

[3410-11-P]

**DEPARTMENT OF AGRICULTURE**

**Forest Service**

**36 CFR Part 294**

**RIN 0596-AC10**

**Special Areas; State Petitions for Inventoried Roadless Area Management**

**AGENCY:** Forest Service, USDA.

**ACTION:** Final rule and decision memo.

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**SUMMARY:** The Department of Agriculture is revising Subpart B of Title 36, Code of Federal Regulations, Protection of Inventoried Roadless Areas, by adopting a new rule that establishes a petitioning process that will provide Governors an opportunity to seek establishment of or adjustment to management requirements for National Forest System inventoried roadless areas within their States. The opportunity for submitting State petitions is available for 18 months following the effective date of this final rule.

Under this final rule, submission of a petition is strictly voluntary, and management requirements for inventoried roadless areas would be guided by individual land management plans until and unless these management requirements are changed through a State-specific rulemaking. Elsewhere in this part of today's **Federal Register**, the Department is announcing the establishment of a national advisory committee in accordance with the Federal Advisory Committee Act (5 U.S.C. App. II) to assist the Secretary with the implementation of this rule.

The preamble of this rule includes a discussion of the public comments received on the proposed rule published July 16, 2004 (69 FR 42636) and the Department's responses to the comments.

**EFFECTIVE DATE:** This rule is effective [Insert date of publication in the **Federal Register**].

**FOR FURTHER INFORMATION CONTACT:** Dave Barone, Planning Specialist, Ecosystem Management Coordination Staff, Forest Service, USDA, (202) 205-1019.

**SUPPLEMENTARY INFORMATION:**

**Background**

The U.S. Department of Agriculture (USDA) Forest Service commitment to land stewardship and public service is the framework within which the agency manages natural resources as provided by law, regulation, and other legal authorities. Implicit in this is the agency's collaboration with public, private, and nonprofit partners. As a leader in natural resource conservation, the USDA Forest Service provides leadership in the conservation, management, and use of the Nation's forests, rangeland, and aquatic ecosystems.

The USDA Forest Service manages National Forest System (NFS) lands to maintain and enhance the quality of the environment to meet the Nation's current and future needs. Agency land management assures sustainable resources by providing for diversity of plant and animal communities and ecological productivity that supports recreation, water, timber, minerals, fish, wildlife, wilderness, and aesthetic values for current and future generations.

State governments are important partners in management of the Nation's land and natural resources. States, particularly in the West, own and manage large tracts of land with tremendous social and biological value. State governments have frequently pioneered innovative land management programs and policies. State governments exert considerable influence over statewide economic development and private land use, both of which significantly affect natural resource management. In addition, State conservation agencies' relationships with others offer additional partnership opportunities. Strong State and Federal cooperation regarding management of inventoried roadless areas can facilitate long-term, community-oriented solutions.

On January 12, 2001, the Department promulgated the roadless rule at 36 CFR part 294 (66 FR 3244), which fundamentally changed the Forest Service's longstanding approach to management of inventoried roadless areas by establishing nationwide prohibitions generally limiting, with some exceptions, timber harvest, road construction, and road reconstruction within inventoried roadless areas on NFS lands.

Concerns were immediately expressed by those most impacted by the roadless rule's prohibitions. These concerns included the sufficiency and the accuracy of the information available for public review during the rulemaking process; the inclusion of an estimated 2.8 million acres of roaded lands in the inventoried roadless area land base; the denial of requests to lengthen the public review period; the denial of cooperating agency status requested by several Western States; the sufficiency of the range of alternatives considered in the rulemaking process; the need for flexibility and exceptions to allow for needed resource management activities; and the changes made in the final

rule after the closure of the public comment period. Concerns were also expressed about applying one set of standards uniformly to every inventoried roadless area.

On May 4, 2001, the Secretary of Agriculture expressed the Administration's commitment to the objective of conserving inventoried roadless area values in the NFS, and also acknowledged concerns raised by local communities, Tribes, and States impacted by the roadless rule. At that time, the Secretary indicated that USDA would move forward with a responsible and balanced approach to re-examining the roadless rule in an effort to address those concerns while enhancing roadless area values and characteristics. To meet this objective, management of inventoried roadless areas must address those activities having the greatest likelihood of altering, fragmenting, or otherwise degrading roadless area values and characteristics. Appropriate management of inventoried roadless areas must also address reasonable and legitimate concerns about how the agency provides for the conservation of roadless areas. For example, providing for outdoor recreation opportunities for fishing and hunting in remote areas may at times require access and active management activities to restore or maintain habitat conditions for the management of some fish and wildlife species.

On July 10, 2001, the Forest Service published an advance notice of proposed rulemaking (ANPR) (66 FR 35918) seeking public comment concerning how best to proceed with long-term conservation and management of inventoried roadless areas. The ANPR acknowledged that the future management of inventoried roadless areas would depend on a number of factors, such as court decisions, public comments, and the consideration of practical options and other administrative tools for amending the 2001 roadless rule to address inventoried roadless area protection.

The responses received on the ANPR represented two main points of view on natural resource management and perspectives on resource decisionmaking: (1) emphasis on environmental protection and preservation, and support for making national decisions; and (2) emphasis on responsible active management, and support for local conservation decisions made through the land management planning process. A summary of the public comment on the ANPR was prepared in May of 2002, and is available on the World Wide Web/Internet on the Forest Service website for Roadless Area Conservation at: <http://www.roadless.fs.fed.us>.

Until promulgation of the 2001 roadless rule, the Forest Service managed inventoried roadless areas based on individual land management plans. These plans have been developed for each unit of the NFS through a public notice and comment process, building on years of scientific findings, analyses, and extensive public involvement. Land management plans typically identify and recommend areas that would be appropriate for designation as wilderness by the Congress, and provide guidance on activities and uses in these areas.

### **Litigation History**

The 2001 roadless rule has been the subject of nine lawsuits in Federal district courts in Idaho, Utah, North Dakota, Wyoming, Alaska, and the District of Columbia. In one of these lawsuits, the U.S. District Court for the District of Idaho issued a preliminary injunction prohibiting implementation of the roadless rule on May 10, 2001. The preliminary injunction was reversed by the U.S. Court of Appeals for the Ninth Circuit.

On June 10, 2003, a settlement agreement was reached in the *State of Alaska v. USDA* litigation. As discussed in more detail below, this settlement agreement led to the

adoption of a final rule on December 30, 2003, that temporarily withdrew the Tongass National Forest from the prohibitions of the roadless rule.

In still another lawsuit, on July 14, 2003, the U.S. District Court for the District of Wyoming found the roadless rule to be unlawful and ordered that the rule “be permanently enjoined.” That ruling has been appealed to the Tenth Circuit by intervenors.

## **Overview**

USDA is committed to conserving and managing inventoried roadless areas and considers these areas an important component of the NFS. The Department believes that revising 36 CFR part 294 by adopting a new rule that establishes a State petitioning process that will allow State-specific consideration of the needs of these areas is an appropriate solution to address the challenges of inventoried roadless area management on NFS lands.

States affected by the roadless rule have been keenly interested in inventoried roadless area management, especially the Western States where most of the agency’s inventoried roadless areas are located. Collaborating and cooperating with States on the long-term strategy for the conservation and management of inventoried roadless areas on NFS lands allows for the recognition of local situations and resolutions of unique resource management challenges within a specific State. Collaboration with others who have strong interest in the conservation and management of inventoried roadless areas also helps ensure balanced management decisions that maintain the most important characteristics and values of those areas.

The State petitions under this final rule must include specific information and recommendations on the management requirements for individual inventoried roadless areas within that particular State. If an inventoried roadless area boundary extends into another State, the petitioning Governor should coordinate with the Governor of the adjacent State. Petitions must be submitted to the Secretary of Agriculture within 18 months of the effective date of this final rule. Petitions will be evaluated, and if accepted, the Secretary would initiate subsequent rulemaking for inventoried roadless area conservation and management within that State. The Department's general petitioning process for the approval, amendment or repeal of rules (7 CFR 1.28) will remain available after expiration of the 18-month petitioning period.

The Secretary has decided to establish a national advisory committee to provide advice and recommendations on the implementation of this State-specific petition for rulemaking process (§294.15). This committee is being established in response to comments received that roadless area management has national aspects that need to be considered. This point is well taken and a national advisory committee can fulfill this function. The advisory committee will consist of members who represent diverse national organizations interested in the conservation and management of National Forest System inventoried roadless areas. Elsewhere in today's **Federal Register** the Department is announcing the establishment of this committee and requesting nominations for membership.

### **Changes Between Proposed Rule and Final Rule**

There were some adjustments made to the final rule based in part on comments received on the proposed rule. Highlights of these changes are discussed below.

**Definition**

The final rule definition section (§294.11) has been changed because the agency has more up-to-date information on inventoried roadless areas today available through the land management planning process than it had in 2000. The 58.5 million acres of inventoried roadless areas used as the basis for the roadless rule's analysis were identified from the then most recent analysis for each national forest or grassland, including the second Roadless Area Review and Evaluation (RARE II) which was documented in a final environmental impact statement dated January of 1979, land management plans, and other large-scale assessments such as the 1996 Southern Appalachian Assessment. Since publication of the 2001 roadless rule, 22 land management plans have been revised and 43 are currently in the plan revision process. These revisions have provided more accurate and current information regarding inventoried roadless areas.

**Advisory Committee**

Sections 294.15 and 294.16 of the proposed rule are now sections 294.16 and 294.17, respectively in the final rule in order to introduce a new section 294.15 in the final rule. This new section recognizes the Department's decision to establish an advisory committee to provide advice and recommendations on the implementation of the rule. The preamble of the proposed rule informed the public that the Secretary was considering the establishment of such an advisory committee and requested public comment regarding the establishment of the committee.

**Severability**

The Department has chosen to add a new section (§294.18) concerning the issue of severability to address the possibility that the rule, or portions of the rule, may be

challenged in litigation. It is the Department's intent that the individual provisions of this rule be severable from each other. If any provision or the application of any provision of this regulation to any circumstance is held invalid, it is the Department's intent that the remainder shall not be affected and would continue to be operative.

Further, the severability provision also responds to public comment expressing concerns and confusion regarding the status of the prior roadless rule that was set aside by the Federal District Court in Wyoming. The Department believes that adopting this new rule resolves the matter by establishing a new process for addressing inventoried roadless area management.

The 2001 rulemaking was immediately challenged in multiple lawsuits, was preliminarily and permanently enjoined, and continues to be the subject of litigation and divisive argument. Regardless of these lawsuits, the Department has concluded that the 2001 rule's inflexible "one-size-fits-all" nationwide rulemaking approach is flawed and there are better means to achieve protection of roadless area values. The Department wishes to make its intent clear that should all or any part of this regulation be set aside, the Department does not intend that the prior rule be reinstated, in whole or in part.

### **Summary of Public Comments and the Department's Responses**

The proposed rule was published in the **Federal Register** on July 16, 2004, for a 60-day public comment period (69 FR 42636). Due to public requests for additional time, the comment period was extended by 62 days for a total of 122 days. The Forest Service received approximately 1.8 million comments from a wide variety of respondents on the proposed rule. All comments were considered in reaching a decision on the final rule. A narrative document containing a summary of the substantive issues raised by

respondents is posted at the Forest Service World Wide Web/Internet website <http://www.roadless.fs.fed.us>. A summary of comments and the Department's responses to them follows.

*Desirability of a National Standard for Roadless Area Conservation:* Some respondents, including a number of members of Congress and Governors, expressed strong support for implementing the roadless rule as adopted in January, 2001, which these respondents regard as essential to ensure the long-term protection of roadless areas from harmful road construction and commercial logging. Other respondents, including some Governors, voiced their strong support for the proposed rule stating that taking a more localized and collaborative approach to developing management requirements for roadless areas is more appropriate than taking a national approach.

*Response:* Many concerns were expressed about applying the national prohibitions of the 2001 roadless rule. Many of these concerns are represented by those raised in the various lawsuits that challenged the 2001 roadless rule. Consistent with these concerns, the U.S. District Court for the District of Wyoming permanently enjoined the 2001 roadless rule. The Department remains committed to providing a responsible and balanced approach to address the concerns raised in litigation and elsewhere while enhancing roadless area values and characteristics. The Department believes that the petitioning opportunity in this final rule represents such a balanced approach.

*Management Requirements and the Status Quo:* Some respondents felt that the proposed rule was not clear and thought that unless a Governor submitted a petition there would be no protections for inventoried roadless areas.

*Response:* The base line management requirements for inventoried roadless areas are those that exist in currently approved land management plans. These plans, and required revisions to these plans, are developed with extensive public involvement and collaboration, using the best available local information about resource conditions, trends, and issues. It would be these management requirements that Governors could petition to adjust. If no petition was submitted, these management plan requirements would remain unchanged subject to amendment or revision under the National Forest Management Act (NFMA) planning procedures at 36 CFR part 219.

*Compliance with Executive Order 13175 and Finding of No “Tribal Implications”:* Some Tribal officials commented that the Forest Service failed to comply with Executive Order 13175 by not consulting and coordinating with Tribes prior to publication of the proposed rule. They stated that since consultation had taken place when the 2001 roadless rule was developed, it should also have taken place with a rulemaking that proposed to replace the 2001 roadless rule. In addition, some Tribal officials felt that Tribes should be afforded the same petitioning opportunities as Governors.

*Response:* The 2001 roadless rule established on-the-ground management prohibitions that actually superceded management requirements in land management plans. In that case, it was appropriate to seek advance consultation with Tribes. The State petitioning process does not propose any on-the-ground changes to existing management requirements. If a petition is accepted by the Secretary and State-specific rulemaking is undertaken to adjust on-the-ground management requirements, consultation with Tribes will take place at that time.

It is important to note that Congressional reviews of inventoried roadless areas for consideration as potential wilderness primarily has been conducted on a state-by-state basis for the past 25 years. In addition, the Department envisions that before the Secretary would approve a petition submitted by a Governor, that the petition would have to have been developed in collaboration with local governments, Tribes, stakeholders, and other interested parties.

*Volume of Public Comments and Support for the 2001 Roadless Rule:* Many respondents discussed the volume of public comment received over the past 5 years in support of the 2001 roadless rule and that the proposed rule goes against the wishes of the American public.

*Response:* Every comment received is considered for its substance and contribution to informed decisionmaking, whether it is one comment repeated by tens of thousands of people or a comment submitted by only one person. The public comment process is not intended to serve as a scientifically valid survey process to determine public opinion. The emphasis in reviewing public comment is on the content of the comment rather than on the number of times a comment was received. The comment analysis process is intended to identify unique substantive comments relative to the proposal to facilitate their consideration in the decisionmaking process. All comments are considered, including comments that support and that oppose the proposal. That people do not agree on how public lands should be managed is a historical, as well as modern dilemma faced by resource managers. However, public comment processes, while imperfect, do provide a vital avenue for engaging a wide array of the public in resource management processes and outcomes.

*Burden to States and Management Responsibility:* Some respondents, including several Governors, commented that the proposed rule would put an undue burden on the States since they do not have the resources to engage in this kind of a process. Other respondents felt that the Federal government was abandoning its responsibilities in managing inventoried roadless areas and disagreed with turning the responsibilities over to State government.

*Response:* Nothing in the proposed or final rule transfers any responsibility for the management of federal lands to the States. These are federal lands administered by the USDA Forest Service, and will continue to be managed as such. Existing management requirements for inventoried roadless areas have been put in place by agency land management planning procedures and approved by Forest Service officials. If, after reviewing these existing management requirements in a collaborative process, a Governor submits a petition, as required by the final rule, that is accepted by the Secretary, a State-specific rulemaking process would be conducted by the Forest Service with the final decision reserved to the Secretary. This rulemaking process will include public notice and comment procedures and the appropriate level of environmental analysis.

The Department envisions that Governors considering submitting a petition to the Secretary for State-specific rulemaking would request the Forest Service to provide the State with existing information and management requirements for their review. After collaborating with local and Tribal governments, stakeholders, and other interested parties, the Governor may or may not then decide to submit a petition. If a petition is submitted and accepted, the rulemaking process would be conducted by the Forest

Service with the State playing a cooperating agency role in the environmental analysis. The Department does not feel that this process would pose an undue burden on a State and does not constitute an unfunded mandate.

*Local Decisionmaking in Land Management Planning Process:* Some respondents felt that any rulemaking to establish management requirements for units of the National Forest System was inappropriate, and that these requirements should only be established through the National Forest Management Act (NFMA) land management planning process. Responses received from several States, in some cases supporting the proposed State-petitioning rule and in other cases opposing it, also indicated that it was their intent to work closely with the Forest Service as land management plans were revised to provide input on management requirements for inventoried roadless areas.

*Response:* The Department believes that in most cases the land management planning process represents the best approach for addressing the challenges of natural resource management on units of the National Forest System. Land management plans are developed, amended, and revised using a collaborative process that considers the integrated management requirements of the entire unit and the role it plays in the surrounding area. Some State and local governments actually participate in the land management plan revision process as cooperating agencies and the Department encourages and supports this level of involvement. The Department also believes, however, that in some cases it is appropriate to allow other approaches, and that the National Forest Management Act (NFMA) and other statutes provide the necessary legal authority to implement the final rule. This final rule provides an opportunity to take

another approach allowing both national perspectives and community-level support to accomplish a long-term solution to roadless area conservation.

*Establishment of an Advisory Committee:* Some respondents felt that an advisory committee was needed to assist in the implementation of the rule, and one group recommended a broader set of responsibilities for the advisory committee that would include the review of all proposed management activities in inventoried roadless areas and all management requirements in proposed plan revisions and amendments. Other respondents commented that a national advisory committee was not necessary. Some State responses included comments that such a committee would duplicate efforts the State would have gone through to develop a petition in an open public process, and that it would not be appropriate for such a committee to pass judgment on a State's petition.

*Response:* The Department has decided that establishing a national advisory committee to provide the Secretary with advice and recommendations would be helpful in implementing this rule. The scope of the committee's duties would be to review each petition submitted in light of the rule requirements, and provide the Secretary with advice and recommendations on each petition, as well as on any subsequent State-specific rulemaking. The Department believes that a third-party review of petitions by an advisory committee composed of members representing national organizations with diverse points of view and knowledge of contemporary issues involving the conservation and management of inventoried roadless areas, would be very helpful to the Secretary.

*Local Government Participation:* Several respondents commented that local governments should be a part of the petitioning process, and should also play a role in any environmental analysis conducted for a State-specific rulemaking effort.

*Response:* The Department agrees that local governments should be included in any collaborative process a Governor conducts in preparation of submitting a petition. We envision a Governor involving all interested parties in such a process, including Tribal governments and adjacent States if some inventoried roadless areas happen to be located in more than one State. Any subsequent State-specific rulemaking undertaken by the Forest Service could also include local government participation in the environmental analysis required by that rulemaking effort.

*Adequacy of the 18 Month Timeframe to Submit a Petition:* Some respondents felt that the 18-month timeframe to submit a petition was more than adequate. Others commented that more time was needed or that no time limits should be imposed since this would offer future Governors an opportunity to submit petitions. One Governor commented that the reason the State did not support the proposed rule was that they would rather work with the Forest Service through the land management planning process. The commenter stated that in the absence of management requirements established through rulemaking, the opportunity to adjust these requirements through subsequent plan revisions and amendments would still be available to Governors in the future. This Governor was concerned that establishing management requirements through rulemaking would just represent one Governor's perspective in one point in time. Several Governors and other respondents stated that there was no need for such a rule since Governors already have the right to petition for rulemaking.

*Response:* Submitting a petition under this final rule would strictly be voluntary on the part of any State. The Department believes that 18 months is an adequate amount of time for a State to collaborate effectively with local and Tribal governments,

stakeholders, and other interested parties to develop a proposal that would consider the full range of public input. While the petitioning opportunity afforded to Governors under this final rule would only be available for 18 months, the Department's general petitioning process for the approval, amendment, or repeal of rules (7 CFR 1.28) would remain available after expiration of the 18-month petitioning period. Management requirements established through the land management planning process would always be available for review and adjustment through subsequent plan revisions or amendments.

*Adjusting Existing Management Requirements for Inventoried Roadless Areas:*

Some respondents opposed the proposed rule because they agreed with the management requirements that were in place for specific NFS units and were concerned that these would be changed. One respondent stated that changing management requirements established through the land management planning process would be a breach of public trust. One group commented that the proposed petitioning process would conflict with the land management planning process; would only look at inventoried roadless areas instead of the entire NFS unit; and may reduce the perceived need by Governors, State agencies, and the public to participate in the land management planning process. One Governor commented that the State had just worked for many years with the Forest Service on a recent plan revision effort and did not want to have anything happen that would change that outcome. Other respondents felt that establishing or adjusting management requirements for inventoried roadless areas through rulemaking would make these requirements more permanent and also make them less likely to be changed in the future.

*Response:* Management requirements established through the land management planning process represent the results of a collaborative process that included many groups and individuals, and also represent a balanced approach for the integrated management for that NFS unit. Not everyone necessarily agrees with every management requirement that is approved, however. The responsible official who approves a land management plan, plan revision, or plan amendment does so through an informed decisionmaking process that seeks, but does not always attain, consensus. In any process used to adjust existing management requirements, be it through a State-specific rulemaking process put in place with this final rule, or through future plan revisions or amendments, some individuals or groups will agree with the changes and some will not. In addition, since any State-specific rulemaking envisioned by the final rule will include public notice and comment procedures and appropriate National Environmental Policy Act (NEPA) environmental analysis procedures, the Secretary will be making an informed decision when adopting any final State-specific rule. There is no guarantee that the management requirements the Secretary adopts through a State-specific rulemaking effort will look exactly like those recommended and proposed in a petition submitted by a Governor.

*Relationship of State-specific Rules and Land Management Plans:* Some respondents raised questions about the relationship of post-petition rules and existing land management plans.

*Response:* First, when a petition is accepted and rulemaking is directed, it is crucial to recognize that the subsequent rulemaking will be undertaken with full public participation. The Department will ensure that the same kinds of considerations that

guide development of land management plans will be taken into account during such rulemakings.

Second, the Department envisions that petitions and subsequent rulemakings may be far more flexible and creative than a simplistic prohibition or moratorium. The goal is to improve protection and accomplishment of management objectives, but there may be a broad range of reasonable alternative variations in context, procedures, duration, and structure as to how that goal is achieved. For example, an agreement to improve coordination by providing notice when actions will be taken within roadless lands on adjoining National Forest System and State Forests (whether done by memorandum of understanding or rulemaking) would not necessitate adjustment of land management plans. Where a rulemaking is undertaken that would alter management direction of land management plans, such a rule must be developed with site-specific information and the same kinds of considerations that apply when amending land management plans. This represents a significant difference between this final rule and the approach taken in the 2001 rulemaking. Finally, any rule established pursuant to this system will be subject to the Department's general petitioning process set out in 7 CFR 1.28.

*The Petitioning Process and Public Input:* Some respondents felt that unless they lived in the State where a petition was submitted to the Secretary and a subsequent State-specific rulemaking was undertaken that they would not be able to comment on any proposed changes to management requirements.

*Response:* If the Secretary directs a State-specific rulemaking, a proposed rule would be published in the Federal Register for public review and comment. As is the case in all rulemaking, public responses will be evaluated, considered, and used to inform

the decisionmaking process for any final rule developed. In addition, individual units of the National Forest System have internet websites and mailing lists that will also provide notice to interested individuals, whether local or not.

*Criteria for Reviewing Petitions:* Some comments were received requesting that the final rule include a specific standard or criteria that the Secretary will apply when reviewing petitions.

*Response:* The Department believes this would not be a valuable addition. The Department's goal has been to design an improved system for protecting roadless areas. There is no single factor that can assess how to best accomplish this goal and no one criteria can be identified given the diverse circumstances that apply across the National Forest System. The Department believes that the overall design of the regulation and the required elements of the petition adequately reflect what will be considered. Ultimately, the Department will consider petitions within the context of Congress' charge that National Forest System lands be managed for the multiple use and sustained yield of the several goods and services and that due consideration shall be given to the relative values of the various resources in particular areas. The authority vested by Congress is broad, as is the discretion in how such authority is applied.

*Ongoing Management and the Petitioning Process:* Some respondents sought clarification of how lands would be managed during review of a petition and how the petitioning process would operate in conjunction with ongoing land management plan revision efforts.

*Response:* As noted in §294.14(a)(4), petitions must describe how the proposed changes “differ from existing applicable land management plan(s) or policies related to

inventoried roadless area management . . .” The Department wishes to be clear that its intention is that applicable land management plans and policies will govern during the pendency of a review of a petition and subsequent rulemaking. Further, the Department notes that the July 16, 2004, interim directive for the management of inventoried roadless areas (69 FR 42648) will remain in place until January 16, 2006, and the Forest Service may renew the interim directive for an additional 18 months. Finally, it is imperative that land management must continue forward on a day-to-day basis, even in the midst of land management plan revisions and the petitioning process. The agency cannot simply stop making decisions. The petitioning process, like land management plan revision, must accommodate the fact that land management is an ongoing and dynamic process. Indeed, it is possible that some States will elect to pursue addressing shared concerns for inventoried roadless area management via the plan revision process rather than the petitioning process.

*Adequate Protection of Inventoried Roadless Areas:* Several respondents suggested that the absence of the court-voided roadless rule left inventoried roadless areas unprotected.

*Response:* That assertion is not correct. The November 2000 final environmental impact statement (FEIS) for the roadless rule estimated a total of 58.5 million acres of inventoried roadless areas, with some percentage of those lands actually having been developed to at least some extent. The FEIS also identified that over 24 million of those acres were already “off limits” to road construction under existing forest plan management direction (along with another 42 million acres of National Forest System (NFS) lands that are “off limits” to road construction by Congressional designation).

Additionally, the remaining inventoried roadless area acres were subject to the local forest plan forestwide and area-specific management direction. Finally, it should be noted that the agency issued an interim directive for the management of inventoried roadless areas in December of 2001 for 18 months, and reinstated it again in July of 2004 for another 18 months. This interim directive reserves to the Chief, except in specific circumstances that are generally consistent with the prohibition exceptions in the roadless rule, the authority to make decisions in inventoried roadless areas regarding: (1) road construction or road reconstruction on any NFS unit until a forest-scale roads analysis is completed and incorporated into a forest plan, or a determination is made that an amendment is not necessary; and (2) timber harvesting on any NFS unit until a revision of a forest plan or adoption of a plan amendment that has considered the protection and management of inventoried roadless areas. Any suggestion that no protections exist for inventoried roadless areas is simply inaccurate.

*Roadless Areas on the Tongass National Forest:* Some comments received indicate that there remains much interest and confusion regarding roadless areas on the Tongass National Forest.

*Response:* As background, on June 10, 2003, a settlement agreement was reached in the *State of Alaska v. USDA* litigation. In that settlement, the Department agreed to propose an amendment to the roadless rule to temporarily withdraw the Tongass National Forest in Alaska from the provisions of the rule, as well as to issue an advance notice of proposed rulemaking to seek public comment on permanently withdrawing both the Tongass and the Chugach National Forests from the provisions of the roadless rule. On December 30, 2003, the Department adopted a final rule that temporarily withdrew the

Tongass National Forest. Management of inventoried roadless areas on the Tongass is now governed by the existing forest plan. The roadless lands on the Tongass National Forest have been repeatedly studied and the relative values and resources associated with those lands are well appreciated and understood. Pursuant to the current forest plans for the Tongass and the Chugach National Forests, road construction will not occur on approximately 90 percent of roadless area lands and timber management will not occur on over 95 percent of roadless area lands. Under the approach established in this final rule, management of inventoried roadless areas on the Tongass will continue to be governed by the existing forest plan. This rule thus negates the need for the further Tongass-specific rulemaking anticipated by the 2003 rule.

*Petition's Compliance with Applicable Federal Law:* Concerns were expressed that petitions might be submitted that do not conform to applicable Federal laws. Some respondents worried that petitions would seek to impose restrictions beyond those permissible under the law, while others expressed concern that petitions would seek to waive mandatory requirements. Several respondents were concerned that petitions would not respect existing rights to access private property.

*Response:* The proposed regulation at §294.14(a)(4) required that petitions identify how the recommended management requirements differ from existing management direction while still complying with applicable laws and regulations. This requirement has been retained. Additionally, the Department is required, under these and any circumstances, to assure that rulemakings conform to all applicable Federal laws. In addition, the Department has added a new regulatory provision at §294.17(c) identifying

that nothing in this rule, nor any rule promulgated pursuant to this petitioning process, shall prohibit the exercise of any valid existing rights.

## **Regulatory Certifications**

### *Regulatory Impact*

This final rule has been reviewed under USDA procedures and Executive Order 12866 issued September 30, 1993 (E.O. 12866) on Regulatory Planning and Review. It has been determined that this is not an economically significant rule. This final rule will not have an annual effect of \$100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This final rule will neither interfere with an action taken or planned by another agency. Finally, this final rule will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. However, because this rule raises novel legal or policy issues arising from legal mandates or the President's priorities, it has been designated as significant and, therefore, has been reviewed by the Office of Management and Budget under E.O. 12866.

Moreover, this final rule has been considered in light of Executive Order 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). It has been determined that this action will not have a significant economic impact on a substantial number of small business entities as defined by the Regulatory Flexibility Act. Therefore, a regulatory flexibility analysis is not required for this final rule. This rule will not impose record keeping requirements; will

not affect small entities' competitive position in relation to large entities; and will not affect small entities' cash flow, liquidity, or ability to remain in the market.

A cost-benefit analysis has been prepared for this final rule that incorporates by reference the November 2000 detailed regulatory impact analysis prepared for the roadless rule promulgated in January of 2001. A quantitative analysis of costs and benefits associated with this final rule is not feasible, however, because there is no experience with implementing the roadless rule, and thus there are no data available. In addition, many of the effects of this final rule are not readily quantifiable in financial terms because they would be based on future State-specific rulemaking. For these reasons, the cost-benefit analysis prepared for this final rule focuses on the qualitative aspects of implementing a State petition process. Detailed quantitative analysis would be conducted in the future if and when any State-specific rulemaking proposals are made.

The range of potential costs and benefits of this final rule has been estimated by comparing selected effects of managing 58.5 million acres of inventoried roadless areas following the prohibitions for road construction and timber management activities in the 2001 roadless rule, with managing these same areas in accordance with the existing management requirements contained in land management plans. Approximately 25 percent of the total acres of inventoried roadless areas are in the State of Alaska. About 72 percent of the total is in the 11 Western States of Montana, Idaho, Wyoming, Washington, Utah, Oregon, New Mexico, Nevada, Colorado, California, and Arizona. The remaining 3 percent is scattered among the remaining 26 States and Puerto Rico. While it is currently unknown which States may choose to submit a petition for State-specific rulemaking, the Department assumes that all 38 States and Puerto Rico will do so

in the first year the rule is implemented. The costs to the Forest Service and the Department to evaluate and make a determination on a petition are estimated to range from \$75,000 to \$150,000. Costs could range from \$25,000 to \$100,000 for an individual State submitting a petition. Total costs to the States for 39 petitions would range from \$975,000 to \$3,900,000; and total costs to the Government would range from \$2,925,000 to \$5,850,000. The total cost to the Government includes the costs associated with an advisory committee that will be established to assist the Secretary with implementation of this rule. Total costs of the rule are, therefore, estimated to range from \$3,900,000 to \$9,750,000.

#### *Environmental Impacts*

The Department prepared a draft environmental impact statement (EIS) (May 2000) and a final EIS (November 2000) in association with promulgation of the 2001 roadless rule. The DEIS and FEIS examined in detail the no action alternative in which no rule prohibiting activities in inventoried roadless areas would be issued, and management of these areas would be governed by existing land management plans. The environmental impacts associated with not implementing the enjoined 2001 roadless rule are essentially those disclosed and discussed for the no action alternative displayed in the FEIS. The FEIS is available in the document archives section of the Roadless Area Conservation World Wide Web/Internet site at <http://www.roadless.fs.fed.us>.

This final rule has been reviewed under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4370f. The Department's publication of the proposed rule included notice of its expectation that the final rule would be designated for categorical exclusion.

Categorical exclusions (CEs) are an integral part of the NEPA scheme and in no way evade compliance with NEPA. In 1983, the Council on Environmental Quality (CEQ) explained that the use of CEs avoids unnecessary documentation of minor environmental effects in environmental assessments (EAs) and allows agencies to focus their environmental review effort on the major actions that will have a significant effect on the environment and which are the primary focus of NEPA (see 48 Fed. Reg. 34, 265-66 (July 28, 1983); see also 40 CFR 1500.4(p) (noting that establishment and use of CEs can reduce excessive paperwork by eliminating unnecessary preparation of EAs). CEQ regulations do not require that an agency provide for public comment when it approves an action under categorical exclusion (see 40 CFR part 1503).

This final rule establishes administrative procedures to allow a Governor to petition the Secretary of Agriculture to undertake future rulemaking for the management of inventoried roadless areas within a specific State. Thus, subsequent State-specific inventoried roadless area rulemaking may be proposed in the future, at which time, the Forest Service would fully consider the environmental effects of that rulemaking in compliance with National Environmental Policy Act (NEPA) procedures. This final rule is merely procedural in nature and scope and, as such, has no direct, indirect, or cumulative effect on the environment. Section 31.1b of Forest Service Handbook (FSH) 1909.15 (57 FR 43208; 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.”

To be clear, this regulation neither prohibits nor requires any action that would fund, authorize, or carry out activities on National Forest System (NFS) lands. As such,

the regulation will not force specific identifiable resource outcomes on NFS lands, and thus, will not have any discernable effects on the various classes of resources listed in the agency's NEPA Policy and Procedures that can constitute extraordinary circumstances. Effectively, the final regulation, in and of itself, is environmentally neutral and constitutes "no effect" to the environment. Thus, the Department's assessment is that this final rule falls within FSH 1909.15, Section 31.1b and no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

#### *Energy Effects*

This final rule has been reviewed under Executive Order 13211, issued May 18, 2001 (E.O. 13211), "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use." It has been determined that this final rule does not constitute a significant energy action as defined in the Executive order.

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

Section 294.14 of this final rule sets out what must be included in a petition submitted to the Secretary requesting State-specific rulemaking. The requirements in this section constitute an information collection as defined by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and implementing regulations at 5 CFR part 1320. These information collection requirements have been reviewed and approved by the Office of Management and Budget (OMB). The OMB control number is displayed in §294.14, paragraph (b).

#### *Government Paperwork Elimination Act Compliance*

The Department is committed to compliance with the Government Paperwork Elimination Act (44 U.S.C. 3504), which requires Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

### *Federalism*

The Department has considered this final rule under the requirements of Executive Order 13132 issued August 4, 1999 (E.O. 13132), "Federalism." The Department has made an assessment that the final rule conforms with the Federalism principles set out in this Executive order; would not impose any significant compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the national government and the States, nor on the distribution of power and responsibilities among the various levels of government. Therefore, the Department concludes that the final rule does not have Federalism implications.

### *Consultation with Indian Tribal Governments*

Pursuant to Executive Order 13175 of November 6, 2000, "Consultation and Coordination with Indian Tribal Governments," the Department has assessed the impact of this final rule on Indian Tribal governments and has determined that the final rule does not significantly or uniquely affect communities of Indian Tribal governments. The final rule deals with the establishment of administrative procedures only and does not make any recommendations for changes to on-the-ground management of any lands in the National Forest System. Once a State-specific rulemaking is proposed to establish or adjust management requirements for inventoried roadless areas, appropriate consultation and coordination with Indian Tribal Governments will take place at that time.

### *No Takings Implications*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, issued March 15, 1988, and it has been determined that the rule does not pose the risk of a taking of private property as the final rule is limited to the establishment of administrative procedures.

### *Civil Justice Reform*

This final rule has been reviewed under Executive Order 12988 of February 7, 1996, "Civil Justice Reform." The Department has not identified any State or local laws or regulations that are in conflict with this regulation or that would impede full implementation of this final rule. After adoption of this final rule: (1) all State and local laws or regulations that conflict with this rule or that would impede full implementation would be preempted; (2) no retroactive effect would be given to this final rule; and (3) the final rule would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

### *Unfunded Mandates*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531- 1538), the Department has assessed the effects of this final rule on State, local, and Tribal governments and the private sector. This final 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.

### **List of Subjects in 36 CFR Part 294**

National Forests, Navigation (air), Recreation and recreation areas, Wilderness areas, Recordkeeping and reporting requirements.

Therefore, for the reasons set forth in the preamble, the Department of Agriculture amends part 294 of title 36 of the Code of Federal Regulations as follows:

**PART 294—SPECIAL AREAS**

**1. Subpart B is revised to read as follows:**

**Subpart B—State Petitions for Inventoried Roadless Area Management**

**Sec.**

**294.10 Purpose.**

**294.11 Definition.**

**294.12 State petitions.**

**294.13 Petition process.**

**294.14 Petition contents.**

**294.15 Advisory committee review.**

**294.16 State-specific rulemaking.**

**294.17 Scope and applicability.**

**294.18 Severability.**

Authority: 16 U.S.C. 472, 529, 551, 1608, 1613; 23 U.S.C. 201, 205.

**Subpart B – State Petitions for Inventoried Roadless Area Management**

**§294.10 Purpose.**

The purpose of these administrative procedures is to set forth a process for State-specific rulemaking to address the management of inventoried roadless areas in areas where the Secretary determines that regulatory direction is appropriate based on a petition from the affected Governor.

**§294.11 Definition.**

*Inventoried roadless areas* – Areas identified in a set of inventoried roadless area maps, contained in the Forest Service Roadless Area Conservation, Final Environmental Impact Statement, Volume 2, dated November 2000, and any subsequent update or revision of those maps through the land management planning process.

**§294.12 State petitions.**

The Governor of any State or territory that contains National Forest System lands may petition the Secretary of Agriculture to promulgate regulations establishing management requirements for all or any portion of National Forest System inventoried roadless areas within that State or territory. Any such petition must be submitted to the Secretary of Agriculture not later than [Insert date 18 months after the publication of the final rule in the **Federal Register**].

**§294.13 Petition process.**

(a) Review and consideration of petitions made pursuant to §294.12 shall be accomplished as follows:

(1) Review – The Secretary shall review petitions and may request additional information from a petitioner before deciding whether to accept the petition. If the Secretary requests additional information from a petitioner, the petition will be considered complete when the petitioner provides the additional information.

(2) Disposition – The Secretary or the Secretary’s designee shall respond to the petition within 180 days of receipt of a completed petition. The response shall accept or decline the petition to initiate a State-specific rulemaking.

**§294.14 Petition contents.**

(a) Any petition made pursuant to §294.12 shall provide the following:

(1) The location and description of the particular lands for which the petition is being made, including maps and other appropriate resources in sufficient detail to enable consideration of the petition;

(2) The particular management requirements recommended for the lands and any exceptions;

(3) The identification of the circumstances and needs intended to be addressed by the petition, including conserving roadless area values and characteristics; protecting human health and safety; reducing hazardous fuels and restoring essential wildlife habitats; maintaining existing facilities such as dams, or providing reasonable access to public and private property or public and privately owned facilities; and technical corrections to existing maps such as boundary adjustments to remove existing roaded areas;

(4) A description of how the recommended management requirements identified in paragraph (2) differ from existing applicable land management plan(s) or policies related to inventoried roadless area management, and how they would comply with applicable laws and regulations;

(5) A description of how the recommended management requirements identified in paragraph (2) compare to existing State or local land conservation policies and direction set forth in any applicable State or local land and resource management plan(s);

(6) A description of how the recommended management requirements identified in paragraph (2) would affect the fish and wildlife that utilize the particular lands in question and their habitat;

(7) A description of any public involvement efforts undertaken by the petitioner during development of the petition, including efforts to engage Tribal and local governments, and persons with expertise in fish and wildlife biology, fish and wildlife management, forest management, outdoor recreation, and other important disciplines; and

(8) A commitment by the petitioner to participate as a cooperating agency in any environmental analysis for a rulemaking process.

(b) The petition contents described in paragraphs (a)(1) through (a)(8) above constitute an information collection requirement as defined by 5 CFR part 1320 and have been assigned Office of Management and Budget control number 0596-0178.

**§294.15 Advisory committee review.**

A National Advisory Committee shall review each petition and provide advice and recommendations to the Secretary within 90 days of receipt of a completed petition. The committee will also provide advice and recommendations to the Secretary on any subsequent State-specific rulemakings.

**§294.16 State-specific rulemaking.**

If the Secretary or the Secretary's designee accepts a petition, the Forest Service shall be directed to initiate notice and comment rulemaking to address the petition. The Forest Service shall coordinate development of the proposed rule with the petitioner. The Secretary or the Secretary's designee shall make the final decision for any State-specific inventoried roadless area management rule.

**§294.17 Scope and applicability.**

(a) The provisions of this regulation apply exclusively to the development and review of petitions made pursuant to this subpart.

(b) Nothing in this regulation shall be construed to provide for the transfer to, or administration by, a State or local authority of any Federally owned lands.

(c) Nothing in this regulation, nor any regulation promulgated pursuant to this petitioning process, shall prohibit the exercise of any valid existing rights.

**§294.18 Severability.**

In the event that any provision, section, subsection, or phrase of these rules is determined by a court or body of competent jurisdiction to be invalid, unconstitutional, or unenforceable, the remaining provisions, sections, subsections, or phrases shall remain in full force and effect.

/s/ Mark Rey  
Under Secretary  
Natural Resources and  
Environment

5/5/05  
(Date)