



DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 261

RIN 0596-AD57

Law Enforcement; Criminal Prohibitions

AGENCY: Forest Service, Agriculture.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture (Department) is revising the Forest Service (Forest Service or Agency)'s criminal prohibitions to enhance consistency of the Forest Service's law enforcement practices with those of State and other Federal land management agencies. The Department is also streamlining enforcement of the Forest Service's criminal prohibitions related to fire and use of vehicles on National Forest System roads and National Forest System trails by eliminating the requirement to issue an order for enforcement.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Gene Smithson, Deputy Director, Law Enforcement and Investigations, 703-605-4730 or Wilmer.Smithson@usda.gov. Individuals who use telecommunications devices for the hearing impaired may call 711 to reach the Telecommunications Relay Service 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Background and Need

This final rule revises certain criminal prohibitions in 36 CFR part 261, subpart A, to enhance consistency of the Forest Service's law enforcement practices with those of State and other Federal land management agencies. In addition, this final rule streamlines enforcement of some of the criminal prohibitions found in 36 CFR part 261, subpart B, which are enforceable

only through issuance of an order, by moving them to 36 CFR part 261, subpart A, which contains criminal prohibitions that are enforceable without issuance of an order.

Forest Service law enforcement personnel continue to encounter a significant volume of violations for simple possession of controlled substances and drug paraphernalia. Agency law enforcement personnel routinely deal with under-age alcohol possession on National Forest System (NFS) lands. These violations pose a threat to the safety of visitors to NFS lands as well as to Forest Service personnel. This final rule enhances the Forest Service's authority to address public safety issues by adding prohibitions relating to controlled substances, drug paraphernalia, and alcoholic beverages. These new prohibitions enable the Forest Service to enforce more effectively violations on NFS lands for simple possession of controlled substances, possession of alcoholic beverages in violation of State law (for open containers or under-age drinking) and furnishing alcoholic beverages to minors. The final rule also authorizes the Forest Service to enforce violations for the possession of drug paraphernalia if prohibited by State law. These changes are intended to align the Forest Service's law enforcement practices more closely with those of State and local law enforcement agencies.

Additionally, the final rule updates the prohibitions to enhance protection of persons visiting and working on NFS lands from theft of personal property and from disorderly conduct by other visitors. The final rule enhances enforcement of wildfire prevention prohibitions by moving them from 36 CFR part 261, subpart B, which requires issuance of an order, to 36 CFR part 261, subpart A, which does not, and by adding a prohibition banning exploding targets year-round. The final rule also makes other revisions such as updating the prohibitions relating to off-road vehicles and updating the penalty for violating the criminal prohibitions in 36 CFR part 261 consistent with current statutory law.

Summary of Comments and Responses

Overview

On October 3, 2023, the Forest Service published a proposed rule in the **Federal Register** (88 FR 68035) proposing to revise the Forest Service's criminal prohibitions to enhance consistency of the Agency's law enforcement practices with those of State and other Federal land management agencies and to streamline enforcement of the Agency's criminal prohibitions related to fire and use of vehicles on NFS roads and NFS trails by eliminating the requirement to issue an order for enforcement.

The Forest Service received 41 comments during the public comment period. Eight were from professional and interest groups, 19 were from individuals, 9 were from State or local governmental entities, and 5 were submitted anonymously. Four commenters supported the proposed rule, 11 conditionally supported the proposed rule, and 26 opposed the proposed rule. One of the commenters requested a 90-day extension of the comment period. Based on the detail in the comments submitted, the Forest Service determined that it was not necessary or appropriate to extend the comment period for the proposed rule.

The comments on the proposed rule and the Department's responses follow.

Comments Outside the Scope of the Proposed Rule

Comment: One commenter was concerned about the Forest Service's response to requests for law enforcement assistance. One commenter believed that a lack of law enforcement on NFS lands is a concern given the increase in crime, wondered why Forest Service law enforcement officers were not given the tools to handle violations of existing regulations, and expressed concern about the number of dog leash regulations. Another commenter recommended removing any penalties for those who protest commercial activities on NFS lands. Some commenters were concerned that the Federal courts do not have a juvenile justice system. Multiple commenters requested that the Forest Service increase funding for cooperative law enforcement agreements with State and local law enforcement agencies. Some commenters wanted a prohibition providing for protection for nude recreation. One commenter was concerned about recreation fees being charged under the Federal Lands Recreation Enhancement Act for areas on NFS lands

with a development scale of zero. Another commenter was concerned about not using State courts for prosecution of prohibitions under the proposed rule.

Response: These comments are outside the scope of the proposed rule, which does not address the Forest Service's response to requests for law enforcement assistance, enforcement of existing regulations, prohibitions on unleashed dogs, enforcement involving protests, the juvenile justice system, the staffing levels of State and local law enforcement agencies, funding for cooperative law enforcement agreements with State and local law enforcement agencies, prohibitions providing for protection for nude recreation, recreation fees charged under the Federal Lands Recreation Enhancement Act, or the venue for prosecuting violations of prohibitions under the proposed rule.

General Comments

Comment: One commenter believed that the proposed rule could be beneficial to the safety of visitors to NFS lands if Forest Service law enforcement officers were provided sufficient training.

Response: The Department agrees that training for Forest Service law enforcement officers is critical, and training will be provided on the final rule. In addition, Forest Service law enforcement officers are already familiar with the prohibitions in the final rule and have been enforcing several of the prohibitions included in subpart A of the proposed rule through orders issued under subpart B of the existing rule. The proposed and final rules streamline work and eliminate the task of issuing orders for these prohibitions for each Agency administrative unit and promote consistent enforcement of these prohibitions nationwide.

Comment: One commenter asserted that the proposed rule would ensure uniformity of enforcement.

Response: The Department agrees that the proposed and final rules promote consistency in law enforcement on NFS lands.

Comment: One commenter expressed concern that the proposed rule would lead to over-policing, would have a disparate impact on people of color, and would lead to pretextual encounters that violate the privacy of NFS visitors.

Response: The final rule is not expected to result in disproportionately high and adverse impacts on minority or low-income populations. Forest Service law enforcement officers are not exempt from Federal civil rights and privacy laws and Executive orders, including Executive Order 14074, *Advancing Effective, Accountable Policing and Criminal Justice Practices To Enhance Public Trust and Public Safety*, and must comply with requirements in the United States Constitution regarding search and seizure. In addition, the final rule will allow Forest Service law enforcement officers to enforce possession of controlled substances on NFS lands under the Forest Service's regulations as a Class B misdemeanor, as appropriate, rather than under 21 U.S.C. 844(a) as a Class A misdemeanor or felony, which carry harsher penalties.

Comment: One commenter asserted that the proposed rule bypassed Congressional review and approval.

Response: The Forest Service submits all final rules, including this final rule, to Congress in accordance with the Congressional Review Act, 5 U.S.C. 801 *et seq.*

Comment: Some commenters expressed concern that the proposed rule would adversely affect public safety. For example, one commenter believed that assault under State law could be charged as disorderly conduct under the proposed rule.

Response: In the limited circumstances when Forest Service law enforcement officers qualify as peace officers under State law, they are acting under State law. The proposed and final rules provide for Forest Service enforcement of prohibitions, including the prohibition on disorderly conduct, as enumerated in those rules, in accordance with the Forest Service's statutory authority. The proposed and final rules enhance consistency in law enforcement on NFS lands by providing for enforcement of certain prohibitions without issuance of an order and enhance consistency of the Forest Service's law enforcement practices with those of State law

enforcement agencies. The proposed and final rules promote visitor and employee safety on NFS lands by adding prohibitions relating to controlled substances, drug paraphernalia, and alcoholic beverages; enhancing protection of persons visiting and working on NFS lands from theft of personal property and from disorderly conduct by other visitors; and enhancing fire prevention on NFS lands.

Comment: Some commenters were concerned the proposed rule would require citizens accused of even a minor offense to go through the Central Violations Bureau (CVB) instead of being prosecuted in a United States District Court. They believed that the CVB is not the appropriate venue for processing minor offenses because it fails to require behavioral programming to reduce the offenders' future threat to the public, and that the proposed rule would preclude Forest Service law enforcement officers from filing citations directly through the State court system, which is designed to handle citations for minor offenses. Another commenter expressed concern about reduced prosecution of violations involving small amounts of a controlled substance.

Response: The proposed rule does not address use of the CVB, which is a national center that provides for electronic payment of United States District Court violation notices issued for offenses committed on Federal property, including NFS lands. The proposed and final rules provide for small amounts of a controlled substance to be handled through issuance of a violation notice and prosecution before a United States magistrate judge as a Class B misdemeanor. Under the Agency's current regulations, violations for simple possession of a controlled substance on NFS lands are often not prosecuted because they involve small amounts that are insufficient to meet guidelines for prosecution under 21 U.S.C. 844(a) before a United States District Court judge as a Class A misdemeanor or felony.

Comment: A commenter believed the best way to ensure law and order on Federal land was to work with State and local law enforcement. Other commenters asserted that the purposes of the proposed rule could be accomplished by contracting with local law enforcement agencies.

Response: The Forest Service agrees that cooperation with State and local law enforcement agencies in the execution of their responsibilities related to NFS lands enhances protection of persons and property on NFS lands. Under the Cooperative Law Enforcement Act (16 U.S.C. 551a), the Forest Service enters into cooperative law enforcement agreements with State and local law enforcement agencies, typically a county sheriff's office, that fund State and local law enforcement where NFS lands and facilities account for increased visitor use in their State. The Forest Service continues to seek opportunities to expand these efforts.

Authority and Jurisdiction

Comment: Some commenters expressed concern regarding assimilation of State law into the Forest Service's regulations.

Response: The proposed and final rules are not assimilating State law under the Assimilative Crimes Act. The Assimilative Crimes Act (18 U.S.C. 13) authorizes Federal enforcement of State criminal laws on Federal lands where the Federal Government has exclusive or concurrent legislative jurisdiction. The United States has exclusive legislative jurisdiction when it possesses all the authority of the State and the State has not reserved to itself the right to exercise any of the authority concurrently with the United States, with limited exceptions. The United States has concurrent legislative jurisdiction when the State has reserved to itself the right to exercise all the same authority concurrently with the United States.

The United States does not have exclusive legislative jurisdiction over any NFS lands. The United States generally has proprietary jurisdiction, rather than concurrent legislative jurisdiction, over NFS lands in the western States, which were reserved from the public domain without conferring any measure of the States' authority over those areas. For NFS lands in the eastern States that were acquired under the Weeks Act (16 U.S.C. 515), the United States has concurrent legislative jurisdiction only for those NFS lands acquired before February 1, 1940 (*United States v. Raffield*, 82 F.3d 611 (4th Cir.), *cert. denied*, 519 U.S. 933 (1996)). For NFS

lands that were acquired under the Weeks Act after February 1, 1940, the United States does not have concurrent legislative jurisdiction until it formally accepts it (40 U.S.C. 255).

However, concurrent legislative jurisdiction, or the lack of it, does not affect the Federal Government's broad authority when it has proprietary jurisdiction to regulate Federal lands under the Property Clause of the United States Constitution (art. IV, sec. 3, cl. 2) and applicable Federal statutes and regulations. In incorporating State law into its law enforcement regulations in 36 CFR part 261, the Forest Service is exercising its authority under the Property Clause and the Organic Administration Act of 1897 (16 U.S.C. 551), which authorize the Agency to promulgate regulations protecting NFS lands and to enforce Federal law on NFS lands.

Consistent with this authority, the Forest Service's existing travel management and law enforcement regulations already incorporate State law. For example, the Forest Service's travel management regulations at 36 CFR 212.5(a)(1) incorporate and apply State traffic law to NFS roads, unless State traffic law conflicts with motor vehicle use designations established under 36 CFR part 212, subpart B, or Forest Service regulations at 36 CFR part 261. The Forest Service's law enforcement regulations at 36 CFR 261.8 prohibit certain conduct affecting fish and wildlife, such as hunting and fishing, to the extent State law is violated, and the Forest Service's law enforcement regulations at 36 CFR 261.15 prohibit operating any vehicle off NFS, State, or county roads without a valid license as required by State law. Forest Service regulations are Federal law. When the Forest Service enforces prohibitions in its regulations that incorporate State law, the Forest Service is enforcing Federal law, not State law.

Comment: One commenter asserted that States would have to consent to the Forest Service's exercise of jurisdiction, or would have to cede jurisdiction, over the NFS lands in their States for the proposed rule to be legally promulgated. Some commenters were concerned the proposed rule would violate the United States Constitution and opposed the proposed rule based on the Forest Service's lack of jurisdiction to promulgate it.

Response: The Forest Service has jurisdiction over NFS lands and does not have to obtain consent from States to exercise that jurisdiction or have States cede jurisdiction to the Forest Service for the proposed rule to be legally promulgated. The Forest Service has broad authority to regulate NFS lands under the Property Clause of the United States Constitution and the Organic Administration Act of 1897, which authorizes the Agency to promulgate regulations protecting NFS lands and to enforce Federal law on NFS lands. (U.S. Constitution., Art. IV, Sec. 3, cl. 2.)

The delegation of this Congressional authority to the Secretary of Agriculture to regulate use and occupancy of NFS lands has been recognized for over one hundred years. See *Light v. United States*, 220 U.S. 523 (1911); *United States v. Grimaud*, 220 U.S. 506 (1911). The authority of the Secretary of Agriculture to promulgate regulations protecting NFS lands is set forth in the Organic Administration Act of 1897 (16 U.S.C. 551), which authorizes regulations that regulate the occupancy and use of the national forests and preserve them from destruction; states that violation of those regulations shall be punished by a fine or imprisonment or both; and provides that any person charged with a violation of those regulations may be tried and sentenced by any United States magistrate judge specially designated for that purpose by the court appointing that United States magistrate judge, in the same manner and subject to the same conditions as provided for in 18 U.S.C. 3401(b)-(e). The Forest Service's law enforcement regulations implementing this authority are codified at 36 CFR part 261.

Comment: One commenter believed the proposed rule was a direct attempt to bypass State law enforcement. Some commenters were concerned the proposed rule would usurp State statutory authority.

Response: The proposed and final rules complement or reinforce, rather than bypass or usurp, State law enforcement authority. The Organic Administration Act of 1897 (16 U.S.C. 480) provides that the States do not lose civil or criminal jurisdiction over their citizens on NFS lands and may enforce State civil and criminal law on NFS lands within the boundaries of their States.

Consistent with that principle, the Forest Service commonly enters into cooperative law enforcement agreements with State and local law enforcement agencies that fund State and local law enforcement where NFS lands and facilities account for increased visitor use in their State. Further, the proposed and final rules reinforce State law to the extent they incorporate it, as with the new prohibitions that prohibit knowingly or intentionally possessing drug paraphernalia in violation of State law, possessing an alcoholic beverage in violation of State law, and providing an alcoholic beverage to a minor in violation of State law.

Comment: One commenter believed the proposed rule would establish a Federal enclave on all NFS lands in violation of the United States Constitution (art. 1, sec. 8, cl. 17); 40 U.S.C. 255 and 3112; 50 U.S.C. 175; and the Assimilative Crimes Act (18 U.S.C. 13).

Response: The Assimilative Crimes Act (18 U.S.C. 13) authorizes Federal enforcement of State criminal laws on Federal lands where the Federal Government has exclusive or concurrent legislative jurisdiction. In promulgating the final rule, the Forest Service is not establishing a Federal enclave subject to exclusive legislative jurisdiction under the Enclave Clause of the United States Constitution or accepting concurrent legislative jurisdiction under 40 U.S.C. 255 and 3112 for purposes of enforcement of State criminal laws on NFS lands under the Assimilative Crimes Act. Rather, in promulgating the final rule, the Forest Service is exercising its proprietary jurisdiction under the Property Clause of the United States Constitution and the Organic Administration Act of 1897.

The Enclave Clause of the United States Constitution provides that Congress has exclusive legislation over the District of Columbia and over all parcels of land purchased by the Federal Government with the consent of a State's legislature for the construction of forts, magazines, arsenals, dockyards, and other needed buildings (U.S. Constitution. Art. 1, Sec. 8, cl. 17).

A Federal enclave is a parcel of land over which the United States has exclusive legislative jurisdiction. The United States has exclusive legislative jurisdiction when it possesses all the

authority of the State, and the State has not reserved to itself the right to exercise any of the authority concurrently with the United States, with limited exceptions. The United States has concurrent legislative jurisdiction when the State has reserved to itself the right to exercise all the same authority concurrently with the United States. Title 40 of the United States Code, sections 255 and 3112, provide that the United States does not have to, but may, accept exclusive or concurrent legislative jurisdiction of the land it acquires from the State where the land is located (40 U.S.C. 255 and 3112).

The United States does not have exclusive legislative jurisdiction, and generally does not have concurrent legislative jurisdiction, over NFS lands. The United States generally has proprietary jurisdiction over NFS lands in the western States, which were reserved from the public domain without conferring any measure of the States' authority over those areas. For NFS lands in the eastern States that were acquired under the Weeks Act (16 U.S.C. 515), the United States has concurrent legislative jurisdiction only for those NFS lands acquired before February 1, 1940 (*United States v. Raffield*, 82 F.3d 611 (4th Cir.), *cert. denied*, 519 U.S. 933 (1996)). For NFS lands that were acquired under the Weeks Act after February 1, 1940, the United States does not have concurrent legislative jurisdiction until it formally accepts it (40 U.S.C. 255 and 3112).

However, concurrent legislative jurisdiction, or the lack of it, does not affect the Forest Service's broad authority under its proprietary jurisdiction to regulate NFS lands under the Property Clause of the United States Constitution (art. IV, sec. 3, cl. 2) and applicable Federal statutes and regulations. As stated in *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (citations omitted):

Absent consent or cession, a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause.

The Property Clause gives Congress the power to promulgate all needed regulations regarding Federal property. Congress has delegated this authority to the Secretary of Agriculture in the Organic Administration Act of 1897 (16 U.S.C. 551). The Forest Service's law enforcement regulations implementing this authority in the Property Clause and the Organic Administration Act of 1897 are codified at 36 CFR part 261.

Occupancy, Use, and Conduct

Comment: Some commenters were concerned that public nudity would become illegal in most locations on NFS lands (1) as a result of the prohibition in the proposed rule on performing an act that is obscene or threatening when committed intentionally to cause, or recklessly to create a substantial risk of causing, public alarm, nuisance, jeopardy, or violence; and (2) as a result of the reference in the preamble to the proposed rule to "indecent exposure" as an example of such an act. These commenters stated that the proposed rule should explicitly define "act that is obscene" and "indecent exposure" and were concerned that those terms could be interpreted to apply to social and recreational nude activities.

Response: The proposed and final rules do not revise the existing definition for "publicly nude" and the existing regulatory prohibition on being publicly nude on NFS lands in the Forest Service's law enforcement regulations. The Agency's existing law enforcement regulations (36 CFR 261.2) define "publicly nude" as being in any place where a person may be observed by another person and failing to cover with a fully opaque garment the rectal area, pubic area, or genitals and, in the case of a female person, failing to cover with a fully opaque garment both breasts below a point immediately above the top of the areola. The definition excludes persons under the age of 10 years. The Forest Service's existing law enforcement regulations authorize the Agency to issue an order under 36 CFR 251.58(j) that prohibits being publicly nude in specified areas on NFS lands.

The Department does not believe it is necessary or appropriate to define the phrase, "act that is obscene," in the final rule. To be covered by the prohibition on disorderly conduct in

§261.4(b), an act that is obscene must be committed intentionally to cause, or recklessly to create a substantial risk of causing, public alarm, nuisance, jeopardy, or violence. This context clarifies the meaning of the phrase, “act that is obscene,” and distinguishes it from social and recreational nude activities to the extent they are not covered by an order prohibiting being publicly nude.

The Department also does not believe it is necessary or appropriate to define the term, “indecent exposure,” which is not used in the proposed and final rules and merely appears in the preamble to the proposed rule as an example, rather than as an element, of an act that is obscene or threatening when committed intentionally to cause, or recklessly to create a substantial risk of causing, public alarm, nuisance, jeopardy, or violence.

Comment: One commenter was concerned about orders not completing a formal process. Another commenter was concerned about the Forest Service’s compliance with issuing orders in accordance with the John D. Dingell, Jr. Conservation, Management, and Recreation Act (Pub. L. No. 116-9, Title IV (Sportsmen’s Access and Related Matters)) (Dingell Act).

Response: The Forest Service’s existing law enforcement regulations at 36 CFR part 261, subpart B, were published for public notice and comment in the *Federal Register*. These regulations authorize the Agency to issue orders that impose temporary closures or restrictions only as enumerated in 36 CFR part 261, subpart B, and only in specific locations, based on site-specific conditions. Consistent with these regulations, each order issued by the Forest Service describes the specific area, road, or trail to which it applies; specifies the times it applies; and states each prohibition it applies from those enumerated in 36 CFR part 261, subpart B, and is displayed in such locations and in such a manner as to reasonably bring the prohibition in the order to the attention of the public.

As required by the Dingell Act and the Forest Service’s implementing directive in Forest Service Handbook 5309.11, chapter 30, section 34, for temporary or permanent hunting, fishing, or recreational shooting orders issued under 36 CFR part 261, subpart B, the Forest Service provides advance notice to the public of the intent to issue the proposed order for public

comment, and provides public notice and opportunity to comment on the proposed order, by completing the following steps: (1) coordination with the appropriate State Fish and Wildlife agency; (2) coordination with affected Indian Tribes, as appropriate; (3) publication and other dissemination of an advance notice of intent before publication of a notice of opportunity for public comment; (4) publication of a notice of opportunity for public comment; (5) publication of a response to comments received during the comment period; and (6) issuance of the final temporary or permanent hunting, fishing, or recreational shooting order.

Comment: Some commenters opposed the proposed revision to 36 CFR 261.53 that would allow for issuance of an order restricting use of an area, as well as closure of an area in its entirety to all uses, without local coordination and opposed the delegation of authority for this purpose.

Response: The proposed and final rules do not change the delegation of the Forest Service's authority to issue orders under 36 CFR part 261, subpart B. The Forest Service's regulations at 36 CFR 261.53 authorize the Agency to issue orders to protect species, archaeological resources, scientific experiments or investigations, public health or safety, property, and the privacy of Tribal activities for traditional and cultural purposes. The Department believes having the flexibility to restrict use of an area, as well as close it entirely, for these purposes will allow the Forest Service to address these concerns in a more targeted manner. For maximum effectiveness and awareness, the Forest Service works closely with local authorities in issuing these types of orders.

Comment: Some commenters opposed traffic enforcement by the Forest Service on State and county roads and were concerned the proposed rule would broaden traffic enforcement.

Response: The proposed and final rules do not address traffic enforcement on State and county roads. Rather, the proposed and final rules address traffic enforcement on NFS roads. An NFS road is defined in the Forest Service's regulations to exclude a State or county road. An NFS road is defined as a road (1) that is wholly or partly within or adjacent to and serving the

NFS that the Forest Service determines is necessary for the protection, administration, and utilization of the NFS and the use and development of its resources; and (2) that is not authorized by a legally documented right-of-way held by a State, county, or other local public road authority (36 CFR 212.1). The proposed and final rules incorporate State traffic law in 36 CFR 261.12, which applies to NFS roads, so that State traffic law is enforceable as Federal traffic law on NFS roads. Specifically, the proposed and final rules incorporate two commonly cited violations of State traffic law: operating a motor vehicle without a valid license and operating a motor vehicle while under the influence of an alcoholic beverage or a controlled substance. The proposed and final rules also incorporate a catch-all prohibition that incorporates any other State traffic laws so that they are enforceable as Federal traffic law. These revisions simplify enforcement of State traffic law on NFS roads and enhance consistency in enforcement of State traffic law.

Comment: Some commenters were concerned that under the proposed rule fighting or assault would be charged as the lesser offense of disorderly conduct.

Response: Disorderly conduct is a category of offense, not the offense itself, for prohibitions enumerated in 36 CFR 261.4. Since June 1981, “engaging in fighting” has been prohibited as disorderly conduct under 36 CFR 261.4(a). The disorderly conduct prohibitions in the proposed and final rules add threatening or other violent behavior; clarify the content by prohibiting making an utterance or performing an act that is made or performed in a manner likely to inflict injury or to incite an immediate breach of peace or that is obscene or threatening. The proposed and final rules also add a criminal intent element that the violator acted with the intent to cause, or recklessly to create a substantial risk of causing, public alarm, nuisance, jeopardy, or violence. Any violations of prohibitions in 36 CFR part 261, subpart A, or in an order issued under 36 CFR part 261, subpart B, can be written as a mandatory appearance that requires the defendant to appear in Federal court, rather than simply paying a collateral fine through the CVB. States may also have the authority to enforce these types of offenses under applicable State law.

Comment: Some commenters objected to including personal property crimes in the proposed rule. Several commenters did not believe that State and local law enforcement agencies were understaffed and consequently constrained in their ability to respond promptly to personal property crimes.

Response: Personal property crimes such as theft have become an increasing problem on NFS lands. To effectively deal with this criminal activity, Forest Service law enforcement officers need appropriate tools to enforce Federal law effectively and professionally. This type of criminal activity may take place in remote locations in the NFS that are difficult to access and may not be routinely patrolled by State and local law enforcement agencies due to staffing constraints. By adding a prohibition against theft, the proposed and final rules allow Forest Service law enforcement officers to assist victims of these type of crimes and disrupt this type of criminal activity on NFS lands.

Comment: Some commenters recommended removing the proposed prohibition on leaving personal property unattended for longer than 24 hours, except in locations where longer periods have been designated, on the grounds that the proposed prohibition was unclear. Some commenters were concerned about the proposed prohibition because they believed that the determination of what constitutes “abandoned property” was subjective. Some commenters suggested a longer timeframe for leaving personal property unattended to accommodate certain types of recreational activities.

Response: Forest Service law enforcement personnel have encountered a noticeable increase in personal property, such as camping and other recreational equipment, being stored on NFS lands. Because the term “abandon” connotes relinquishing property without an intent to reclaim possession, the Forest Service needs a better tool to manage illegally stored personal property on NFS lands. The proposed rule would prohibit leaving personal property unattended for longer than 24 hours, except in locations where longer periods have been designated. Including a specified timeframe for leaving personal property unattended is an objective way to

establish relinquishment of the property without an intent to reclaim it. In the final rule, the Department is extending the timeframe for leaving personal property unattended from 24 hours to 72 hours to accommodate certain types of recreational activities such as hunting, backpacking, and fishing trips and to be consistent with the Forest Service's regulations at 36 CFR 262.12, which establish a 72-hour timeframe for impoundment of property.

Comment: Commenters expressed concern that the proposed revisions to 36 CFR 261.10 governing occupancy and use would inappropriately expand the Forest Service's law enforcement mission with respect to driving under the influence and crimes affecting persons and property.

Response: The Organic Administration Act of 1897 gives the Forest Service broad authority to promulgate regulations governing occupancy and use of NFS lands and to criminally enforce violations of those regulations (16 U.S.C. 551). The proposed and final rules prohibit constructing, placing, or maintaining a sign on NFS lands or facilities without an authorization; abandoning personal property on NFS lands; possession of alcohol by a minor or possession of an open container in a vehicle, where prohibited by State law; and providing an alcoholic beverage to a minor in violation of State law. These revisions in the proposed and final rules promote the Agency's mission to provide for resource protection and address public health and safety on NFS lands and complement enforcement of State law by State and local law enforcement agencies on NFS lands.

Comment: Some commenters requested clarification concerning the proposed revision prohibiting the construction, placement, or maintenance of unauthorized signs on NFS lands or facilities.

Response: Unauthorized signs inhibit the public from fully utilizing NFS lands and can create nuisances and hazards which can inhibit appropriate use of NFS resources. Existing Forest Service regulations at 36 CFR 261.10(a) prohibit constructing, placing, or maintaining certain improvements on NFS lands or facilities without a special use authorization, contract, approved

plan of operations, or other written authorization when such authorization is required. Signs are not listed as a type of improvement that is prohibited without a written authorization.

Accordingly, the proposed and final rules revise 36 CFR 261.10(a) to prohibit constructing, placing, or maintaining a sign on NFS lands or facilities without a written authorization, such as a special use authorization, contract, or approved plan of operations.

Fireworks and Exploding Targets

Comment: Multiple commenters believed that fireworks should be regulated more on NFS lands, that it was necessary to have a prohibition on use of fireworks and exploding targets on NFS lands, and that the Forest Service should strive to prevent fires on NFS lands.

Response: The proposed and final rules enhance fire prevention on NFS lands by moving prohibitions relating to fire that are currently enforceable only through issuance of an order under 36 CFR part 261, subpart B, to the prohibitions in 36 CFR part 261, subpart A, which are generally applicable to NFS lands and enforceable without issuance of an order. These prohibitions ban possession or use of fireworks or other pyrotechnic devices on NFS lands; violation of any State law concerning burning or fires or any State law whose purpose is to prevent or restrict the spread of fire; and operation or use of any internal or external combustion engine without a properly installed and maintained spark-arresting device that meets specified requirements. In addition, the proposed and final rules enhance fire prevention on NFS lands by prohibiting the possession or use of exploding targets on NFS lands.

Controlled Substances and Alcoholic Beverages

Comment: One commenter wondered how proposed prohibitions involving controlled substances would be enforced in States where controlled substances are legal.

Response: It is a violation of Federal law for a person knowingly or intentionally to possess controlled substances (21 U.S.C. 844(a)). Forest Service law enforcement officers enforce 21 U.S.C. 844(a) on NFS lands, and in some circumstances off NFS lands, under the National Forest System Drug Control Act of 1986 (16 U.S.C. 559b–559g). Violations of

21 U.S.C. 844(a) require referral to the appropriate United States Attorney's Office for the filing of a complaint or information and prosecution before a United States District Court judge. In many instances, violations for simple possession of a controlled substance on NFS lands are not prosecuted under 21 U.S.C. 844(a) because they involve small amounts that are insufficient to meet applicable prosecutorial guidelines. The proposed and final rules provide an alternative to proceeding under 21 U.S.C. 844(a) by adding a prohibition against knowingly or intentionally possessing a controlled substance in violation of Federal law. Under this new prohibition, possession of small amounts of a controlled substance can be handled through issuance of a violation notice by a Forest Service law enforcement officer and prosecution before a United States magistrate judge as a Class B misdemeanor. Forest Service law enforcement personnel can continue to refer cases involving larger amounts of controlled substances that meet prosecutorial guidelines to the appropriate United States Attorney's Office.

Comment: Some commenters believed that violations involving controlled substances and alcoholic beverages should be prosecuted in State court and that the Forest Service should limit the scope of revisions to its law enforcement regulations regarding these types of violations. Additionally, some commenters believed that the Forest Service should use existing State law for enforcement of violations involving alcoholic beverages.

Response: Violations of Federal law on or affecting NFS lands, including violations of Federal laws involving controlled substances and prohibitions in the Forest Service's law enforcement regulations at 36 CFR part 261, subpart A, and orders issued under 36 CFR part 261, subpart B, are prosecuted in Federal court, not State court (16 U.S.C. 551). Forest Service law enforcement officers may enforce State law in certain circumstances. Under 16 U.S.C. 553, Forest Service law enforcement officers may aid in the enforcement of State laws pertaining to stock, fires, and fish and game on NFS lands if authorized by State officials. Under 16 U.S.C. 559d(5), Forest Service law enforcement officers may accept designations of law enforcement authority from State and local governmental agencies for purposes of cooperating in multi-

agency investigations of violations of the Controlled Substances Act and other offenses committed in the course of or in connection with those violations. Under 16 U.S.C. 559g(c), Forest Service law enforcement officers may accept designations of law enforcement authority from State and local governmental agencies for purposes of cooperating with those agencies in investigation and enforcement if it is mutually beneficial and the Forest Service and the cooperating agency have entered into a memorandum of understanding or cooperative agreement. Some State statutes authorize peace officers to take limited actions in response to violations of State law in certain circumstances. When Forest Service law enforcement officers qualify as peace officers under State law, they may enforce State law.

Changes to the Proposed Rule

The Department is extending the timeframe for leaving personal property unattended from 24 hours in the proposed rule to 72 hours in the final rule to accommodate certain types of recreational activities such as hunting, backpacking, and fishing trips and to be consistent with the Forest Service's regulations at 36 CFR 262.12, which establish a 72-hour timeframe for impoundment of property.

Regulatory Certifications

Regulatory Planning and Review

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will determine whether a regulatory action is significant as defined by E.O. 12866 and will review significant regulatory actions. OIRA has determined that this final rule is not significant as defined by E.O. 12866. E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Department has developed the final rule consistent with E.O. 13563.

Congressional Review Act

Pursuant to subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), OIRA has designated this final rule as not a major rule as defined by 5 U.S.C. 804(2).

National Environmental Policy Act

The final rule streamlines enforcement of criminal prohibitions in existing regulations by providing for enforcement without issuance of an order and enhances consistency of the Forest Service's law enforcement practices with those of State and other Federal land management agencies. Agency regulations at 36 CFR 220.6(d)(2) exclude from documentation in an environmental assessment or environmental impact statement "rules, regulations, or policies to establish service-wide administrative procedures, program processes, or instructions." The Department has concluded that this final rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Regulatory Flexibility Act Analysis

The Department has considered the final rule under the Regulatory Flexibility Act (RFA), 5 U.S.C. 602 *et seq.* The final rule streamlines enforcement of criminal prohibitions in existing regulations by providing for enforcement without issuance of an order and enhances consistency of the Forest Service's law enforcement practices with those of State and other Federal land management agencies. The final rule will not have economic effects on small entities as defined by the RFA. Therefore, the Department has determined that this final rule will not have a significant economic impact on a substantial number of small entities as defined by the RFA.

Federalism

The Department has considered the final rule under the requirements of E.O. 13132, *Federalism*. The Department has determined that the final rule conforms with the federalism principles set out in this E.O.; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, on the relationship between the Federal Government

and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Department has concluded that the final rule does not have federalism implications.

Consultation and Coordination with Indian Tribal Governments

E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*, requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The final rule streamlines enforcement of criminal prohibitions in existing regulations by providing for enforcement without issuance of an order and enhances consistency of the Forest Service's law enforcement practices with those of State and other Federal land management agencies. The Department has reviewed this final rule in accordance with the requirements of E.O. 13175 and has determined that this final rule will not have substantial direct effects on Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Therefore, consultation and coordination with Indian Tribal governments is not required for this final rule.

Environmental Justice

The Department has considered the final rule under the requirements of E.O. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, and E.O. 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*. The Department has determined that the final rule is not expected to result in disproportionate and adverse impacts on communities with environmental justice concerns or the

exclusion of communities with environmental justice concerns from meaningful involvement in decisionmaking.

Family Policymaking Assessment

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. No. 105-277), requires Federal agencies to issue a Family Policymaking Assessment for a rule that may affect family wellbeing. The final rule will have no impact on the autonomy or integrity of the family as an institution. Accordingly, the Department has concluded that it is not necessary to prepare a Family Policymaking Assessment for the final rule.

Takings Implications

The Department has analyzed the final rule in accordance with the principles and criteria in E.O. 12630, *Governmental Actions and Interference with Constitutionally Protect Property Rights*. The Department has determined that the final rule will not pose the risk of a taking of private property.

Energy Effects

The Department has reviewed the final rule under E.O. 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*. The Department has determined that the final rule will not constitute a significant energy action as defined in E.O. 13211.

Civil Justice Reform

The Department has analyzed the final rule in accordance with the principles and criteria in E.O. 12988, *Civil Justice Reform*. Upon publication of the final rule, (1) all State and local laws and regulations that conflict with the final rule or that impede its full implementation will be preempted; (2) no retroactive effect will be given to this final rule; and (3) it will not require administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538),

the Department has assessed the effects of the final rule on State, local, and Tribal governments and the private sector. The final rule will not compel the expenditure of \$100 million or more, adjusted annually for inflation, in any 1 year by State, local, and Tribal governments in the aggregate or by the private sector. Therefore, a statement under section 202 of the Act is not required.

Paperwork Reduction Act

The final rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 36 CFR part 261

Law enforcement, National forests.

Therefore, for the reasons set forth in the preamble, the Department is amending chapter II of title 36 of the Code of Federal Regulations as follows:

PART 261—PROHIBITIONS

1. The authority citation for part 261 continues to read:

Authority: 7 U.S.C. 1011(f); 16 U.S.C. 460l-6d, 472, 551, 620(f), 1133(c)-(d)(1), 1246(i).

2. Revise § 261.1b to read as follows:

§ 261.1b Penalty.

Unless otherwise provided by law, the punishment for violation of any prohibition in or order issued under this part shall be imprisonment of not more than six months or a fine in accordance with the applicable provisions of 18 U.S.C. 3571 or both.

3. Amend § 261.2 by:

- a. Adding in alphabetical order definitions for “Alcoholic beverage” and “Controlled substance”;
- b. Revising the definition for “Developed recreation site”; and
- c. Adding in alphabetical order definitions for “Exploding target”, “Firework”, “Pyrotechnic device”, and “Recreation site”.

The additions and revision read as follows:

§ 261.2 Definitions.

* * * * *

Alcoholic beverage means alcoholic beverage as defined by State law.

* * * * *

Controlled substance means a drug or other substance, its immediate precursor included in schedules I, II, III, IV, or V of section 202 of the Controlled Substance Act (21 U.S.C. 812), or a drug or other substance added to these schedules under the terms of the Act.

* * * * *

Developed recreation site has the same meaning as in chapter 50 of Forest Service Handbook 2309.13.

* * * * *

Exploding target means a binary explosive consisting of two separate components (usually an oxidizer like ammonium nitrate and a fuel such as aluminum or another metal) that is designed to explode when struck by a bullet.

* * * * *

Firework has the same meaning as in 27 CFR 555.11 or a successor regulation.

* * * * *

Pyrotechnic device has the same meaning as the term “articles pyrotechnic” in 27 CFR 555.11 or a successor regulation.

* * * * *

Recreation site has the same meaning as in chapter 50 of Forest Service Handbook 2309.13.

* * * * *

4. Revise § 261.4 to read as follows:

§ 261.4 Disorderly conduct.

The following are prohibited when committed intentionally to cause, or recklessly to create a substantial risk of causing, public alarm, nuisance, jeopardy, or violence:

(a) Engaging in fighting or any threatening or other violent behavior.

(b) Making an utterance or performing an act that is obscene or threatening or that is made or performed in a manner that is likely to inflict injury or incite an immediate breach of peace.

(c) Making noise that is unreasonable considering the nature and purpose of the conduct, location, and time.

5. Amend § 261.5 by adding paragraphs (h) through (j) to read as follows:

§ 261.5 Fire.

* * * * *

(h) Possessing or using an exploding target or any kind of firework or other pyrotechnic device.

(i) Violating any State law concerning burning or fires or any State law that is for the purpose of preventing or restricting the spread of fire.

(j) Operating or using any internal or external combustion engine without a spark arresting device that is properly installed, maintained, and in effective working order in accordance with USDA Forest Service Standard 5100–1.

6. Amend § 261.9 by adding paragraph (j) to read as follows:

§ 261.9 Property.

* * * * *

(j) Damaging or removing without authorization any personal property that belongs to another person.

7. Amend § 261.10 by revising paragraphs (a), (e), (o), and (p) and adding paragraphs (q) through (s) to read as follows:

§ 261.10 Occupancy and use.

* * * * *

(a) Constructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure, communications equipment, sign, or other improvement on National Forest System lands or facilities or making a significant surface disturbance on National Forest System lands without a special use authorization, contract, approved plan of operations, or other written authorization when that written authorization is required.

* * * * *

(e) Leaving personal property unattended for longer than 72 hours, except in locations where longer periods have been designated.

* * * * *

(o) Use or occupancy of National Forest System lands or facilities without a special use authorization, contract, approved plan of operations, or other written authorization when that written authorization is required.

(p) Knowingly or intentionally possessing any controlled substance in violation of Federal law.

(q) Knowingly or intentionally possessing any drug paraphernalia in violation of State law.

(r) Possessing any alcoholic beverage in violation of State law.

(s) Providing any alcoholic beverage to a minor in violation of State law.

8. Amend § 261.12 by adding paragraphs (e) through (i) to read as follows:

§ 261.12 National Forest System roads and trails.

* * * * *

(e) Operating a motor vehicle without a valid license as required by State law.

(f) Operating a motor vehicle while under the influence of an alcoholic beverage or a controlled substance in violation of State law.

(g) Operating a motor vehicle in violation of any State law other than those described in paragraph (e) or (f) of this section.

(h) Operating a vehicle or motor vehicle carelessly, recklessly, or in a manner or at a speed that would endanger or be likely to endanger any person or property.

(i) Operating a motor vehicle in violation of a posted sign or traffic control device.

9. Amend § 261.15 by revising paragraphs (e) and (g) to read as follows:

§ 261.15 Use of vehicles off roads.

* * * * *

(e) While under the influence of an alcoholic beverage or a controlled substance in violation of State law.

* * * * *

(g) Carelessly, recklessly, or in a manner or at a speed that endangers or is likely to endanger any person or property.

* * * * *

10. Amend § 261.50 by revising paragraphs (a) and (b) to read as follows:

§ 261.50 Orders.

(a) The Chief, each Regional Forester, each Experiment Station Director, the head of each administrative unit, their deputies, or persons acting in these positions may issue orders, consistent with their delegations of authority, that close or restrict the use of described areas by applying the prohibitions authorized in this subpart, individually or in combination.

(b) The Chief, each Regional Forester, each Experiment Station Director, the head of each administrative unit, their deputies, or persons acting in these positions may issue orders, consistent with their delegations of authority, that close or restrict the use of any National Forest System road or National Forest System trail.

* * * * *

11. Revise § 261.52 to read as follows:

§ 261.52 Fire.

When provided by an order, the following are prohibited:

(a) Building, maintaining, attending, or using a fire, campfire, or stove fire.

(b) Using an explosive.

(c) Smoking.

(d) Smoking, except within an enclosed vehicle or building, at a recreation site, or while stopped in an area at least 3 feet in diameter that is barren or cleared of all flammable material.

(e) Entering or being in an area.

(f) Entering an area without any firefighting tool prescribed by the order.

(g) Operating an internal combustion engine.

(h) Welding or operating an acetylene or other torch with open flame.

12. Amend § 261.53 by revising the section heading and introductory text to read as follows:

§ 261.53 Special closures or restrictions.

When provided by an order, it is prohibited to go into or be in any area which is closed or restricted for the protection of:

* * * * *

13. Amend § 261.54 by removing paragraph (f).

14. Amend § 261.58 by revising paragraphs (b), (d), and (bb) to read as follows:

§ 261.58 Occupancy and use.

* * * * *

(b) Entering or using a recreation site or portion thereof.

* * * * *

(d) Occupying a recreation site with prohibited camping equipment prescribed by the order.

* * * * *

(bb) Possessing an alcoholic beverage.

* * * * *

Homer Wilkes,

Under Secretary,

Natural Resources and Environment.

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