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**FSM 2700 - SPECIAL USES MANAGEMENT**

**CHAPTER 2770 - FEDERAL POWER ACT PROJECTS**

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**Approved:** TOM L. THOMPSON  
Deputy Chief for National Forest System

**Date Approved:** 09/30/2003

**Posting Instructions:** Amendments are numbered consecutively by title and calendar year. Post by document; remove the entire document and replace it with this amendment. Retain this transmittal as the first page(s) of this document. The last amendment to this title was 2700-2003-1 to 2720.

<b>New Document</b>	2770	15 Pages
<b>Superseded Document(s) by Issuance Number and Effective Date</b>	2770 (Amendment 2700-90-1, 06/01/90)	9 Pages

**Digest:**

A notice of issuance of this amendment was published in the Federal Register on October 14, 2003 (68 FR 59160).

2770.1 - Reorganizes the authority section and expands the narrative description in paragraph 1 for the Federal Power Act of June 5, 1920 (formerly para. 3); expands the narrative description in paragraph 2 for the Wild and Scenic River Act of October 2, 1968; and expands the narrative description in paragraph 3 for the Federal Land Policy and Management Act (FLPMA) of October 21, 1976 (formerly para. 1). Adds a new paragraph 4 referencing the Energy Policy Act

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**Digest--Continued:**

of October 24, 1992, as an authority that amended FLPMA and the need for a Forest Service authorization for the continued operation of hydropower projects licensed or exempted by FERC as of October 24, 1992. Adds a new paragraph 5 (formerly para. 4) revising the cross-reference to delegations of authority to the Chief on hydropower matters in Title 7, Code of Federal Regulations, from section 2.60(a)(22) to section 2.60(a)(28).

2770.2 - Corrects a typographical error by replacing “protect or effectively utilize” to “protect and effectively utilize.”

2770.3 - Revises, reorganizes, and enumerates paragraphs in this section setting out agency policy regarding the role of the Forest Service in preparation of environmental documentation for processing hydropower licensing applications.

Paragraph 10 sets out revised policy that the Forest Service participate with FERC in the preparation of needed environmental documentation, and paragraph 11 sets out policy that the Forest Service coordinate with FERC to provide information and rationale to support 4(e) conditions, 10(a) recommendations, or other conditions contained in FERC environmental analysis; this direction set out in paragraphs 10 and 11 revises the policy previously contained in the unnumbered third paragraph of this section which required the Forest Service to provide environmental documentation.

Paragraph 12 adds direction for the Forest Service to encourage project owners of unlicensed projects on National Forest System lands to obtain a determination from FERC regarding jurisdiction under the Federal Power Act.

Direction previously set out in the unnumbered fifth paragraph of this section has been removed; this direction required the Forest Service to issue special use authorizations for all hydropower projects licensed by the FERC and stated that only the Chief may deny a special use authorization for a FERC-licensed hydropower project and that the Regional Forester may, for compelling reasons and with appropriate documentation, recommend denial action to the Chief.

2770.4 - In paragraph 1, changes the responsibility for signing reports and making recommendations for approval or denial of projects proposed in designated wilderness areas or other special areas requiring Presidential approval from the Associate Deputy Chief to the Deputy Chief, National Forest System. Removes the former paragraph 2f requiring the Director of Lands, Washington Office, to forward to FERC those Regional Forester decisions involving section 4(e) of the Federal Power Act. In paragraph 3a, removes the former requirement that Regional Foresters in Regions 2, 3, 8, 9, and 10 transmit reports pursuant to section 4(e) of the Federal Power Act to the Washington Office, Director of Lands for forwarding to FERC.

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**Digest--Continued:**

2771 - Revises direction to clarify when a Forest Service special use authorization is or is not required for hydropower projects involving the use of National Forest System lands pursuant to the Federal Land Policy and Management Act, as amended by the Energy Policy Act.

2772.1 - 2772.12 - Revises direction on the role of the Forest Service in environmental analysis and documentation for hydropower projects involving National Forest System lands and resources; FSM 2772.11 clarifies that FERC is usually the Federal lead agency for licensed projects when an environmental impact statement is to be prepared, and FSM 2772.12 states that the Forest Service is responsible for NEPA compliance for hydropower projects on National Forest System lands exempt from a FERC license.

2775.3 - Revises direction concerning hydropower projects in “designated” and “study” Wild and Scenic Rivers Act areas on National Forest System lands.

2775.32 - Adds new direction concerning hydropower projects in Forest Service identified “designated” and “study” wild and scenic rivers areas on National Forest System lands.

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This chapter covers the review of proposals and the granting of special use authorizations for those hydropower projects and primary transmission lines subject to licensing by the Federal Energy Regulatory Commission (FERC) that are partly or wholly on National Forest System land. This chapter also covers the Forest Service-Federal Energy Regulatory Commission relationship during project planning, construction, and operation. For related direction, refer to FSM 7500 for dam safety, FSM 2600 for fish and wildlife, FSM 2520 for riparian areas, FSM 2320 for wilderness areas, FSM 2350 for wild and scenic river areas, and FSM 2540 for instream flow coordination requirements.

**2770.1 - Authority**

1. The Federal Power Act of June 5, 1920 (16 U.S.C. 791a, 797, 803, 806-808, 814, 818, 821, 823a-b, 824i-k). This act authorizes the Federal Energy Regulatory Commission (FERC) to grant licenses for hydropower projects that affect: the navigable waters and lands of the United States; surplus water from a Government dam; and interstate commerce (interstate power line). When a project is located on National Forest System lands, section 4(e) of the act authorizes the Forest Service to impose mandatory conditions in the FERC license for a hydropower project. When a project is not located on National Forest System lands, but affects National Forest System lands and resources, the Forest Service may make recommendations to FERC under section 10(a) of the act to mitigate impacts or enhance natural resources.

2. Wild and Scenic Rivers Act of October 2, 1968 (82 Stat. 906; 16 U.S.C. 1278). This act authorizes the Forest Service, acting for the Secretary of Agriculture, to determine the acceptability of projects within and upstream, downstream, or on a stream tributary to wild and scenic rivers designated under section 3(a) of the act; and wild and scenic study rivers designated under section 5(a) of the act. Section 7(a) directs the Forest Service to determine whether a proposed project within a designated river corridor would be on or directly affecting a proposed project located upstream, downstream, or on a stream tributary would invade the designated river area or unreasonably diminish its scenic, recreational, fish, or wildlife values present at date of designation. The same protection is provided to a section 5(a) study river with the exception that project proposals upstream, downstream, or on a stream tributary may not invade the study river area or diminish its scenic, recreational, fish, or wildlife values present at date of designation for study.

3. Federal Land Policy and Management Act (FLPMA) of October 21, 1976, as amended (43 U.S.C. 1761-1771). Title V of this act authorizes the Secretary of Agriculture to issue, renew, or grant authorizations to occupy, use, or traverse National Forest System lands for the generation, transmission, and distribution of electric power.

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4. Energy Policy Act of October 24, 1992 (106 Stat. 2776; 43 U.S.C. 1761(d)). This act amends section 501 of FLPMA by providing that Forest Service authorizations are not required for the continued operation of projects licensed or exempted by FERC as of October 24, 1992, unless prior to that time, all or part of the project had been under a FLPMA act authorization or additional National Forest System lands were proposed to be added to the licensed or exempted project area.

5. Title 7, Code of Federal Regulations, Section 2.60(a)(28). Delegates to the Chief the authority to represent the U. S. Department of Agriculture in all matters relating to responsibilities and authorities under the Federal Power Act.

### **2770.2 - Objective**

To encourage hydropower production where it is compatible with National Forest purposes and ensure that the planning, construction, and operation of hydropower projects protect and effectively utilize National Forest System lands and resources.

### **2770.3 - Policy**

1. Consider energy potential a National Forest System resource in arriving at management decisions concerning proposed hydropower projects.

2. Respond to the Federal Energy Regulatory Commission's (FERC) notice of acceptance of a license application with a report pursuant to section 4(e) of the Federal Power Act of October 24, 1992 (43 U.S.C 1761(d)) for any project that occupies National Forest System land. See FSH 2709.15, chapter 50 for additional direction in responding to FERC license applications.

3. Provide FERC with a statement of the conclusions as to the project's consistency or interference with National Forest purposes and the project's consistency with the applicable land management plan. Identify the nature and extent of any significant inconsistency or interference.

4. Coordinate with FERC and other Federal and State agencies, as appropriate, in determining the license conditions necessary for the protection and utilization of National Forest System lands and resources. Transmit to FERC those section 4(e) license conditions the Forest Service considers necessary to mitigate effects on National Forest System lands and resources that are directly attributable to project operations and maintenance. Section 4(e) conditions shall be:

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- a. Necessary to protect and utilize National Forest System lands and resources; these conditions must be clearly described or guided by the applicable land management plan and authorities;
  - b. Capable of achieving the desired results and supported by substantial evidence regarding their effectiveness; and
  - c. Directly attributed to the operation, maintenance, and/or occupancy of the project on National Forest System lands.
5. In a licensing proceeding for an existing project, do not require a licensee under section 4(e) to mitigate for impacts associated with original inundation of National Forest System lands authorized under the current license.
  6. Coordinate with other Federal and State agencies that have the authority for mandatory license conditions to achieve consistency and avoid conflicting license conditions.
  7. Coordinate with the license applicant(s), Federal and State authorities, and, where appropriate, Tribal and local governments and other interested parties to develop mutually agreed upon license conditions.
  8. Participate in FERC licensing to reduce delays and minimize the need for post-licensing data collection and analyses and to provide information, as appropriate, for other agencies to consider in fulfilling their responsibilities in project licensing.
  9. Provide additional license conditions to FERC as recommendations under section 10(a) of the Federal Power Act. Such additional license conditions may include mitigation or enhancement measures contained in settlement agreements applicable to National Forest System lands or resources.
  10. Participate with FERC in the preparation of needed environmental documentation such that on-the-ground activities on National Forest System land required by the license or license amendment may be implemented without additional environmental review and documentation required and/or performed by the Forest Service.
  11. Coordinate with FERC to provide information and rationale to support 4(e) conditions, 10(a) recommendations, or other conditions contained in FERC environmental analyses. File license conditions and supporting analyses with FERC in a timely manner to meet procedural deadlines.
  12. Encourage the project owners of unlicensed hydropower projects on National Forest System lands to obtain a determination from FERC regarding jurisdiction under the Federal Power Act.

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**2770.4 - Responsibility**

1. Deputy Chief, National Forest System. It is the responsibility of the Deputy Chief for National Forest System to:

- a. Sign reports and correspondence that make recommendations for approval or denial of projects proposed in designated wilderness areas or other special areas which require Presidential approval.
- b. Approve for forwarding to the Department those recommendations that the Forest Service considers to be in the public interest.

2. Director of Lands, Washington Office. It is the responsibility of the Director of Lands, Washington Office, to:

- a. Sign reports and correspondence to the Federal Energy Regulatory Commission (FERC) relating to activities under the Federal Power Act.
- b. Represent the Department of Agriculture in contacts with FERC at the Washington level in matters relating to hydropower projects (FSM 1043).
- c. Coordinate the review of matters pertaining to hydropower projects with other agencies of the Department.
- d. Schedule the assignment of Forest Service personnel as witnesses in FERC hearings, secure Office of the General Counsel review, and approve testimony prior to its being filed with FERC.

3. Regional Forester. It is the responsibility of the Regional Forester to:

- a. Sign reports and correspondence with the FERC on behalf of the Department of Agriculture relating to licensing activities under the Federal Power Act, as amended, including reports under section 4(e) of the Federal Power Act. This authority may not be delegated.
- b. Establish Region-wide guidelines for analysis and coordination of hydropower projects on National Forest System lands.
- c. Coordinate with FERC staff as necessary.
- d. Maintain information base for use in managing Federal Power Act (FPA) project activities.

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- e. Coordinate review of applications, field investigations, and preparation of draft 4(e) reports for FERC licenses.
- f. Respond directly to FERC in behalf of the Department of Agriculture on applications for preliminary permits and exemptions.
- g. Establish procedures to contact licensees or special use holders at least 5 years prior to license or special use expiration to ascertain their intentions concerning continuation of the project.
- h. Prepare, or assist FERC in preparing, for approval by the Deputy Chief, National Forest System, the environmental impact statement necessary to recommend Presidential action on projects proposed in wilderness areas.
- i. Sign and transmit determinations under section 7 of the Wild and Scenic Rivers Act for hydropower projects. This authority may not be delegated.
- j. As appropriate, authorize Forest Supervisors to correspond directly with FERC on all administrative and construction matters during construction and operation of a project.
- k. Sign special use authorizations for hydropower projects after the project has been licensed or exempted from licensing by FERC. The authority to sign special use permits for these projects may be redelegated to the Forest Supervisor, but may not be redelegated by the Forest Supervisor.

**2771 - SPECIAL USE AUTHORIZATION**

For additional direction on special use authorizations, see FSH 2709.11 and FSH 2709.15, chapter 60.

The Federal Land Policy and Management Act (FLPMA) of October 21, 1976 (43 U.S.C. 1761-1771) authorizes the Forest Service to issue special use authorizations for hydropower projects located on National Forest System lands. However, the Energy Policy Act of October 24, 1992 (43 U.S.C. 1761(d)) amended FLPMA by providing that a special use authorization is not required for any existing project, whether licensed or exempted, that was not subject to an authorization under FLPMA prior to October 24, 1992. Many projects in existence on October 24, 1992, did not have FLPMA special use authorizations and, therefore, are exempt from a Forest Service special use authorization requirement in the future. A special use authorization is required for new hydropower projects proposed after October 24, 1992.

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Issue a special use authorization for hydropower projects:

1. In existence on October 24, 1992, and subject to the Forest Service authorization requirement; or
2. Proposed after October 24, 1992, only after the project is licensed or exempted from licensing by FERC.

**2771.1 - Coordination With the License**

Use the following to provide a reasonable and orderly phase-in of Federal Land Policy and Management Act (FLPMA) requirements:

1. License Issued Prior to FLPMA. A licensee does not need a Forest Service special use authorization for project facilities authorized by a Federal Power Commission (FPC) license issued prior to October 21, 1976. A license issued prior to FLPMA by the FPC (now FERC) under the Federal Power Act serves as authorization to occupy Federal lands.
2. License Issued Between October 21, 1976, and July 6, 1980. A holder of a FPC/FERC license or license amendment issued between October 21, 1976, and July 6, 1980, must have a Forest Service special use authorization if advised to do so by the Forest Service during that period (or if a Forest Service special use authorization was actually issued during that period).
3. License Issued After July 6, 1980. A holder of a FERC license issued after July 6, 1980, must have a Forest Service special use authorization. This includes original and new (reissued) licenses unless the requirement for a permit was waived by the Forest Service during the period October 21, 1976, and July 6, 1980. If a Forest Service special use authorization already exists, amend it to include the added lands.
4. License Amendments After July 6, 1980, of Licenses Issued Prior to FLPMA. A special use authorization is required for the use of National Forest System lands affected by a license amendment issued after July 6, 1980, even though the current license was issued prior to passage of FLPMA.

**2771.2 - Content**

Special use authorizations shall authorize the occupancy and use of National Forest lands and shall include those conditions and requirements that are not included in the license but which are necessary for comprehensive and compatible use of land, water, and energy resources consistent with the purposes for which the National Forests were created or acquired.

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### **2771.3 - Term**

For FERC licensed projects, issue special use authorization for the same term as the license. For FERC exempted projects, an authorized officer shall determine the term of the permit. Temporary facilities may be authorized for a shorter time period.

### **2772 - ANALYSIS**

#### **2772.1 - Environmental Analysis and Documentation**

For additional direction, see FSM 1950, FSH 1909.15, and FSH 2709.15, chapter 30.

#### **2772.11 - Licensed Projects**

The Federal Energy Regulatory Commission (FERC) is responsible for National Environmental Policy Act (NEPA) compliance for projects licensed by FERC. FERC is usually the Federal lead agency for licensed projects when an environmental impact statement (EIS) is to be prepared. It is the responsibility of the authorized officer to request to designate the Forest Service as a cooperating agency when National Forest System lands are affected.

#### **2772.12 - Exempted Projects**

The Forest Service is responsible for NEPA compliance for hydropower projects on National Forest System lands exempt from a FERC license.

#### **2772.2 - Mitigation**

Document those resource losses which can be mitigated under existing laws. Identify alternative methods of mitigating such losses.

### **2773 - FEDERAL ENERGY REGULATORY COMMISSION APPLICATION**

#### **2773.1 - Applications for License**

The Regional Forester shall state the official position of the Department of Agriculture regarding licensing of projects affecting National Forest System lands and resources in the report submitted to the Federal Energy Regulatory Commission (FERC) under the provisions of Section 4(e) of the Federal Power Act (FSH 2709.15, ch. 50). Where appropriate, include comments on the effects on other programs of the secretary.

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### **2773.2 - Applications for Preliminary Permit**

The Regional Forester shall provide comments on potential problems and concerns and conditions for applications for preliminary permits on projects affecting National Forest System lands and resources. Do not prepare a 4(e) report for a preliminary permit.

### **2773.3 - Applications for Exemption**

The Regional Forester shall identify potential problems and provide comments and recommendations to FERC on applications for exemptions. Incorporate standard and special conditions required on exemptions in the special use authorization. Do not prepare a 4(e) report for an exemption.

### **2773.4 - Requirements Affecting Power Production Capability**

Do not include conditions and requirements affecting power production capability in the Forest Service special use authorization for a FERC licensed project, except where a Federally-owned dam under the jurisdiction of the Forest Service is involved.

## **2774 - COORDINATION**

### **2774.1 - Actions Within Project Boundaries**

Prior to initiating activities or authorizing uses by others on National Forest System lands covered by a hydropower project special use authorization or license, ensure that such activities or uses will not adversely affect project operations or conflict with the terms and conditions of the project special use authorization or license. Prior to granting special use authorizations to third parties, review with the Federal Energy Regulatory Commission (FERC) and affected licensee the proposed non-project uses within the boundaries of licensed projects.

### **2774.2 - Exchange Within Withdrawals**

Exchange or otherwise dispose of lands withdrawn for power purposes within licensed project boundaries only after (1) FERC vacates or amends the withdrawal, opening (restoring) the lands, or (2) FERC makes a determination that the lands may be conveyed subject to a Section 24 (Federal Power Act) reservation in the patent or deed.

### **2774.3 - Removal of Withdrawals**

Petition FERC to release the powersite withdrawal and retract the project boundary from National Forest lands in excess of that actually needed for the project.

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#### **2774.4 - Federal Takeover of Project Facilities**

See FSM 2716.4 and FSM 7530 for directions on Federal takeover of project facilities.

#### **2774.5 - Coordinated Forest Service Administration**

Where a project involves more than one forest or region, the Chief or the appropriate Regional Forester shall designate a lead region or forest to serve as the primary contact for coordination purposes.

### **2775 - SPECIAL AREAS**

#### **2775.1 - Projects in Designated Wilderness Areas**

For additional direction, see FSM 2320.

A new hydropower project may occupy land in a wilderness only if the President approves (16 U.S.C. 1133(d)(4)). The Federal Energy Regulatory Commission (FERC) is responsible for the environmental impact statement (EIS) needed to evaluate proposed licensing of the project. Such an EIS would be prepared with the cooperation of the Forest Service. If the Forest Service determined that the proposal was in the public interest, the Forest Service would submit the EIS, along with its recommendation and proposed regulations, through the Department of Agriculture to the President for a decision. The 4(e) report, then, would be submitted to FERC by the Forest Service if the President approves the project and the associated use of the wilderness. Special use authorization for study and other non-ground-disturbing activities in a wilderness may be issued without Presidential approval.

#### **2775.2 - Projects in Roadless Areas**

Roadless areas include legislatively unreleased RARE II areas, Further Planning Areas, and Congressionally mandated Wilderness Study Areas. Generally, grant special use authorizations in these areas only for study and other non-ground disturbing activities pending implementation of the forest plan. Preferably hold proposals within these areas until the forest plan is approved. If the land use decision must be made earlier, conduct a suitable analysis in compliance with the National Environmental Policy Act.

#### **2775.3 - Projects in Wild and Scenic Rivers Areas**

Any hydropower project-work licensed under the Federal Power Act (FPA) of June 5, 1920 (16 U.S.C. 791(a) et seq.) within the corridor of a river designated as a "wild and scenic river" as provided for in sections 2(a)(ii) and 3(a) of the Wild and Scenic River (W&SR) Act of October 2, 1968 (16 U.S.C. 1278) or a study river as provided for in section 5(a) of the W&SR Act is prohibited. Project proposals upstream, downstream, or on a stream tributary to a designated wild and scenic river may not invade the designated river area or unreasonably

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diminish its scenery, recreation, fish, or wildlife values as present at the date of designation. Project proposals upstream, downstream, or on a stream tributary to a designated study river may not invade the study river area or diminish its scenery, recreation, fish, or wildlife values as present at date of designation for study. The Regional Forester must make this determination on rivers administered by the Department of Agriculture in accordance with section 7 of the W&SR Act prior to issuance of an exemption or license by FERC. See FSM 2354.04 and 2770.4 for delegation of authority for making this determination. See FSH 2709.15, section 54.7 and 36 CFR 297 for further requirements.

**2775.31 - Lands in Conservation Units in Alaska**

Ensure that the streamflow of and transportation on the river are not interfered with or impeded and that the transportation and utility system is located and constructed in an environmentally sound manner where hydropower projects are located within the boundaries of a unit of the National Wild and Scenic Rivers System in Alaska. See Section 1107(b) of the Alaska National Interest Lands Conservation Act (ANILCA) (94 Stat. 2464; 16 U.S.C. 3167).

**2775.32 - Projects on Agency-Identified Wild and Scenic Study Rivers**

Rivers found eligible or suitable for the National Wild and Scenic Rivers System through agency planning processes are not protected by the W&SR Act from proposed hydropower facilities that have potential to affect river values. Forest Service policy is to protect rivers under study for suitability or inclusion in the National Wild and Scenic Rivers System by managing those lands to protect the river's free-flowing condition, outstandingly remarkable value(s), and classification as long as the river is considered either eligible or suitable for inclusion in the National Wild and Scenic Rivers System.

**2775.4 - Projects in Research Natural Areas**

In general, any hydropower facility would be incompatible with the purposes of a research natural area (RNA); therefore, line officers shall not issue a special use authorization for a project which includes land within an RNA boundary (FSM 4063). When the Regional Forester feels that the hydropower values that would be foregone are of greater public benefit than keeping the RNA fully protected, the Regional Forester may request, with Station Director concurrence, reconsideration or modification by the Chief of the designation order establishing the RNA.

Do not issue an investigation special use authorization for a RNA; however, a non-ground disturbing investigation special use authorization may be issued in the following situations (1) The RNA's management plan allows actions which would include or be similar to those proposed by the hydropower project, (2) there would be no direct or indirect modification to the ecological processes of the RNA such as a tunnel under the RNA, or (3) where the Regional Forester anticipates that a proposed hydropower development may have significant public benefits.

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Issue no project special use authorization for candidate RNA's until the land management planning decision is implemented. Line officers may issue investigation special use authorizations for candidate RNA's where no ground disturbance will take place.

Coordinate the issuance of any special use authorizing actions within the RNA with the Research Station Director.

**2775.5 - Projects in Other Special Areas**

There may be other special areas established by the forest plan or unit plan, or legislation, where the Forest Service may determine that hydropower development would not be compatible. These special areas may include:

1. Special interest areas, such as scenic, geological, botanical, zoological, and paleontological areas (FSM 2362).
2. Cultural resources (FSM 2361).
3. National scenic or historic trails (FSM 2353.4).
4. Other special land allocations such as National recreation areas established through the forest plan or other procedure where hydropower development would be incompatible.

Issue non-ground disturbing investigation authorizations for future hydropower development that could be incompatible with other resources or if the proposal is in a study area. Where the hydropower use is incompatible with the special land allocation for the affected area and the effects cannot be adequately mitigated, inform FERC that the proposal is inconsistent and would interfere with National Forest purposes (FSH 2709.15, sec. 54).

**2775.6 - Projects in State-Designated Special Areas**

The States may designate special areas, such as State wild and scenic rivers, wild trout streams, and State game refuges, which may include National Forest land. A State may have passed laws that prohibit State permits for hydropower projects on these special areas, but these laws are not binding on Federally authorized projects. However, in the spirit of cooperation, give them very careful analysis when considering projects which may impact them. Under section 4(e) of the Federal Power Act, the Forest Service is not authorized to condition the license to ensure protection of the State's designated special areas. However, the Forest Service and the State may request that such protection be provided by FERC.