISTIC VALUES

High artistic values may be expressed in many ways, including areas as diverse as community design or planning, engineering, and sculpture. A property is eligible for its high artistic values if it so fully articulates a particular concept of design that it expresses an aesthetic ideal. A property is not eligible, however, if it does not express aesthetic ideals or design concepts more fully than other properties of its type.

Eligible

- A sculpture in a town square that epitomizes the design principles of the Art Deco style is eligible.
- A building that is a classic expression of the design theories of the Craftsman Style, such as carefully detailed handwork, is eligible.
- A landscaped park that synthesizes early 20th century principles of landscape architecture and expresses an aesthetic ideal of environment can be eligible.
- Properties that are important representatives of the aesthetic values of a cultural group, such as petroglyphs and ground drawings by Native Americans, are eligible.

Not Eligible

- A sculpture in a town square that is a typical example of sculpture design during its period would not qualify for high artistic value, although it might be eligible if it were significant for other reasons.
- A building that is a modest example (within its historic context) of the Craftsman Style of architecture, or a landscaped park that is characteristic of turn of the century landscape design would not qualify for high artistic value.

A Significant and Distinguishable Entity Whose Components May Lack Individual Distinction. This portion of Criterion C refers to districts. For detailed information on districts, refer to *Part IV* of this bulletin.

CRITERION D: INFORMATION POTENTIAL

Properties may be eligible for the National Register if they have yielded, or may be likely to yield, information important in prehistory or history.

UNDERSTANDING CRITERION D: INFORMATION POTENTIAL

Certain important research questions about human history can only be answered by the actual physical material of cultural resources. Criterion D encompasses the properties that have the potential to answer, in whole or in part, those types of research questions. The most common type of property nominated under this Criterion is the archeological site (or a district comprised of archeological sites). Buildings, objects, and structures (or districts comprised of these property types), however, can also be eligible for their information potential.

Criterion D has two requirements, which must *both* be met for a property to qualify:

- The property must have, or have had, information to contribute to our understanding of human history or prehistory, and
- The information must be considered important.

Under the first of these requirements, a property is eligible if it has been used as a source of data and contains more, as yet unretrieved data. A property is also eligible if it has not yet yielded information but, through testing or research, is determined a likely source of data.

Under the second requirement, the information must be carefully evaluated within an appropriate context to determine its importance. Information is considered "important" when it is shown to have a significant bearing on a research design that addresses such areas as: 1) current data gaps or alternative theories that challenge existing ones or 2) priority areas identified under a State or Federal agency management plan.

APPLYING CRITERION D: INFORMATION POTENTIAL

ARCHEOLOGICAL SITES

Criterion D most commonly applies to properties that contain or are likely to contain information bearing on an important archeological research question. The property must have characteristics suggesting the likelihood that it possesses configurations of artifacts, soil strata, structural remains, or other natural or cultural features that make it possible to do the following:

- Test a hypothesis or hypotheses about events, groups, or processes in the past that bear on important research questions in the social or natural sciences or the humanities; or
- Corroborate or amplify currently available information suggesting that a hypothesis is either true or false; or
- Reconstruct the sequence of archeological cultures for the purpose of identifying and explaining continuities and discontinuities in the archeological record for a particular area.

BUILDINGS, STRUCTURES, AND OBJECTS

While most often applied to archeological districts and sites, Criterion D can also apply to buildings, structures, and objects that contain important information. In order for these types of properties to be eligible under Criterion D, they themselves must be, or must have been, the principal source of the important information.

Eligible

- A building exhibiting a local variation on a standard design or construction technique can be eligible if study could yield important information, such as how local availability of materials or construction expertise affected the evolution of local building development.

Not Eligible

- The ruins of a hacienda once contained murals that have since been destroyed. Historical documentation, however, indicates that the murals were significant for their highly unusual design. The ruins can not be eligible under Criterion D for the importance of the destroyed murals if the information is contained only in the documentation.

Criterion D - Champe-Fremont 1 Archeological Site, *Omaha vicinity, Douglas County, Nebraska. This archeological site, dating from ca. 1100-1450 A.D., consists of pit houses and storage pits which have the potential to yield important information concerning the subsistence patterns, religious and mortuary practices, and social organization of the prehistoric residents of eastern Nebraska. (Nebraska State Historical Society)*

ASSOCIATION WITH HUMAN ACTIVITY

A property must be associated with *human activity* and be critical for understanding a site's historic environment in order to be eligible under Criterion D. A property can be linked to human activity through events, processes, institutions, design, construction, settlement, migration, ideals, beliefs, lifeways, and other facets of the development or maintenance of cultural systems.

The natural environment associated with the properties was often very different from that of the present and strongly influenced cultural development. Aspects of the environment that are pertinent to human activities should be considered when evaluating properties under Criterion D.

Natural features and paleontological (floral and faunal) sites are not usually eligible under Criterion D in and of themselves. They can be eligible, however, if they are either directly related to human activity or critical to understanding a site's historic environment. In a few cases, a natural feature or site unmarked by cultural materials, that is primarily eligible under Criterion A, may also be eligible under Criterion D, *if* study of the feature, or its location, setting, etc. (usually in the context of data gained from other sources), will yield important information about the event or period with which it is associated.

ESTABLISHING A HISTORIC CONTEXT

The information that a property yields, or will yield, must be evaluated within an appropriate historic context. This will entail consulting the body of information already collected from similar properties or other pertinent sources, including modern and historic written records. The researcher must be able to anticipate if and how the potential information will affect the definition of the context. The information likely to be obtained from a particular property must confirm, refute, or supplement in an important way existing information.

A property is *not* eligible if it cannot be related to a particular time period or cultural group and, as a result, lacks any historic context within which to evaluate the importance of the information to be gained.

DEVELOPING RESEARCH QUESTIONS

Having established the importance of the information that may be recovered, it is necessary to be explicit in demonstrating the connection between the important information and a specific property. One approach is to determine if specific important research questions can be answered by the data contained in the property. Research questions can be related to property-specific issues, to broader questions about a large geographic area, or to theoretical issues independent of any particular geographic location. These questions may be derived from the academic community or from preservation programs at the local, regional, State, or national level. Research questions are usually developed as part of a "research design," which specifies not only the questions to be asked, but also the types of data needed to supply the answers, and often the techniques needed to recover the data.

Eligible

- When a site consisting of a village occupation with midden deposits, hearths, ceramics, and stratified evidence of several occupations is being evaluated, three possible research topics could be: 1) the question of whether the site occupants were indigenous to the area prior to the time of occupation or recent arrivals, 2) the investigation of the settlement-subsistence pattern of the occupants, 3) the question of whether the region was a center for the domestication of plants. Specific questions could include: A) Do the deposits show a sequential development or sudden introduction of Ceramic Type X? B) Do the dates of the occupations fit our expectations based on the current model for the reoccupation behavior of slash-and-burn agriculturalists? C) Can any genetic changes in the food plant remains be detected?

Not Eligible

- A property is not eligible if so little can be understood about it that it is not possible to determine if specific important research questions can be answered by data contained in the property.

ESTABLISHING THE PRESENCE OF ADEQUATE DATA

To support the assertion that a property has the data necessary to provide the important information, the property should be investigated with techniques sufficient to establish the presence of relevant data categories. What constitutes appropriate investigation techniques would depend upon specific circumstances including the property's location, condition, and the research questions being addressed, and could range from surface survey (or photographic survey for buildings), to the application of remote sensing techniques or intensive subsurface testing. Justification of the research potential of a property may be based on analogy to another better known property if sufficient similarities exist to establish the appropriateness of the analogy.

Eligible

- Data requirements depend on the specific research topics and questions to be addressed. To continue the example in "Developing Research Questions" above, we might want to ascertain the following with reference to questions A, B, and C: A) The site contains Ceramic Type X in one or more occupation levels and we expect to be able to document the local evaluation of the type or its intrusive nature. B) The hearths contain datable carbon deposits and are associated with more than one occupation. C) The midden deposits show good floral/faunal preservation, and we know enough about the physical evolution of food plants to interpret signs that suggest domestication.

Not Eligible

- Generally, if the applicable research design requires clearly stratified deposits, then subsurface investigation techniques must be applied. A site composed only of surface materials can not be eligible for its potential to yield information that could only be found in stratified deposits.

INTEGRITY

The assessment of integrity for properties considered for information potential depends on the data requirements of the applicable research design. A property possessing information potential does not need to recall *visually* an event, person, process, or construction technique. It is important that the significant data contained in the property remain sufficiently intact to yield the expected important information, if the appropriate study techniques are employed.

Eligible

- An irrigation system significant for the information it will yield on early engineering practices can still be eligible even though it is now filled in and no longer retains the appearance of an open canal.

Not Eligible

- A plowed archeological site contains several superimposed components that have been mixed to the extent that artifact assemblages cannot be reconstructed. The site cannot be eligible if the data requirements of the research design call for the study of artifacts specific to one component.

PARTLY EXCAVATED OR DISTURBED PROPERTIES

The current existence of appropriate physical remains must be ascertained in considering a property's ability to yield important information. Properties that have been partly excavated or otherwise disturbed and that are being considered for their potential to yield additional important information must be shown to retain that potential in their remaining portions.

Eligible

- A site that has been partially excavated but still retains substantial intact deposits (or a site in which the remaining deposits are small but contain critical information on a topic that is not well known) is eligible.

Not Eligible

- A totally collected surface site or a completely excavated buried site is not eligible since the physical remains capable of yielding important information no longer exist at the site. (See *Completely Excavated Sites*, on page 24, for exception.) Likewise, a site that has been looted or otherwise disturbed to the extent that the remaining cultural materials have lost their important depositional context (horizontal or vertical location of deposits) is not eligible.
- A reconstructed mound or other reconstructed site will generally not be considered eligible, because original cultural materials or context or both have been lost.

COMPLETELY EXCAVATED SITES

Properties that have yielded important information in the past and *that no longer retain additional* research potential (such as completely excavated archeological sites) must be assessed essentially as historic sites under Criterion A. Such sites must be significant for associative values related to: 1) the importance of the data gained or 2) the impact of the property's role in the history of the development of anthropology/ archeology or other relevant disciplines. Like other historic properties, the site must retain the ability to convey its association as the former repository of important information, the location of historic events, or the representative of important trends.

Eligible

- A property that has been excavated is eligible if the data recovered was of such importance that it influenced the direction of research in the discipline, as in a site that clearly established the antiquity of the human occupation of the New World. (See Criterion A in *Part VI: How to Identify the Type of Significance of a Property* and Criteria Consideration G in *Part VII: How to Apply the Criteria Considerations.*)

Not Eligible

- A totally excavated site that at one time yielded important information but that no longer can convey either its historic/ prehistoric utilization or significant modern investigation is not eligible.

VII. HOW TO APPLY THE CRITERIA CONSIDERATIONS

INTRODUCTION

Certain kinds of properties are not usually considered for listing in the National Register: religious properties, moved properties, birthplaces and graves, cemeteries, reconstructed properties, commemorative properties, and properties achieving significance within the past fifty years. These properties *can* be eligible for listing, however, if they meet special requirements, called Criteria Considerations, in addition to meeting the regular requirements (that is, being eligible under one or more of the four Criteria and possessing integrity). *Part VII* provides guidelines for determining which properties must meet these special requirements and for applying each Criteria Consideration.

The Criteria Considerations need to be applied only to *individual* properties. Components of eligible districts do not have to meet the special requirements unless they make up the majority of the district or are the focal point of the district. These are the general steps to follow when applying the Criteria Considerations to your property:

- Before looking at the Criteria Considerations, make sure your property meets one or more of the four Criteria for Evaluation and possesses integrity.
- If it does, check the Criteria Considerations (next column) to see if the property is of a type that is usually excluded from the National Register. The sections that follow also list specific examples of properties of each type. If your property clearly *does not* fit one of these types, then it does not need to meet any special requirements.
- If your property *does* fit one of these types, then it must meet the special requirements stipulated for that type in the Criteria Considerations.

CRITERIA CONSIDERATIONS*

Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past fifty years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

a. a religious property deriving primary significance from architectural or artistic distinction or historical importance; or

b. a building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or

c. a birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his or her productive life; or

d. a cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, from association with historic events; or

e. a reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or

f. a property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or,

g. a property achieving significance within the past 50 years if it is of exceptional importance.

*The Criteria Considerations are taken from the Criteria for Evaluation, found in the *Code of Federal Regulations, Title 36, Part 60.*

CRITERIA CONSIDERATION A: RELIGIOUS PROPERTIES

A religious property is eligible if it derives its primary significance from architectural or artistic distinction or historical importance.

UNDERSTANDING CRITERIA CONSIDERATION A: RELIGIOUS PROPERTIES

A religious property requires justification on architectural, artistic, or historic grounds to avoid any appearance of judgment by government about the validity of any religion or belief. Historic significance for a religious property cannot be established on the merits of a religious doctrine, but rather, for architectural or artistic values or for important historic or cultural forces that the property represents. A religious property's significance under Criterion A, B, C, or D must be judged in purely secular terms. A religious group may, in some cases, be considered a cultural group whose activities are significant in areas broader than religious history.

Criteria Consideration for Religious Properties applies:

- If the resource was constructed by a religious institution.
- If the resource is presently owned by a religious institution or is used for religious purposes.
- If the resource was owned by a religious institution or used for religious purposes during its Period of Significance.
- If Religion is selected as an Area of Significance.

Examples of Properties that MUST Meet Criteria Consideration A: Religious Properties

- *A historic church where an important non-religious event occurred, such as a speech by Patrick Henry.*
- *A historic synagogue that is significant for architecture.*
- *A private residence is the site of a meeting important to religious history.*
- *A commercial block that is currently owned as an investment property by a religious institution.*
- *A historic district in which religion was either a predominant or significant function during the period of significance.*

Example of Properties that DO NOT Need to Meet Criteria Consideration A: Religious Properties

- *A residential or commercial district that currently contains a small number of churches that are not a predominant feature of the district.*
- *A town meeting hall that serves as the center of community activity and houses a wide variety of public and private meetings, including religious service. The resource is significant for architecture and politics, and the religious function is incidental.*
- *A town hall, significant for politics from 1875 to 1925, that housed religious services during the 1950s. Since the religious function occurred after the Period of Significance, the Criteria Consideration does not apply.*

APPLYING CRITERIA CONSIDERATION A: RELIGIOUS PROPERTIES

ELIGIBILITY FOR HISTORIC EVENTS

A religious property can be eligible under Criterion A for any of three reasons:

- It is significant under a theme in the history of religion having secular scholarly recognition; or
- It is significant under another historical theme, such as exploration, settlement, social philanthropy, or education; or
- It is significantly associated with traditional cultural values.

RELIGIOUS HISTORY

A religious property can be eligible if it is directly associated with either a specific event or a broad pattern in the history of religion.

Eligible

- The site of a convention at which a significant denominational split occurred meets the requirements of Criteria Consideration A. Also eligible is a property that illustrates the broad impact of a religious institution on the history of a local area.

Not Eligible

- A religious property cannot be eligible simply because was the place of religious services for a community, or was the oldest structure used by a religious group in a local area.

OTHER HISTORICAL THEMES

A religious property can be eligible if it is directly associated with either a specific event or a broad pattern that is significant in another historic context. A religious property would also qualify if it were significant for its associations that illustrate the importance of a particular religious group in the social, cultural, economic, or political history of the area. Eligibility depends on the importance of the event or broad pattern and the role of the specific property.

Eligible

- A religious property can qualify for its important role as a temporary hospital during the Revolutionary War, or if its school was significant in the history of education in the community.

Not Eligible

- A religious property is not significant in the history of education in a community simply because it had occasionally served as a school.

TRADITIONAL CULTURAL VALUES

When evaluating properties associated with traditional cultures, it is important to recognize that often these cultures do not make clear distinctions between what is secular and what is sacred. Criteria Consideration A is not intended to exclude traditional cultural resources merely because they have religious uses or are considered sacred. A property or natural feature important to a traditional culture's religion and mythology is eligible if its importance has been ethnohistorically documented and if the site can be clearly defined. It is critical, however, that the activities be documented and that the associations not be so diffuse that the physical resource cannot be adequately defined.[8]

Eligible

- A specific location or natural feature that an Indian tribe believes to be its place of origin and that is adequately documented qualifies under Criteria Consideration A.

ELIGIBILITY FOR HISTORIC PERSONS

A religious property can be eligible for association with a person important in religious history, if that significance has scholarly, secular recognition or is important in other historic contexts. Individuals who would likely be considered significant are those who formed or significantly influenced an important religious institution or movement, or who were important in the social, economic, or political history of the area. Properties associated with individuals important only within the context of a single congregation and lacking importance in any other historic context would not be eligible under Criterion B.

Eligible

- A religious property strongly associated with a religious leader, such as George Whitefield or Joseph Smith, is eligible.

[8] For more information on applying Criteria Consideration A to traditional cultural properties, refer to *National Register Bulletin: Guidelines for Evaluating and Documenting Traditional Cultural Properties.*

ELIGIBILITY FOR ARCHITECTURAL OR ARTISTIC DISTINCTION

A religious property significant for its architectural design or construction should be evaluated as are other properties under Criterion C; that is, it should be evaluated within an established architectural context and, if necessary, compared to other properties of its type, period, or method of construction. (See "Comparing Related Properties" in *Part V: How to Evaluate a Property Within Its Historic Context.)*

Eligible

- A historic camp meeting district that meets the requirements of Criterion C for its significance as a type of construction is eligible.

ELIGIBILITY FOR INFORMATION POTENTIAL

A religious property, whether a district, site, building, structure, or object, is eligible if it can yield important information about the religious practices of a cultural group or other historic themes. This kind of property should be evaluated as are other properties under Criterion D, in relation to similar properties, other information sources, and existing data gaps.

Eligible

- A 19th century camp meeting site that could provide information about the length and intensity of site use during revivals of the Second Great Awakening is eligible.
- Rock cairns or medicine wheels that had a historic religious mythological function and can provide information about specific cultural beliefs are eligible.

ABILITY TO REFLECT HISTORIC ASSOCIATIONS

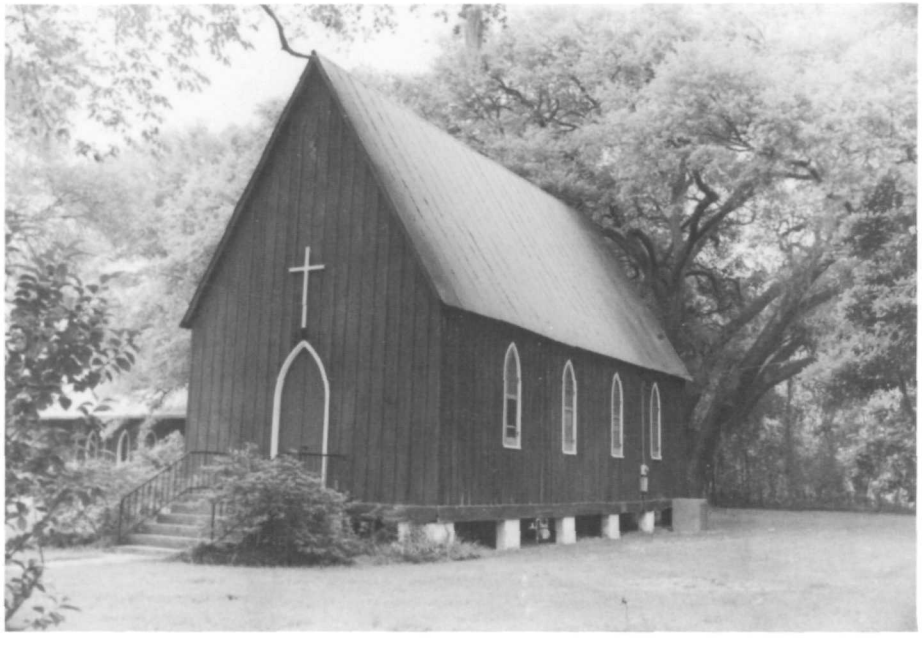
As with all eligible properties, religious properties must physically represent the period of time for which they are significance. For instance, a recent building that houses an older congregation cannot qualify based on the historic activities of the group because the current building does not convey the earlier history. Likewise, an older building that housed the historic activities of the congregation is eligible if it still physically represents the period of the congregation's significance. However, if an older building has been remodeled to the extent that its appearance dates from the time of the remodeling, it can only be eligible if the period of significance corresponds with the period of the alterations.

Eligible

- A church built in the 18th century and altered beyond recognition in the 19th century is eligible only if the additions are important in themselves as an example of late 19th century architecture or as a reflection of an important period of the congregation's growth.

Not Eligible

- A synagogue built in the 1920s cannot be eligible for the important activities of its congregation in the 18th and 19th centuries. It can only be eligible for significance obtained after its construction date.
- A rural 19th century frame church recently sheathed in brick is not eligible because it has lost its characteristic appearance and therefore can no longer convey its 19th century significance, either for architectural value or historic association.



Criteria Consideration A - Religious Properties. *A religious property can qualify as an exception to the Criteria if it is architecturally significant.* ***The Church of the Nativity*** *in Rosedale, Iberville Parish, Louisiana, qualified as a rare example in the State of a 19th century small frame Gothic Revival style chapel. (Robert Obier)*

CRITERIA CONSIDERATION B: MOVED PROPERTIES

A property removed from its original or historically significant location can be eligible if it is significant primarily for architectural value or it is the surviving property most importantly associated with a historic person or event.

UNDERSTANDING CRITERIA CONSIDERATION B: MOVED PROPERTIES

The National Register criteria limit the consideration of moved properties because significance is embodied in locations and settings as well as in the properties themselves. Moving a property destroys the relationships between the property and its surroundings and destroys associations with historic events and persons. A move may also cause the loss of historic features such as landscaping, foundations, and chimneys, as well as loss of the potential for associated archeological deposits. Properties that were moved *before* their period of significance do not need to meet the special requirements of Criteria Consideration B.

One of the basic purposes of the National Register is to encourage the preservation of historic properties as living parts of their communities. In keeping with this purpose, it is not usual to list artificial groupings of buildings that have been created for purposes of interpretation, protection, or maintenance. Moving buildings to such a grouping destroys the integrity of location and setting, and can create a false sense of historic development.

APPLYING CRITERIA CONSIDERATION B: MOVED PROPERTIES

ELIGIBILITY FOR ARCHITECTURAL VALUE

A moved property significant under Criterion C must retain enough historic features to convey its architectural values and retain integrity of design, materials, workmanship, feeling, and association.

Examples of Properties that MUST Meet Criteria Consideration B: Moved Properties

- *A resource moved from one location on its original site to another location on the property, during or after its Period of Significance.*
- *A district in which a significant number of resources have been moved from their original location.*
- *A district which has one moved building that makes an especially significant contribution to the district.*
- *A portable resource, such as a ship or railroad car, that is relocated to a place incompatible with its original function.*
- *A portable resource, such as a ship or railroad car, whose importance is critically linked to its historic location or route and that is moved.*

Examples of Properties that DO NOT Need to Meet Criteria Consideration B: Moved Properties

- *A property that is moved prior to its Period of Significance.*
- *A district in which only a small percentage of typical buildings in a district are moved.*
- *A moved building that is part of a complex but is of less significance than the remaining (unmoved) buildings.*
- *A portable resource, such as a ship or railroad car, that is eligible under Criterion C and is moved within its natural setting (water, rails, etc.).*
- *A property that is raised or lowered on its foundations.*

ELIGIBILITY FOR HISTORIC ASSOCIATIONS

A moved property significant under Criteria A or B must be demonstrated to be the surviving property most importantly associated with a particular historic event or an important aspect of a historic person's life. The phrase "most importantly associated" means that it must be the single surviving property that is most closely associated with the event or with the part of the person's life for which he or she is significant.

Eligible

- A moved building occupied by an business woman during the majority of her productive career would be eligible if the other extant properties are a house she briefly inhabited prior to her period of significance and a commercial building she owned after her retirement.

Not Eligible

- A moved building associated with the beginning of rail transportation in a community is not eligible if the original railroad station and warehouse remained intact on their original sites.

SETTING AND ENVIRONMENT

In addition to the requirements above, moved properties must still have an orientation, setting, and general environment that are comparable to those of the historic location and that are compatible with the property's significance.

Eligible

- A property significant as an example of mid-19th century rural house type can be eligible after a move, provided that it is placed on a lot that is sufficient in size and character to recall the basic qualities of the historic environment and setting, and provided that the building is sited appropriately in relation to natural and manmade surroundings.

Not Eligible

- A rural house that is moved into an urban area and a bridge that is no longer situated over a waterway are not eligible.

ASSOCIATION DEPENDENT ON THE SITE

For a property whose design values or historical associations are directly dependent on its location, any move will cause the property to lose its integrity and prevent it from conveying its significance.

Eligible

- A farm structure significant only as an example of a method of construction peculiar to the local area is still eligible if it is moved within that local area and the new setting is similar to that of the original location.

Not Eligible

- A 19th century rural residence that was designed around particular topographic features, reflecting that time period's ideals of environment, is not eligible if moved.

PROPERTIES DESIGNED TO BE MOVED

A property designed to move or a property frequently moved during its historic use must be located in a historically appropriate setting in order to qualify, retaining its integrity of setting, design, feeling, and association. Such properties include automobiles, railroad cars and engines, and ships.

Eligible

- A ship docked in a harbor, a locomotive on tracks or in a railyard, and a bridge relocated from one body of water to another are eligible.

Not Eligible

- A ship on land in a park, a bridge placed in a pasture, or a locomotive displayed in an indoor museum are not eligible.

ARTIFICIALLY CREATED GROUPINGS

An artificially created grouping of buildings, structures, or objects is not eligible unless it has achieved significance since the time of its assemblage. It cannot be considered as a reflection of the time period when the individual buildings were constructed.

Eligible

- A grouping of moved historic buildings whose creation marked the beginning of a major concern with past lifestyles can qualify as an early attempt at historic preservation and as an illustration of that generation's values.

Not Eligible

- A rural district composed of a farmhouse on its original site and a grouping of historic barns recently moved onto the property is not eligible.

PORTIONS OF PROPERTIES

A moved *portion* of a building, structure, or object is not eligible because, as a fragment of a larger resource, it has lost integrity of design, setting, materials, workmanship, and location.

CRITERIA CONSIDERATION C: BIRTHPLACES OR GRAVES

A birthplace or grave of a historical figure is eligible if the person is of outstanding importance and if there is no other appropriate site or building directly associated with his or her productive life.

UNDERSTANDING CRITERIA CONSIDERATION C: BIRTHPLACES AND GRAVES

Birthplaces and graves often attain importance as reflections of the origins of important persons or as lasting memorials to them. The lives of persons significant in our past normally are recognized by the National Register through listing of properties illustrative of or associated with that person's productive life's work. Birthplaces and graves, as properties that represent the beginning and the end of the life of distinguished individuals, may be temporally and geographically far removed from the person's significant activities, and therefore are not usually considered eligible.

Examples of Properties that MUST Meet Criteria Consideration C: Birthplaces and Graves

- *The birthplace of a significant person who lived elsewhere during his or her Period of Significance.*
- *A grave that is nominated for its association with the significant person buried in it.*
- *A grave that is nominated for information potential.*

Examples of Properties that DO NOT Need to Meet Criteria Consideration C: Birthplaces and Graves

- *A house that was inhabited by a significant person for his or her entire lifetime.*
- *A grave located on the grounds of the house where a significant person spent his or her productive years.*

APPLYING CRITERIA CONSIDERATION C: BIRTHPLACES AND GRAVES

PERSONS OF OUTSTANDING IMPORTANCE

The phrase "a historical figure of outstanding importance" means that in order for a birthplace or grave to qualify, it cannot be simply the birthplace or grave of a person significant in our past (Criterion B). It must be the birthplace or grave of an individual who was of outstanding importance in the history of the local area, State, or nation. The birthplace or grave of an individual who was one of several people active in some aspect of the history of a community, a state, or the Nation would not be eligible.

LAST SURVIVING PROPERTY ASSOCIATED WITH A PERSON

When an geographical area strongly associated with a person of outstanding importance has lost all other properties directly associated with his or her formative years or productive life, a birthplace or grave may be eligible.

ELIGIBILITY FOR OTHER ASSOCIATIONS

A birthplace or grave can also be eligible if it is significant for reasons other than association with the productive life of the person in question. It can be eligible for significance under Criterion A for association with important events, under Criterion B for association with the productive lives of *other* important persons, or under Criterion C for architectural significance. A birthplace or grave can also be eligible in rare cases if, after the passage of time, it is significant for its commemorative value. (See Criteria Consideration F for a discussion of commemorative properties.) A birthplace or grave can also be eligible under Criterion D if it contains important information on research, *e.g.*, demography, pathology, mortuary practices, socioeconomic status differentiation.

Criteria Consideration C - Birthplaces. *A birthplace of a historical figure is eligible if the person is of outstanding importance and there is no other appropriate site or building associated with his or her productive life. The* ***Walter Reed Birthplace,*** *Gloucester vicinity, Gloucester County, Virginia is the most appropriate remaining building associated with the life of the man who, in 1900, discovered the cause and mode of transmission of the great scourge of the tropics, yellow fever. (Virginia Historic Landmarks Commission)*

CRITERIA CONSIDERATION D: CEMETERIES

A cemetery is eligible if it derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events.

UNDERSTANDING CRITERIA CONSIDERATION D: CEMETERIES

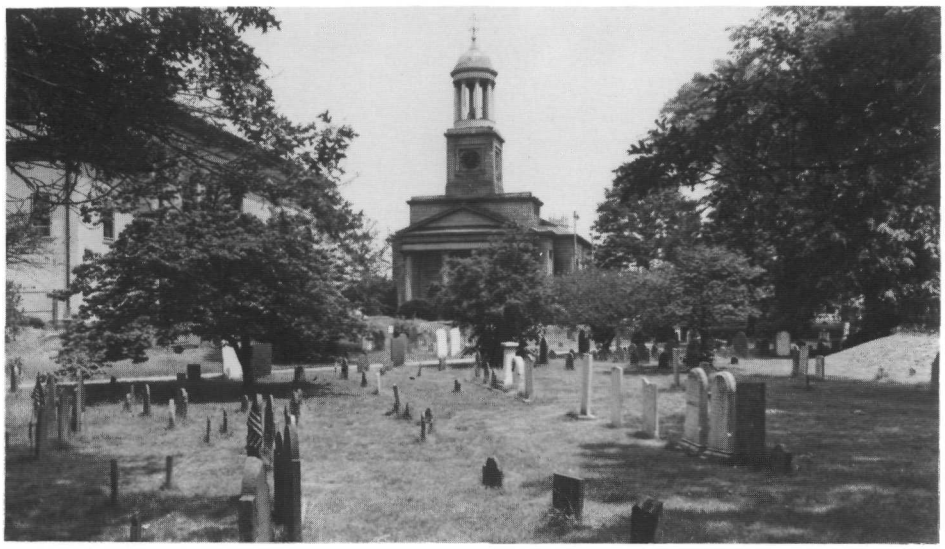
A cemetery is a collection of graves that is marked by stones or other artifacts or that is unmarked but recognizable by features such as fencing or depressions, or through maps, or by means of testing. Cemeteries serve as a primary means of an individual's recognition of family history and as expressions of collective religious and/or ethnic identity. Because cemeteries may embody values beyond personal or family-specific emotions, the National Register criteria allow for listing of cemeteries under certain conditions.

Examples of Properties that MUST Meet Criteria Consideration D: Cemeteries

- *A cemetery that is nominated individually for Criterion A, B, or C.*

Examples of Properties that DO NOT Need to Meet Criteria Consideration D: Cemeteries

- *A cemetery that is nominated along with its associated church, but the church is the main resource nominated.*
- *A cemetery that is nominated under Criterion D for information potential.*
- *A cemetery that is nominated as part of a district but is not the focal point of the district.*



Criteria Consideration D - Cemeteries. *The* ***Hancock Cemetery,*** *Quincy, Norfolk County, Massachusetts meets the exception to the Criteria because it derives its primary significance from its great age (the earliest burials date from 1640) and from the distinctive design features found in its rich collection of late 17th and early 18th century funerary art. (N. Hobart Holly)*

APPLYING CRITERIA CONSIDERATION D: CEMETERIES

PERSONS OF TRANSCENDENT IMPORTANCE

A cemetery containing the graves of persons of transcendent importance may be eligible. To be of transcendent importance the persons must have been of great eminence in their fields of endeavor or had a great impact upon the history of their community, State, or nation. (A single grave that is the burial place of an important person and is located in a larger cemetery that does not qualify under this Criteria Consideration should be treated under Criteria Consideration C: Birthplaces and Graves.)

Eligible

- A historic cemetery containing the graves of a number of persons who were exceptionally significant in determining the course of a State's political or economic history during a particular period is eligible.

Not Eligible

- A cemetery containing graves of State legislators is not eligible if they simply performed the daily business of State government and did not have an outstanding impact upon the nature and direction of the State's history.

ELIGIBILITY ON THE BASIS OF AGE

Cemeteries can be eligible if they have achieved historic significance for their relative great age in a particular geographic or cultural context.

Eligible

- A cemetery dating from a community's original 1830s settlement can attain significance from its association with that very early period.

ELIGIBILITY FOR DESIGN

Cemeteries can qualify on the basis of distinctive design values. These values refer to the same design values addressed in Criterion C and can include aesthetic or technological achievement in the fields of city planning, architecture, landscape architecture, engineering, mortuary art, and sculpture. As for all other nominated properties, a cemetery must clearly express its design values and be able to convey its historic appearance.

Eligible

- A Victorian cemetery is eligible if it clearly expresses the aesthetic principles related to funerary design for that period, through such features as the overall plan, landscaping, statuary, sculpture, fencing, buildings, and grave markers.

Not Eligible

- A cemetery cannot be eligible for design values if it no longer conveys its historic appearance because of the introduction of new grave markers.

ELIGIBILITY FOR ASSOCIATION WITH EVENTS

Cemeteries may be associated with historic events including specific important events or general events that illustrate broad patterns.

Eligible

- A cemetery associated with an important Civil War battle is eligible.
- A cemetery associated with the settlement of an area by an ethnic or cultural group is eligible if the movement of the group into the area had an important impact, if other properties associated with that group are rare, and if few documentary sources have survived to provide information about the group's history.

Not Eligible

- A cemetery associated with a battle in the Civil War does not qualify if the battle was not important in the history of the war.
- A cemetery associated with an area's settlement by an ethnic or cultural group is not eligible if the impact of the group on the area cannot be established, if other extant historic properties better convey association with the group, or if the information that the cemetery can impart is available in documentary sources.

ELIGIBILITY FOR INFORMATION POTENTIAL

Cemeteries, both historic and prehistoric, can be eligible if they have the potential to yield important information. The information must be important within a specific context and the potential to yield information must be demonstrated.

A cemetery can qualify if it has potential to yield important information provided that the information it contains is not available in extant documentary evidence.

Eligible

- A cemetery associated with the settlement of a particular cultural group will qualify if it has the potential to yield important information about subjects such as demography, variations in mortuary practices, or the study of the cause of death correlated with nutrition or other variables.

INTEGRITY

Assessing the integrity of a historic cemetery entails evaluating principal design features such as plan, grave markers, and any related elements (such as fencing). Only that portion of a historic cemetery that retains its historic integrity can be eligible. If the overall integrity has been lost because of the number and size of recent grave markers, some features such as buildings, structures, or objects that retain integrity may be considered as individual properties if they are of such historic or artistic importance that they individually meet one or more of the requirements listed above.

NATIONAL CEMETERIES

National Cemeteries administered by the Veterans Administration are eligible because they have been designated by Congress as primary memorials to the military history of the United States. Those areas within a designated national cemetery that have been used or prepared for the reception of the remains of veterans and their dependents, as well as any landscaped areas that immediately surround the graves may qualify. Because these cemeteries draw their significance from the presence of the remains of military personnel who have served the country throughout its history, the age of the cemetery is not a factor in judging eligibility, although integrity must be present.

A national cemetery or a portion of a national cemetery that has only been set aside for use in the future is not eligible.

CRITERIA CONSIDERATION E: RECONTRUCTED PROPERTIES

A reconstructed property is eligible when it is accurately executed in a suitable environment *and* presented in a dignified manner as part of a restoration master plan *and* when no other building or structure with the same associations has survived. All three of these requirements must be met.

UNDERSTANDING CRITERIA CONSIDERATION E: RECONSTRUCTED PROPERTIES

"Reconstruction" is defined as the reproduction of the exact form and detail of a vanished building, structure, object, or a part thereof, as it appeared at a specific period of time. Reconstructed buildings fall into two categories: buildings wholly constructed of new materials and buildings reassembled from some historic and some new materials. Both categories of properties present problems in meeting the integrity requirements of the National Register criteria.

Examples of Properties that MUST Meet Criteria Consideration E: Reconstructed Properties

- *A property in which most or all of the fabric is not original.*
- *A district in which an important resource or a significant number of resources are reconstructions.*

Examples of Properties that DO NOT Need to Meet Criteria Consideration E: Reconstructed Properties

- *A property that is remodeled or renovated and still has the majority of its original fabric.*

APPLYING CRITERIA CONSIDERATION E: RECONSTRUCTED PROPERTIES

ACCURACY OF THE RECONSTRUCTION

The phrase "accurately executed" means that the reconstruction must be based upon sound archeological, architectural, and historic data concerning the historic construction and appearance of the resource. That documentation should include both analysis of any above or below ground material and research in written and other records.

SUITABLE ENVIRONMENT

The phrase "suitable environment" refers to: 1) the physical context provided by the historic district and 2) any interpretive scheme, if the historic district is used for interpretive purposes. This means that the reconstructed property must be located at the same site as the original. It must also be situated in its original grouping of buildings, structures, and objects (as many as are extant), and that grouping must retain integrity. In addition, the reconstruction must not be misrepresented as an authentic historic property.

Eligible

- A reconstructed plantation manager's office building is considered eligible because it is located at its historic site, grouped with the remaining historic plantation buildings and structures, and the plantation as a whole retains integrity. Interpretation of the plantation district includes an explanation that the manager's office is not the original building, but a reconstruction.

Not Eligible

- The same reconstructed plantation manager's office building would not qualify if it were rebuilt at a location different from that of the original building, or if the district as a whole no longer reflected the period for which it is significant, or if a misleading interpretive scheme were used for the district or for the reconstruction itself.

RESTORATION MASTER PLANS

Being presented "as part of a restoration master plan" means that: 1) a reconstructed property is an essential component in a historic district and 2) the reconstruction is part of an overall restoration plan for an entire district. "Restoration" is defined as accurately recovering the form and details of a property and its setting as it appeared at a particular period by removing later work or by replacing missing earlier work (as opposed to completely rebuilding the property). The master plan for the entire property must emphasize restoration, not reconstruction. In other words, the master plan for the entire resource would not be acceptable under this consideration if it called for reconstruction of a majority of the resource.

Eligible

- A reconstructed plantation manager's office is eligible if the office were an important component of the plantation *and* if the reconstruction is one element in an overall plan for restoring the plantation *and* if no other building or structure with the same associations has survived.
- The reconstruction of the plantation manager's office building can be eligible only if the majority of buildings, structures, and objects that comprised the plantation are extant and are being restored. For guidance regarding restoration see the *Secretary of the Interior's Standards for Historic Preservation Projects.*

LAST SURVIVING PROPERTY OF A TYPE

This consideration also stipulates that a reconstruction can qualify if, in addition to the other requirements, no other building, object, or structure with the same association has survived. A reconstruction that is part of a restoration master plan is appropriate only if: 1) the property is the only one in the district with which a particular important activity or event has been historically associated or 2) no other property with the same associative values has survived.

RECONSTRUCTIONS OLDER THAN FIFTY YEARS

After the passage of fifty years, a reconstruction may attain its own significance for what it reveals about the period in which it was built, rather than the historic period it was intended to depict. On that basis, a reconstruction can possibly qualify under any of the Criteria.

CRITERIA CONSIDERATION F: COMMEMORATIVE PROPERTIES

A property primarily commemorative in intent can be eligible if design, age, tradition, or symbolic value has invested it with its own historical significance.

UNDERSTANDING CRITERIA CONSIDERATION F: COMMEMORATIVE PROPERTIES

Commemorative properties are designed or constructed after the occurrence of an important historic event or after the life of an important person. They are not directly associated with the event or with the person's productive life, but serve as evidence of a later generation's assessment of the past. Their significance comes from their value as cultural expressions at the date of their creation. Therefore, a commemorative property generally must be over fifty years old and must possess significance based on its own value, not on the value of the event or person being memorialized.

Examples of Properties that MUST Meet Criteria Consideration F: Commemorative Properties

- *A property whose sole or primary function is commemorative or in which the commemorative function is of primary significance.*

Examples of Properties that DO NOT Need to Meet Criteria Consideration F: Commemorative Properties

- *A resource that has a non-commemorative primary function or significance.*
- *A single marker that is a component of a district (whether contributing or non-contributing).*

APPLYING CRITERIA CONSIDERATION F: COMMEMORATIVE PROPERTIES

ELIGIBILITY FOR DESIGN

A commemorative property derives its design from the aesthetic values of the period of its creation. A commemorative property, therefore, may be significant for the architectural, artistic, or other design qualities of its own period in prehistory or history.

Eligible

- A commemorative statue situated in a park or square is eligible if it expresses the aesthetics or craftsmanship of the period when it was made, meeting Criterion C.
- A late 19th century statue erected on a courthouse square to commemorate Civil War veterans would qualify if it reflects that era's shared perception of the noble character and valor of the veterans and their cause. This was commonly conveyed by portraying idealized soldiers or allegorical figures of battle, victory, or sacrifice.

ELIGIBILITY FOR AGE, TRADITION, OR SYMBOLIC VALUE

A commemorative property cannot qualify for association with the event or person it memorializes. A commemorative property may, however, acquire significance after the time of its creation through *age*, *tradition*, or *symbolic* value. This significance must be documented by accepted methods of historical research, including written or oral history, and must meet one or more of the Criteria.

Eligible

- A commemorative marker erected by a cultural group that believed the place was the site of its origins is eligible if, for subsequent generations of the group, the marker itself became the focus of traditional association with the group's historic identity.
- A building erected as a monument to an important historical figure will qualify if through the passage of time the property itself has come to symbolize the value placed upon the individual and is widely recognized as a reminder of enduring principles or contributions valued by the generation that erected the monument.
- A commemorative marker erected early in the settlement or development of an area will qualify if it is demonstrated that, because of its relative great age, the property has long been a part of the historic identity of the area.

Not Eligible

- A commemorative marker erected in the past by a cultural group at the site of an event in its history would not be eligible if the marker were significant only for association with the event, and it had not become significant itself through tradition.
- A building erected as a monument to an important historical figure would not be eligible if its only value lay in its association with the individual, and it has not come to symbolize values, ideas, or contributions valued by the generation that erected the monument.
- A commemorative marker erected to memorialize an event in the community's history would not qualify simply for its association with the event it memorialized.

INELIGIBILITY AS THE LAST REPRESENTATIVE OF AN EVENT OR PERSON

The loss of properties directly associated with a significant event or person does not strengthen the case for consideration of a commemorative property. Unlike birthplaces and graves, a commemorative property usually has no direct historic association. The commemorative property can qualify for historic association only if it is clearly significant in its own right, as stipulated above.

CRITERIA CONSIDERATION G: PROPERTIES THAT HAVE ACHIEVED SIGNIFICANCE WITHIN THE LAST FIFTY YEARS[9]

A property achieving significance within the last fifty years is eligible if it is of exceptional importance.

UNDERSTANDING CRITERIA CONSIDERATION G: PROPERTIES THAT HAVE ACHIEVED SIGNIFICANCE WITHIN THE LAST FIFTY YEARS

The National Register Criteria for Evaluation exclude properties that achieved significance within the last fifty years unless they are of exceptional importance. Fifty years is a general estimate of the time needed to develop historical perspective and to evaluate significance. This consideration guards against the listing of properties of passing contemporary interest and ensures that the National Register is a list of truly historic places.

Examples of Properties that MUST Meet Criteria Consideration G: Properties that Have Achieved Significance Within the Last Fifty Years

- *A property that is less than fifty years old.*
- *A property that continues to achieve significance into a period less than fifty years before the nomination.*
- *A property that has non-contiguous Periods of Significance, one of which is less than fifty years before the nomination.*
- *A property that is more than fifty years old and had no significance until a period less than fifty years before the nomination.*

Examples of Properties that DO NOT Need to Meet Criteria Consideration G: Properties that Have Achieved Significance Within the Last Fifty Years

- *A resource whose construction began over fifty years ago, but the completion overlaps the fifty year period by a few years or less.*
- *A resource that is significant for its plan or design, which is over fifty years old, but the actual completion of the project overlaps the fifty year period by a few years.*
- *A historic district in which a few properties are newer than fifty years old, but the majority of properties and the most important Period of Significance are greater than fifty years old.*

[9] For more information on Criteria Consideration G, refer to *National Register Bulletin: Guidelines for Evaluating and Nominating Properties that Have Achieved Significance Within the Last Fifty Years.*

APPLYING CRITERIA CONSIDERATION G: PROPERTIES THAT HAVE ACHIEVED SIGNIFICANCE WITHIN THE PAST FIFTY YEARS

ELIGIBILITY FOR EXCEPTIONAL IMPORTANCE

The phrase "exceptional importance" may be applied to the extraordinary importance of an event or to an entire category of resources so fragile that survivors of any age are unusual. Properties listed that had attained significance in less than fifty years include: the launch pad at Cape Canaveral from which men first traveled to the moon, the home of nationally prominent playwright Eugene O'Neill, and the Chrysler Building (New York) significant as the epitome of the "Style Moderne" architecture.

Properties less than fifty years old that qualify as exceptional because the entire category of resources is fragile include a recent example of a traditional sailing canoe in the Trust Territory of the Pacific Islands, where because of rapid deterioration of materials, no working Micronesian canoes exist that are more than twenty years old. Properties that by their nature can last more than fifty years cannot be considered exceptionally important because of the fragility of the class of resources.

The phrase "exceptional importance" does not require that the property be of national significance. It is a measure of a property's importance within the appropriate historic context, whether the scale of that context is local, State, or national.

Eligible

- The General Laundry Building in New Orleans, one of the few remaining Art Deco Style buildings in that city, was listed in the National Register when it was forty years old because of its exceptional importance as an example of that architectural style.

HISTORICAL PERSPECTIVE

A property that has achieved significance within the past fifty years can be evaluated only when sufficient historical perspective exists to determine that the property is exceptionally important. The necessary perspective can be provided by scholarly research and evaluation, and must consider both the historic context and the specific property's role in that context.

In many communities, properties such as apartment buildings built in the 1950s cannot be evaluated because there is no scholarly research available to provide an overview of the nature, role, and impact of that building type within the context of historical and architectural developments of the 1950s.

NATIONAL PARK SERVICE RUSTIC ARCHITECTURE

Properties such as structures built in a rustic style by the National Park Service during the 1930s and 1940s can be evaluated because a broad study, *National Park Service Rustic Architecture* (1977), provides the context for evaluating properties of this type and style. Specific examples were listed in the National Register prior to reaching fifty years of age when documentation concerning the individual properties established their significance within the historical and architectural context of the type and style.

VETERANS ADMINISTRATION HOSPITALS

Hospitals less than fifty years old that were constructed by the Veterans Bureau and Veterans Administration can be evaluated because the collection of forty-eight facilities built between 1920 and 1946 has been analyzed in a study prepared by the agency. The study provided a historic and architectural context for development of veteran's care within which hospitals could be evaluated. The exceptional importance of specific individual facilities constructed within the past fifty years could therefore be determined based on their role and their present integrity.

COMPARISON WITH RELATED PROPERTIES

In justifying exceptional importance, it is necessary to identify other properties within the geographical area that reflect the same significance or historic associations and to determine which properties *best* represent the historic context in question. Several properties in the area could become eligible with the passage of time, but few will qualify now as exceptionally important.

POST-WORLD WAR II PROPERTIES

Properties associated with the post-World War II era must be identified and evaluated to determine which ones in an area could be judged exceptionally important. For example, a public housing complex may be eligible as an outstanding expression of the nation's post-war urban policy. A military installation could be judged exceptionally important because of its contribution to the Cold War arms race. A church building in a Southern city may have served as the pivotal rallying point for the city's most famous civil rights protest. A post-war suburban subdivision may be the best reflection of contemporary siting and design tenets in a metropolitan area. In each case, the nomination preparer must justify the *exceptional* importance of the property relative to similar properties in the community, State, or nation.

ELIGIBILITY FOR INFORMATION POTENTIAL

A property that has achieved significance within the past fifty years can qualify under Criterion D only if it can be demonstrated that the information is of exceptional importance within the appropriate context and that the property contains data superior to or different from those obtainable from other sources, including other culturally related sites. An archeological site less than fifty years old may be eligible if the former inhabitants are so poorly documented that information about their lifeways is best obtained from examination of the material remains.

Eligible

- Data such as the rate of adoption of modern technological innovations by rural tenant farmers in the 1950s may not be obtainable through interviews with living persons but could be gained by examination of homesites.

Not Eligible

- A recent archeological site such as the remains of a Navajo sheep corral used in the 1950s would not be considered exceptionally significant for its information potential on animal husbandry if better information on the same topic is available through ethnographic studies or living informants.

HISTORIC DISTRICTS

Properties which have achieved significance within the past fifty years can be eligible for the National Register if they are an integral part of a district which qualifies for National Register listing. This is demonstrated by documenting that the property dates from within the district's defined Period of Significance and that it is associated with one or more of the district's defined Areas of Significance.

Properties less than fifty years old may be an integral part of a district when there is sufficient perspective to consider the properties as historic. This is accomplished by demonstrating that: 1) the district's Period of Significance is justified as a discrete period with a defined beginning and end, 2) the character of the district's historic resources is clearly defined and assessed, 3) specific resources in the district are demonstrated to date from that discrete era, and 4) the majority of district properties are over fifty years old. In these instances, it is not necessary to prove exceptional importance of either the district itself or the less-than-fifty-year-old properties. Exceptional importance still must be demonstrated for district where the majority of properties or the major Period of Significance is less than fifty years old, and for less-than-fifty-year-old properties which are nominated individually.

PROPERTIES MORE THAN FIFTY YEARS IN AGE, LESS THAN FIFTY YEARS IN SIGNIFICANCE

Properties that are more than fifty years old, but whose significant associations or qualities are less than fifty years old, must be treated under the fifty year consideration.

Eligible

- A building constructed early in the twentieth century (and having no architectural importance), but that was associated with an important person during the 1950s, must be evaluated under Criteria Consideration G because the Period of Significance is within the past fifty years. Such a property would qualify if the person was of exceptional importance.

REQUIREMENT TO MEET THE CRITERIA, REGARDLESS OF AGE

Properties that are less than fifty years old and are not exceptionally important will *not* automatically qualify for the National Register once they are fifty years old. In order to be listed in the National Register, all properties, regardless of age, must be demonstrated to meet the Criteria for Evaluation.

VIII. HOW TO EVALUATE THE INTEGRITY OF A PROPERTY

INTRODUCTION

Integrity is the ability of a property to convey its significance. To be listed in the National Register of Historic Places, a property must not only be shown to be significant under the National Register criteria, but it also must have integrity. The evaluation of integrity is sometimes a subjective judgment, but it must always be grounded in an understanding of a property's physical features and how they relate to its significance.

Historic properties either retain integrity (this is, convey their significance) or they do not. Within the concept of integrity, the National Register criteria recognizes seven aspects or qualities that, in various combinations, define integrity.

To retain historic integrity a property will always possess several, and usually most, of the aspects. The retention of specific aspects of integrity is paramount for a property to convey its significance. Determining *which* of these aspects are most important to a particular property requires knowing why, where, and when the property is significant. The following sections define the seven aspects and explain how they combine to produce integrity.

SEVEN ASPECTS OF INTEGRITY

- Location
- Design
- Setting
- Materials
- Workmanship
- Feeling
- Association

UNDERSTANDING THE ASPECTS OF INTEGRITY

LOCATION

Location is the place where the historic property was constructed or the place where the historic event occurred. The relationship between the property and its location is often important to understanding why the property was created or why something happened. The actual location of a historic property, complemented by its setting, is particularly important in recapturing the sense of historic events and persons. Except in rare cases, the relationship between a property and its historic associations is destroyed if the property is moved. (See Criteria Consideration B in *Part VII: How to Apply the Criteria Considerations*, for the conditions under which a moved property can be eligible.)

DESIGN

Design is the combination of elements that create the form, plan, space, structure, and style of a property. It results from conscious decisions made during the original conception and planning of a property (or its significant alteration) and applies to activities as diverse as community planning, engineering, architecture, and landscape architecture. Design includes such elements as organization of space, proportion, scale, technology, ornamentation, and materials.

A property's design reflects historic functions and technologies as well as aesthetics. It includes such considerations as the structural system; massing; arrangement of spaces; pattern of fenestration; textures and colors of surface materials; type, amount, and style of ornamental detailing; and arrangement and type of plantings in a designed landscape.

Design can also apply to districts, whether they are important primarily for historic association, architectural value, information potential, or a combination thereof. For districts significant primarily for historic association or architectural value, design concerns more than just the individual buildings or structures located within the boundaries. It also applies to the way in which buildings, sites, or structures are related: for example, spatial relationships between major features; visual rhythms in a streetscape or landscape plantings; the layout and materials of walkways and roads; and the relationship of other features, such as statues, water fountains, and archeological sites.

SETTING

Setting is the physical environment of a historic property. Whereas location refers to the specific place where a property was built or an event occurred, setting refers to the *character* of the place in which the property played its historical role. It involves *how*, not just where, the property is situated and its relationship to surrounding features and open space.

Setting often reflects the basic physical conditions under which a property was built and the functions it was intended to serve. In addition, the way in which a property is positioned in its environment can reflect the designer's concept of nature and aesthetic preferences.

The physical features that constitute the setting of a historic property can be either natural or manmade, including such elements as:

- Topographic features (a gorge or the crest of a hill);
- Vegetation;
- Simple manmade features (paths or fences); and
- Relationships between buildings and other features or open space.

These features and their relationships should be examined not only within the exact boundaries of the property, but also between the property and its *surroundings*. This is particularly important for districts.

MATERIALS

Materials are the physical elements that were combined or deposited during a particular period of time and in a particular pattern or configuration to form a historic property. The choice and combination of materials reveal the preferences of those who created the property and indicate the availability of particular types of materials and technologies. Indigenous materials are often the focus of regional building traditions and thereby help define an area's sense of time and place.

A property must retain the key exterior materials dating from the period of its historic significance. If the property has been rehabilitated, the historic materials and significant features must have been preserved. The property must also be an actual historic resource, not a recreation; a recent structure fabricated to look historic is not eligible. Likewise, a property whose historic features and materials have been lost and then reconstructed is usually not eligible. (See Criteria Consideration E in *Part VII: How to Apply the Criteria Considerations* for the conditions under which a reconstructed property can be eligible.)

WORKMANSHIP

Workmanship is the physical evidence of the crafts of a particular culture or people during any given period in history or prehistory. It is the evidence of artisans' labor and skill in constructing or altering a building, structure, object, or site. Workmanship can apply to the property as a whole or to its individual components. It can be expressed in vernacular methods of construction and plain finishes or in highly sophisticated configurations and ornamental detailing. It can be based on common traditions or innovative period techniques.

Workmanship is important because it can furnish evidence of the technology of a craft, illustrate the aesthetic principles of a historic or prehistoric period, and reveal individual, local, regional, or national applications of both technological practices and aesthetic principles. Examples of workmanship in historic buildings include tooling, carving, painting, graining, turning, and joinery. Examples of workmanship in prehistoric contexts include Paleo-Indian clovis projectile points; Archaic period beveled adzes; Hopewellian birdstone pipes; copper earspools and worked bone pendants; and Iroquoian effigy pipes.

FEELING

Feeling is a property's expression of the aesthetic or historic sense of a particular period of time. It results from the presence of physical features that, taken together, convey the property's historic character. For example, a rural historic district retaining original design, materials, workmanship, and setting will relate the feeling of agricultural life in the 19th century. A grouping of prehistoric petroglyphs, unmarred by graffiti and intrusions and located on its original isolated bluff, can evoke a sense of tribal spiritual life.

ASSOCIATION

Association is the direct link between an important historic event or person and a historic property. A property retains association if it *is* the place where the event or activity occurred and is sufficiently intact to convey that relationship to an observer. Like feeling, association requires the presence of physical features that convey a property's historic character. For example, a Revolutionary War battlefield whose natural and manmade elements have remained intact since the 18th century will retain its quality of association with the battle.

Because feeling and association depend on individual perceptions, their retention *alone* is never sufficient to support eligibility of a property for the National Register.

ASSESSING INTEGRITY IN PROPERTIES

Integrity is based on significance: why, where, and when a property is important. Only after significance is fully established can you proceed to the issue of integrity.

The steps in assessing integrity are:

- Define the **essential physical features** that must be present for a property to represent its significance.
- Determine whether the **essential physical features are visible** enough to convey their significance.
- Determine whether the property needs to be **compared with similar properties.** And,
- Determine, based on the significance and essential physical features, **which aspects of integrity** are particularly vital to the property being nominated and if they are present.

Ultimately, the question of integrity is answered by whether or not the property retains the **identity** for which it is significant.

DEFINING THE ESSENTIAL PHYSICAL FEATURES

All properties change over time. It is not necessary for a property to retain all its historic physical features or characteristics. The property must retain, however, the essential physical features that enable it to convey its historic identity. The essential physical features are those features that define both *why* a property is significant (Applicable Criteria and Areas of Significance) and *when* it was significant (Periods of Significance). They are the features without which a property can no longer be identified as, for instance, a late 19th century dairy barn or an early 20th century commercial district.

CRITERIA A AND B

A property that is significant for its historic association is eligible if it retains the essential physical features that made up its character or appearance during the period of its association with the important event, historical pattern, or person(s). If the property is a site (such as a treaty site) where there are no material cultural remains, the setting must be intact.

Archeological sites eligible under Criteria A and B must be in overall good condition with excellent preservation of features, artifacts, and spatial relationships to the extent that these remains are able to convey important associations with events or persons.

CRITERION C

A property important for illustrating a particular architectural style or construction technique must retain most of the physical features that constitute that style or technique. A property that has lost some historic materials or details can be eligible *if* it retains the majority of the features that illustrate its style in terms of the massing, spatial relationships, proportion, pattern of windows and doors, texture of materials, and ornamentation. The property is not eligible, however, if it retains some basic features conveying massing but has lost the majority of the features that once characterized its style.

Archeological sites eligible under Criterion C must be in overall good condition with excellent preservation of features, artifacts, and spatial relationships to the extent that these remains are able to illustrate a site type, time period, method of construction, or work of a master.

CRITERION D

For properties eligible under Criterion D, including archeological sites and standing structures studied for their information potential, less attention is given to their overall condition, than it they were being considered under Criteria A, B, or C. Archeological sites, in particular, do not exist today exactly as they were formed. There are always cultural and natural processes that alter the deposited materials and their spatial relationships.

For properties eligible under Criterion D, integrity is based upon the property's potential to yield specific data that addresses important research questions, such as those identified in the historic context documentation in the Statewide Comprehensive Preservation Plan or in the research design for projects meeting the *Secretary of the Interior's Standards for Archeological Documentation*.

INTERIORS

Some historic buildings are virtually defined by their exteriors, and their contribution to the built environment can be appreciated even if their interiors are not accessible. Examples of this would include early examples of steel-framed skyscraper construction. The great advance in American technology and engineering made by these buildings can be read from the outside. The change in American popular taste during the 19th century, from the symmetry and simplicity of architectural styles based on classical precedents, to the expressions of High Victorian styles, with their combination of textures, colors, and asymmetrical forms, is readily apparent from the exteriors of these buildings.

Other buildings "are" interiors. The Cleveland Arcade, that soaring 19th century glass-covered shopping area, can only be appreciated from the inside. Other buildings in this category would be the great covered train sheds of the 19th century.

In some cases the loss of an interior will disqualify properties from listing in the National Register—a historic concert hall noted for the beauty of its auditorium and its fine acoustic qualities would be the type of property that if it were to lose its interior, it would lose its value as a historic resource. In other cases, the overarching significance of a property's exterior can overcome the adverse effect of the loss of an interior.

In borderline cases particular attention is paid to the significance of the property and the remaining historic features.

HISTORIC DISTRICTS

For a district to retain integrity as a whole, the majority of the components that make up the district's historic character must possess integrity even if they are individually undistinguished. In addition, the relationships among the district's components must be substantially unchanged since the period of significance.

When evaluating the impact of intrusions upon the district's integrity, take into consideration the relative number, size, scale, design, and location of the components that do not contribute to the significance. A district is not eligible if it contains so many alterations or new intrusions that it no longer conveys the sense of a historic environment.

A component of a district cannot contribute to the significance if:

- it has been substantially altered since the period of the district's significance *or*
- it does not share the historic associations of the district.

VISIBILITY OF PHYSICAL FEATURES

Properties eligible under Criteria A, B, and C must not only retain their essential physical features, but the features must be visible enough to convey their significance. This means that even if a property is physically intact, its integrity is questionable if its significant features are concealed under modern construction. Archeological properties are often the exception to this; by nature they usually do not require visible features to convey their significance.

NON-HISTORIC EXTERIORS

If the historic *exterior* building material is covered by non-historic material (such as modern siding), the property can still be eligible *if* the significant form, features, and detailing are not obscured. If a property's exterior is covered by a non-historic false-front or curtain wall, the property will not qualify under Criteria A, B, or C, because it does not retain the visual quality necessary to convey historic or architectural significance. Such a property also cannot be considered a contributing element in a historic district, because it does not add to the district's sense of time and place. If the false front, curtain wall, or non-historic siding is removed and the original building materials are intact, then the property's integrity can be re-evaluated.

PROPERTY CONTAINED WITHIN ANOTHER PROPERTY

Some properties contain an earlier structure that formed the nucleus for later construction. The exterior property, if not eligible in its own right, can qualify on the basis of the interior property *only if* the interior property can yield significant information about a specific construction technique or material, such as rammed earth or tabby. The interior property *cannot* be used as the basis for eligibility if it has been so altered that it no longer contains the features that could provide important information, or if the presence of important information cannot be demonstrated.

SUNKEN VESSELS

A sunken vessel can be eligible under Criterion C as embodying the distinctive characteristics of a method of construction if it is structurally intact. A *deteriorated* sunken vessel, no longer structurally intact, can be eligible under Criterion D if the remains of either the vessel or its contents is capable of yielding significant information. For further information, refer to *National Register Bulletin: Nominating Historic Vessels and Shipwrecks to the National Register of Historic Places.*

Natural Features

A natural feature that is associated with a historic event or trend, such as a rock formation that served as a trail marker during westward expansion, must retain its historic appearance, unobscured by modern construction or landfill. Otherwise it is not eligible, even though it remains intact.

COMPARING SIMILAR PROPERTIES

For some properties, comparison with similar properties should be considered during the evaluation of integrity. Such comparison may be important in deciding what physical features are essential to properties of that type. In instances where it has not been determined what physical features a property must possess in order for it to reflect the significance of a historic context, comparison with similar properties should be undertaken during the evaluation of integrity. This situation arises when scholarly work has not been done on a particular property type or when surviving examples of a property type are extremely rare. (See **Comparing Related Properties** in *Part V: How to Evaluate a Property within its Historic Context.)*

RARE EXAMPLES OF A PROPERTY TYPE

Comparative information is particularly important to consider when evaluating the integrity of a property that is a rare surviving example of its type. The property must have the essential physical features that enable it to convey its historic character or information. The rarity and poor condition, however, of other extant examples of the type may justify accepting a greater degree of alteration or fewer features, provided that enough of the property survives for it to be a significant resource.

Eligible

- A one-room schoolhouse that has had all original exterior siding replaced and a replacement roof that does not exactly replicate the original roof profile can be eligible if the other extant rare examples have received an even greater degree of alteration, such as the subdivision of the original one-room plan.

Not Eligible

- A mill site contains information on how site patterning reflects historic functional requirements, but parts of the site have been destroyed. The site is not eligible for its information potential if a comparison of other mill sites reveals more intact properties with complete information.

DETERMINING THE RELEVANT ASPECTS OF INTEGRITY

Each type of property depends on certain aspects of integrity, more than others, to express its historic significance. Determining which of the aspects is most important to a particular property requires an understanding of the property's significance and its essential physical features.

CRITERIA A AND B

A property important for association with an event, historical pattern, or person(s) ideally might retain *some* features of all seven aspects of integrity: location, design, setting, materials, workmanship, feeling, and association. Integrity of design and workmanship, however, might not be as important to the significance, and would not be relevant if the property were a site. A basic integrity test for a property associated with an important event or person is whether a historical contemporary would recognize the property as it exists today.

For archeological sites that are eligible under Criteria A and B, the seven aspects of integrity can be applied in much the same way as they are to buildings, structures, or objects. It is important to note, however, that the site must have *demonstrated* its ability to convey its significance, as opposed to sites eligible under Criterion D where only the potential to yield information is required.

Eligible

A mid-19th century waterpowered mill important for its association with an area's industrial development is eligible if:

- it is still on its original site (**Location**), and
- the important features of its setting are intact (**Setting**), and
- it retains most of its historic materials (**Materials**), and
- it has the basic features expressive of its design and function, such as configuration, proportions, and window pattern (**Design**).

Not Eligible

A mid-19th century waterpowered mill important for its association with an area's industrial development is not eligible if:

- it has been moved (**Location, Setting, Feeling**, and **Association**), or
- substantial amounts of new materials have been incorporated (**Materials, Workmanship,** and **Feeling**), or
- it no longer retains basic design features that convey its historic appearance or function (**Design, Workmanship,** and **Feeling**).

CRITERION C

A property significant under Criterion C must retain those physical features that characterize the type, period, or method of construction that the property represents. Retention of design, workmanship, and materials will usually be more important than location, setting, feeling, and association. Location and setting will be important, however, for those properties whose design is a reflection of their immediate environment (such as designed landscapes and bridges).

For archeological sites that are eligible under Criterion C, the seven aspects of integrity can be applied in much the same way as they are to buildings, structures, or objects. It is important to note, however, that the site must have *demonstrated* its ability to convey its significance, as opposed to sites eligible under Criterion D where only the *potential* to yield information is required.

Eligible

A 19th century wooden covered bridge, important for illustrating a construction type, is eligible if:

- the essential features of its design are intact, such as abutments, piers, roof configuration, and trusses (**Design, Workmanship,** and **Feeling**), and
- most of the historic materials are present (**Materials, Workmanship**, and **Feeling**), and
- evidence of the craft of wooden bridge technology remains, such as the form and assembly technique of the trusses (**Workmanship**).
- Since the design of a bridge relates directly to its function as a transportation crossing, it is also important that the bridge still be situated over a waterway (**Setting, Location, Feeling,** and **Association**).

Not Eligible

For a 19th century wooden covered bridge, important for its construction type, replacement of some materials of the flooring, siding, and roofing would not necessarily damage its integrity. Integrity would be lost, however, if:

- the abutments, piers, or trusses were substantially altered (**Design, Workmanship,** and **Feeling**) or
- considerable amounts of new materials were incorporated (**Materials, Workmanship,** and **Feeling**).
- Because environment is a strong factor in the design of this property type, the bridge would also be ineligible if it no longer stood in a place that conveyed its function as a crossing (**Setting, Location, Feeling,** and **Association**).

CRITERION D

For properties eligible under Criterion D, setting and feeling may not have direct bearing on the property's ability to yield important information. Evaluation of integrity probably will focus primarily on the location, design, materials, and perhaps workmanship.

Eligible

A multicomponent prehistoric site important for yielding data on changing subsistence patterns can be eligible if:

- floral or faunal remains are found in clear association with cultural material (**Materials** and **Association**) and
- the site exhibits stratigraphic separation of cultural components (**Location**).

Not Eligible

A multicomponent prehistoric site important for yielding data on changing subsistence patterns would not be eligible if:

- floral or faunal remains were so badly decomposed as to make identification impossible (**Materials**), or
- floral or faunal remains were disturbed in such a manner as to make their association with cultural remains ambiguous (**Association**), or
- the site has lost its stratigraphic context due to subsequent land alterations (**Location**).

Eligible

A lithic scatter site important for yielding data on lithic technology during the Late Archaic period can be eligible if:

- the site contains lithic debitage, finished stone tools, hammerstones, or antler flakers (**Material** and **Design**), and
- the site contains datable material (**Association**).

Not Eligible

A lithic scatter site important for yielding data on lithic technology during the Late Archaic period would not be eligible if:

- the site contains natural deposits of lithic materials that are impossible to distinguish from culturally modified lithic material (**Design**) or
- the site does not contain any temporal diagnostic evidence that could link the site to the Late Archaic period (**Association**).

IX. SUMMARY OF THE NATIONAL HISTORIC LANDMARKS CRITERIA FOR EVALUATION

A property being nominated to the National Register may also merit consideration for potential designation as a National Historic Landmark. Such consideration is dependent upon the stringent application of the following distinct set of criteria (found in the *Code of Federal Regulations, Title 36, Part 65*).

NATIONAL HISTORIC LANDMARKS CRITERIA

The quality of national significance is ascribed to districts, sites, buildings, structures, and objects that possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, engineering, and culture and that possess a high degree of integrity of location, design, setting, materials, workmanship, feeling, and association, and:

1. That are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represent, the broad national patterns of United States history and from which an understanding and appreciation of those patterns may be gained; or
2. That are associated importantly with the lives of persons nationally significant in the history of the United States; or
3. That represent some great idea or ideal of the American people; or
4. That embody the distinguishing characteristics of an architectural type specimen exceptionally valuable for a study of a period, style or method of construction, or that represent a significant, distinctive and exceptional entity whose components may lack individual distinction; or
5. That are composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but collectively compose an entity of exceptional historical or artistic significance, or outstandingly commemorate or illustrate a way of life or culture; or
6. That have yielded or may be likely to yield information of major scientific importance by revealing new cultures, or by shedding light upon periods of occupation over large areas of the United States. Such sites are those which have yielded, or which may reasonably be expected to yield, data affecting theories, concepts and ideas to a major degree.

NATIONAL HISTORIC LANDMARK EXCLUSIONS

Ordinarily, cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings and properties that have achieved significance within the past fifty years are not eligible for designation. If such properties fall within the following categories they may, nevertheless, be found to qualify:

1. A religious property deriving its primary national significance from architectural or artistic distinction or historical importance; or
2. A building or structure removed from its original location but which is nationally significant primarily for its architectural merit, or for association with persons or events of transcendent importance in the nation's history and the association consequential; or
3. A site of a building or structure no longer standing but the person or event associated with it is of transcendent importance in the nations's history and the association consequential; or

4. A birthplace, grave or burial if it is of a historical figure of transcendent national significance and no other appropriate site, building, or structure directly associated with the productive life of that person exists; or

5. A cemetery that derives its primary national significance from graves of persons of transcendent importance, or from an exceptionally distinctive design or an exceptionally significant event; or

6. A reconstructed building or ensemble of buildings of extraordinary national significance when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other buildings or structures with the same association have survived; or

7. A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own national historical significance; or

8. A property achieving national significance within the past 50 years if it is of extraordinary national importance.

COMPARING THE NATIONAL HISTORIC LANDMARKS CRITERIA AND THE NATIONAL REGISTER CRITERIA

In general, the instructions for preparing a National Register nomination and the guidelines stated in this bulletin for applying the National Register Criteria also apply to Landmark nominations and the use of the Landmark criteria. While there are specific distinctions discussed below, *Parts IV and V* of this bulletin apply equally to National Register listings and Landmark nominations. That is, the categories of historic properties are defined the same way; historic contexts are identified similarly; and comparative evaluation is carried out on the same principles enumerated in *Part V*.

There are some differences between National Register and National Historic Landmarks Criteria. The following is an explanation of how each Landmark Criterion compares with its National Register Criteria counterpart:

CRITERION 1

This Criterion relates to National Register Criterion A. Both cover properties associated with events. The Landmark Criterion, however, requires that the events associated with the property be *outstandingly* represented by that property and that the property be related to the broad national patterns of U.S. history. Thus, the quality of the property to convey and interpret its meaning must be of a higher order and must relate to national themes rather than the narrower context of State or local themes.

CRITERION 2

This Criterion relates to National Register Criterion B. Both cover properties associated with significant people. The Landmark Criterion differs in that it specifies that the association of a person to the property in question be an important one and that the person associated with the property be of *national* significance.

CRITERION 3

This Criterion has no counterpart among the National Register Criteria. It is rarely, if ever, used alone. While not a landmark at present, the Liberty Bell is an object that might be considered under this Criterion. The application of this Criterion obviously requires the most careful scrutiny and would apply only in rare instances involving ideas and ideals of the highest order.

CRITERION 4

This Criterion relates to National Register Criterion C. Its intent is to qualify exceptionally important works of architecture or collective elements of architecture extraordinarily significant as an ensemble, such as a historic district. Note that the language is more restrictive than that of the National Register Criterion in requiring that a candidate in architecture be "a specimen exceptionally valuable for the study of a period, style, or method of construction" rather than simply embodying distinctive characteristics of a type, period, or method of construction. With regard to historic districts, the Landmarks Criterion requires an entity that is distinctive and exceptional. Unlike National Register Criterion C, this Criterion will not qualify the works of a master, per se, but only such works which are exceptional or extraordinary. Artistic value is considered only in the context of history's judgement in order to avoid current conflicts of taste.

CRITERION 5

This Criterion does not have a strict counterpart among the National Register Criteria. It may seem redundant of the latter part of Landmark Criterion 4. It is meant to cover collective entities such as Greenfield Village and historic districts like New Bedford, Massachusetts, which qualify for their collective association with a nationally significant event, movement, or broad pattern of national development.

CRITERION 6

The National Register counterpart of this is Criterion D. Criterion 6 was developed specifically to recognize archeological sites. All such sites must address this Criterion. The following are the qualifications that distinguish this Criterion from its National Register counterpart: the information yielded or likely to be yielded must be of *major* scientific importance by revealing new cultures, or by shedding light upon periods of occupation *over large areas* of the United States. Such sites should be expected to yield data affecting *theories, concepts, and ideas* to a *major degree.*

The data recovered or expected to be recovered must make a major contribution to the existing corpus of information. Potentially recoverable data must be likely to revolutionize or substantially modify a major theme in history or prehistory, resolve a substantial historical or anthropological debate, or close a serious gap in a major theme of U. S. history or prehistory.

EXCLUSIONS AND EXCEPTIONS TO THE EXCLUSIONS

This section of the National Historic Landmarks Criteria has its counterpart in the National Register's "Criteria Considerations." The most abundant difference between them is the addition of the qualifiers "national," "exceptional," or "extraordinary" before the word significance. Other than this, the following are the most notable distinctions:

EXCLUSION 2

Buildings moved from their original location, qualify only if one of two conditions are met: 1) the building is nationally significant for architecture, *or* 2) the persons or events with which they are associated are of *transcendent* national significance and the association is consequential.

Transcendent significance means an order of importance higher than that which would ordinarily qualify a person or event to be nationally significant. A consequential association is a relationship to a building that had an evident impact on events, rather than a connection that was incidental and passing.

EXCLUSION 3

This pertains to the site of a structure no longer standing. There is no counterpart to this exclusion in the National Register Criteria. In order for such a property to qualify for Landmark designation it must meet the second condition cited for Exclusion 2.

EXCLUSION 4

This exclusion relates to Criteria Consideration C of the National Register Criteria. The only difference is that a burial place qualifies for Landmark designation only if, in addition to other factors, the person buried is of *transcendent* national importance.

When evaluating properties at the national level for designation as a National Historic Landmark, please refer to the National Historic Landmarks outline, *History and Prehistory in the National Park System and the National Historic Landmarks Program, 1987*. (For more information about the National Historic Landmarks program, please write to Department of the Interior, National Park Service, National Historic Landmarks, 1849 C Street, NW, NC400, Washington, DC 20240.)

X. GLOSSARY

Associative Qualities - An aspect of a property's history that links it with historic events, activities, or persons.

Code of Federal Regulations - Commonly referred to as "CFR." The part containing the National Register Criteria is usually referred to as 36 CFR 60, and is available from the National Park Service.

CLG - Certified Local Government.

Culture - A group of people linked together by shared values, beliefs, and historical associations, together with the group's social institutions and physical objects necessary to the operation of the institution.

Cultural Resource - See Historic Resource.

Evaluation - Process by which the significance and integrity of a historic property are judged and eligibility for National Register listing is determined.

Historic Context - An organizing structure for interpreting history that groups information about historic properties that share a common theme, common geographical area, and a common time period. The development of historic contexts is a foundation for decisions about the planning, identification, evaluation, registration, and treatment of historic properties, based upon comparative historic significance.

Historic Integrity - The unimpaired ability of a property to convey its historical significance.

Historic Property - See Historic Resource.

Historic Resource - Building, site, district, object, or structure evaluated as historically significant.

Identification - Process through which information is gathered about historic properties.

Listing - The formal entry of a property in the National Register of Historic Places. See also, Registration.

Nomination - Official recommendation for listing a property in the National Register of Historic Places.

Property Type - A grouping of properties defined by common physical and associative attributes.

Registration - Process by which a historic property is documented and nominated or determined eligible for listing in the National Register.

Research Design - A statement of proposed identification, documentation, investigation, or other treatment of a historic property that identifies the project's goals, methods and techniques, expected results, and the relationship of the expected results to other proposed activities or treatments.

XI. LIST OF NATIONAL REGISTER BULLETINS

The Basics
How to Apply National Register Criteria for Evaluation *

Guidelines for Completing National Register of Historic Places Form
Part A: How to Complete the National Register Form *
Part B: How to Complete the National Register Multiple Property Documentation Form *

Researching a Historic Property *

Property Types
Guidelines for Evaluating and Documenting Historic **Aids to Navigation** *

Guidelines for Identifying, Evaluating and Registering **America's Historic Battlefields**

Guidelines for Evaluating and Registering Historical **Archeological Sites**

Guidelines for Evaluating and Documenting Historic **Aviation Properties**

Guidelines for Evaluating and Registering **Cemeteries and Burial Places**

How to Evaluate and Nominate **Designed Historic Landscapes** *

Guidelines for Identifying, Evaluating and Registering Historic **Mining Sites**

How to Apply National Register Criteria to **Post Offices** *

Guidelines for Evaluating and Documenting **Properties Associated with Significant Persons**

Guidelines for Evaluating and Documenting **Properties That Have Achieved Significance Within the Last Fifty Years** *

Guidelines for Evaluating and Documenting **Rural Historic Landscapes** *

Guidelines for Evaluating and Documenting **Traditional Cultural Properties** *

Nominating Historic **Vessels and Shipwrecks** to the National Register of Historic Places

Technical Assistance
Defining Boundaries for National Register Properties*

Guidelines for Local Surveys: A Basis for Preservation Planning *

How to Improve the Quality of Photographs for National Register Nominations

National Register Casebook: Examples of Documentation *

Using the UTM Grid System to Record Historic Sites

To order these publications, write to: National Register of Historic Places, National Park Service, 1849 C St., NC 400, NW, Washington, D.C. 20240, or e-mail at: nr_reference@nps.gov. Publications marked with an asterisk (*) are also available in electronic form at **www.cr.nps.gov/nr**.

U.S. GOVERNMENT PRINTING OFFICE: 2005—717-788