



## DEPARTMENT OF AGRICULTURE

### Forest Service

### 36 CFR Part 254

**RIN: 0596-AD41**

### Conveyance of Small Tracts

**AGENCY:** Forest Service, USDA.

**ACTION:** Final rule.

---

**SUMMARY:** The United States Department of Agriculture (USDA), Forest Service is issuing this final rule to implement certain changes to the Small Tracts Act, which was enacted in the Agriculture Improvement Act of 2018, also known as the 2018 Farm Bill. These statutory changes create two new categories of lands eligible for conveyance outside of the National Forest System under the Small Tracts Act: parcels 40 acres or less that are physically isolated, inaccessible, or have lost National Forest System character; and parcels of ten acres or less that are not eligible for conveyance under previous eligibility conditions and are encroached on by a permanent habitable improvement for which there is no evidence that the encroachment was intentional or negligent.

**DATES:** This final rule is effective **[insert date 30 days from date of publication in the *FEDERAL REGISTER*]**.

**ADDRESSES:** Information on this final rule may be obtained via written request addressed to the Director, Lands and Realty Management, USDA Forest Service, 201 14<sup>th</sup> Street Southwest, Washington, DC 20250-1124 or by email to [SM.FS.WO\\_LandStaff@usda.gov](mailto:SM.FS.WO_LandStaff@usda.gov).

**FOR FURTHER INFORMATION CONTACT:** Brad Tait, Lands Staff, by phone at

971-806-2199, or via email at *bradley.tait@usda.gov*. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

Public Law 97-465, commonly known as the Small Tracts Act (16 U.S.C. 521c-521i), was enacted in 1983 to help the Forest Service resolve land disputes and boundary management problems for parcels that generally were small in scale (less than ten acres) with land values that did not exceed \$150,000. Eligible lands for sale, exchange, or interchange included National Forest System lands encumbered by an encroachment like a house or fence; roads or road rights-of-way in excess of Forest Service transportation needs; and “mineral survey fractions,” or small parcels of National Forest System lands interspersed with or adjacent to lands transferred out of Federal ownership under mining laws.

### **Discussion of Amendments to the Small Tracts Act**

The Small Tracts Act was amended by Section 8621 of the Agriculture Improvement Act of 2018, also known as the 2018 Farm Bill (Pub. L. 115-334). The changes to the Small Tracts Act required by the Agriculture Improvement Act of 2018 are being implemented in two phases. The first phase, implementing statutory revisions that did not entail the exercise of agency discretion, was accomplished by revisions to 36 CFR part 254 by the final rule published in the **Federal Register** without notice and comment on February 13, 2020 (85 FR 8180). The second phase, implementing changes

that may entail an exercise of agency discretion, is accomplished by this final rule.

The Agriculture Improvement Act of 2018 added two new paragraphs to the Small Tracts Act Section 3 (16 U.S.C. 521e) to resolve by conveyance certain encroachment, trespass, and boundary management problems: paragraph (4) (16 U.S.C. 521e(4)), adding a limited conveyance authority for parcels of 40 acres or less that are determined by the Secretary of Agriculture (hereafter “Secretary”) to be physically isolated from other Federal lands, to be inaccessible, or to have lost National Forest character; and paragraph (5) (16 U.S.C. 521e(5)), addressing encroachments by permanent habitable improvements on parcels of 10 acres or less. This final rule implements paragraph (4) by adding a new 36 CFR 254.37, and implements paragraph (5) by adding a new paragraph (b) to 36 CFR 254.32. These amendments to the Small Tracts Act are expected to provide the Forest Service with more flexibility for resolving property conflicts with private landowners, reduce the time and expense arising from a protracted boundary dispute, and alleviate management burden and expense to the Forest Service.

Rulemaking is required for these specific amendments because Section 6 of the Small Tracts Act (16 U.S.C. 521(h)) provides that “[t]he Secretary shall issue regulations to carry out the provisions of this Act, including specification of . . . criteria which shall be used in making the determination as to what constitutes the public interest.” The public interest determination in § 254.36 will apply to the new paragraph 254.32(b) and new § 254.37 created by this final rule.

A previous rule published on February 13, 2020 (85 FR 8180), added a new paragraph (c) to 36 CFR 254.32. As noted above, this final rule published **insert date of**

**publication in the FEDERAL REGISTER]** revises 36 CFR 254.32 to add a new paragraph (b); accordingly, it redesignates existing paragraph (b) as paragraph (c), which in turn redesignates paragraph (c), added by the previous rule, as paragraph (d). The previous rule also added 36 CFR 254.38. This final rule published **[insert date of publication in the FEDERAL REGISTER]** revises the citations to other rule provisions in 36 CFR 254.38(a) from 36 CFR 254.32(c) to 36 CFR 254.32(d), consistent with the revisions to § 254.32 made by this final rule, and revises 36 CFR 254.38(b) to add a subparagraph (3).

## **SUMMARY OF PUBLIC COMMENTS AND RESPONSES**

### *Overview*

On February 26, 2020, the Forest Service published a proposed rule implementing provisions within Section 8621 of the Agriculture Improvement Act of 2018 in the **Federal Register** (85 FR 11041) with a 60-day comment period ending April 27, 2020. The agency received 18 comments, with approximately half of the respondents expressing support of the proposed rule and half expressing criticism. Comments in support of the rule tended to be general in nature: some respondents described specific scenarios in which they would like to see the rule applied to resolve a management issue, or alternative ways to spend funds received from eligible conveyances. Several critical comments also were general in nature, or raised philosophical, rather than substantive, issues with the rule. Some critical comments did raise substantive concerns regarding specific applications of the rule that the Forest Service plans to address in directives instructing field-level personnel in how to implement this rule.

### *General Comments*

*Comment:* One respondent expressed concern that the regulations place no limitations on the number of conveyances to a single landowner. There were also concerns that a single parcel that is too large to qualify could be divided into smaller qualifying parcels.

*Response:* These concerns are currently addressed in 36 CFR 254.35(g), which limits the area conveyed to the “minimum necessary to resolve encroachment or land management problems.”

*Comment:* One respondent took issue with the acreage limitations contained in the rule, stating that the limitations do not take into account small acreage discrepancies that could disqualify otherwise eligible parcels.

*Response:* Congress set clear acreage limitations within the 2018 Farm Bill amendments to the Small Tracts Act, which the Forest Service is required to follow.

*Comment:* One respondent supported the expanded conveyance categories, but preferred that the money generated go towards deferred maintenance rather than new land acquisition.

*Response:* Congress made clear that money generated from eligible conveyances be deposited into a Sisk Act account, which limits expenditures to the acquisition of land within the same State the funds were generated.

*Comment:* One respondent raised concerns that the rule would encourage squatting, or adverse possession, on Forest Service land in order eventually to gain ownership.

*Response:* Squatting or other types of adverse possession are generally not applicable against the Federal government. While the Small Tracts Act provides an avenue for private landowners to gain ownership of Federal land underlying encroachments, Forest Service officials are required to consider “factual evidence of claim of title or color of

title” in reaching a conveyance decision, among other factors and considerations.

*Comment:* One respondent raised an issue with the maximum parcel sizes allowable for conveyance under the Small Tracts Act.

*Response:* While the Small Tracts Act does specify parcel sizes for some of its conveyance categories, those acreage amounts represent the maximum allowable acreage for such transactions. Actual acreage will be determined on a case-by-case basis in accordance with factual and record evidence provided by the private landowner and will often be smaller than the maximum allowable acreage.

*Comment:* One respondent took issue with the inclusion of the terms “shed” and “hunting blind” in the definition of “permanent habitable improvement” because of the ability to move these structures easily.

*Response:* The Forest Service has removed the terms “shed” and “hunting blind” from the definition of “permanent habitable improvement” in section 254.31 of this final rule, based on the non-permanent and non-habitable nature of such structures.

*Comment:* One respondent generally supported the rule but encouraged the Forest Service to apply the public interest criteria at 36 CFR 254.36 when considering conveyances of parcel 40 acres or less that are physically isolated, inaccessible, or have lost National Forest character.

*Response:* Pursuant to 36 CFR 254.36(b), the Forest Service will apply the public interest criteria at 36 CFR 254.36 to all potential conveyances under the Small Tracts Act.

*Comment:* One respondent stated that the Forest Service should not apply an existing categorical exclusion (CE) under the National Environmental Policy Act (NEPA) that excludes from further analysis in an environmental assessment or environmental impact

statement the “sale or exchange of land or interests in land and resources where the resulting land uses remain essentially the same” to the new category for parcels 40 acres or less that are physically isolated, inaccessible, or have lost National Forest character. The respondent offered three reasons for this: 1) the CE was enacted prior to this 40-acre category and could not take into account properly its environmental effects; 2) the Forest Service has no basis to support a conclusion that the size and scope of the new 40-acre conveyance category will not have significant impacts on the human environment; and 3) the discretion afforded to agency officials to determine whether a parcel has lost National Forest character is too broad to remove it from analysis under NEPA. The respondent also requests that the agency provide more guidance to officials tasked with determining whether a parcel is isolated, inaccessible, or has lost National Forest character.

*Response:* The final rule does not make any changes to the NEPA process. Each conveyance proposed under this new 40-acre category will be examined and subject to an appropriate level of NEPA analysis. Generally, the public will have an opportunity to provide input.

Regarding the request to provide more guidance to officials on what qualifies as isolated, inaccessible, or having lost National Forest character, the agency intends to amend its directives implementing the Small Tracts Act to include guidelines for agency officials to consider when determining whether a parcel meets any of these categories.

*Comment:* One respondent expressed concern that the expansion of categories offered under the Farm Bill amendment to the Small Tracts Act will result in a “death by a thousand paper-cuts” scenario where public forest land is converted to private use at too great of a scale.

*Response:* The Small Tracts Act is considered a relief authority, only to be used in specific instances to resolve specific title claims, innocent encroachments, and management inefficiencies (*see* Forest Service Handbook 5509.11, ch. 21.1). Since 2007, the Forest Service has conveyed less than 500 acres using the Small Tracts Act, which is greatly offset by the number of acres it acquires under authorities such as the Land and Water Conservation Fund. Public interest determinations indicate most land conveyed to private entities under the Small Tracts Act no longer meets the mission and purpose of the agency, ultimately guiding public resources towards more suitable lands and resources. Moreover, the use of the conveyance authority in the Small Tracts Act is discretionary and subject to public interest considerations contained in the Act and 36 CFR 254.36.

## **REGULATORY CERTIFICATIONS**

### *Executive Order 12866*

Executive Order (EO) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this final rule is not significant.

### *Executive Order 13771*

The final rule has been reviewed in accordance with EO 13771 on reducing regulation and controlling regulatory costs, and is considered an EO deregulatory action.

### *Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

### *Regulatory Flexibility Act Analysis*

The Agency has considered the final rule under the requirements of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). This final rule will not have any direct effect on small entities as defined by the Regulatory Flexibility Act. The final rule will not impose recordkeeping requirements on small entities; will not affect their competitive position in relation to large entities; and will not affect their cash flow, liquidity, or ability to remain in the market. Therefore, the Department has determined that this final rule would not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act.

### *Federalism*

The Department has considered this final rule under the requirements of EO 13132, *Federalism*. The Department has concluded that the final rule conforms with the federalism principles set out in this executive order; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, nor on the distribution of power and responsibilities among the various levels of government. Therefore, the Department concludes that this final rule does not have federalism implications.

### *Consultation with Tribal Governments*

Tribal consultation is not required for the revisions to the Small Tracts Act regulations effected in this final rule. Tribal consultation on individual proposed projects and local notification requirements to Tribes and other individuals for land adjustment activities will occur as required.

### *No Takings Implications*

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

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

This 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 are not already approved for use, and therefore imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 - 3521), and its implementing regulations at 5 CFR part 1320, do not apply.

#### *National Environmental Policy Act*

Agency regulations at 36 CFR 220.6(d)(2) (73 FR 43093) exclude from documentation in an environmental assessment or impact statement “rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.” The Department has concluded that the revisions to regulations effected in this final rule fall within this category of actions and that no extraordinary circumstances exist which would require preparation of an environment assessment or environmental impact statement.

#### *Energy Effects*

This final rule has been reviewed under E.O. 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.” The

Department has determined that this final rule does not constitute a significant energy action as defined in E.O. 13211.

#### *Civil Justice Reform*

The Department has analyzed this rule in accordance with the principles and criteria of Executive Order 12988, *Civil Justice Reform*. The Department has not identified any State or local laws or regulations that conflict with this regulation or that would impede full implementation of this rule. Nevertheless, in the event that such conflicts were to be identified, the final rule, if implemented, will preempt the State or local laws or regulations found to be in conflict. However, in that case, (1) no retroactive effect will be given to this final rule; and (2) the USDA will 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, statements as described under sections 202 and 205 of the Act are not required.

#### **List of Subjects in 36 CFR Part 254**

Community facilities, National forests.

Therefore, for the reasons set forth in the preamble, the Forest Service is amending part 254 of title 36 of the Code of Federal Regulations as follows:

**Part 254 LANDOWNERSHIP ADJUSTMENT**

**Subpart C– Conveyance of Small Tracts**

1. The authority citation for part 254, subpart C continues to read:

**Authority:** Pub. L. 97-465; 96 Stat. 2535.

2. Amend §254.31 by adding, in alphabetical order, the definition of “Permanent Habitable Improvement” to read as follows:

**§254.31 Definitions.**

\* \* \* \* \*

*Permanent Habitable Improvement* means a dwelling, improvement, house, or other structure presently being used as a residence or domicile for a lasting or indefinite period of time.

\* \* \* \* \*

3. Revise § 254.32 to read as follows:

**§254.32 Encroachments and other improvements.**

(a) This subpart allows conveyance of parcels of 10 acres or less, which will resolve encroachments by persons on National Forest System lands:

(1) To whom no advance notice was given that the improvements encroached or would encroach, and

(2) Who in good faith relied on an erroneous survey, title search, or other land description which did not reveal such encroachment.

(b) This subpart also allows conveyance of parcels of 10 acres or less that are not eligible for conveyance under subsection (a) but are encroached on by a permanent habitable improvement for which there is no evidence that the encroachment was

intentional or negligent.

(c) Forest Service officials shall consider the following factors when determining whether to convey lands upon which encroachments exist under subsections (a) and (b):

(1) The location of the property boundaries based on historical location and continued acceptance and maintenance,

(2) Factual evidence of claim of title or color of title,

(3) Notice given to persons encroaching on National Forest System lands,

(4) Degree of development in the encroached upon area, and

(5) Creation of an uneconomic remnant.

(d) This subpart also allows conveyance of parcels that are used as a cemetery (including a parcel of not more than one acre adjacent to the parcel used as a cemetery), a landfill, or a sewage treatment plant under a special use authorization issued or otherwise authorized by a Forest Service official.

4. Add § 254.37 to read as follows:

**§ 254.37 Conveyance of parcels 40 acres or less that no longer meet National Forest System objectives.**

(a) This subpart allows conveyance of parcels of 40 acres or less that are determined by Forest Service officials to:

(1) be physically isolated from other Federal land; or

(2) be inaccessible; or

(3) have lost National Forest character.

(b) [Reserved]

5. Amend § 254.38 by revising paragraph (a) and adding paragraph (b)(3) to read as follows:

(a) The net proceeds derived from any sale or exchange of parcels in § 254.32(b) and (d) and § 254.37 shall be deposited in the fund commonly known as the “Sisk Act” account.

(b) \* \* \*

(3) Reimbursement for costs incurred in preparing a sale conducted under § 254.37 if the sale is a competitive sale.

James E. Hubbard  
Undersecretary,  
Natural Resources and Environment.  
[FR Doc. 2020-21258 Filed: 9/28/2020 8:45 am; Publication Date: 9/29/2020]