



**FOREST SERVICE HANDBOOK  
NATIONAL HEADQUARTERS (WO)  
WASHINGTON, DC**

**FSH 5409.13 - LAND ACQUISITION HANDBOOK**

**CHAPTER 30 - LAND EXCHANGE**

**Amendment No.:** 5409.13-2004-1

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**Approved:** GLORIA MANNING  
Associate Deputy Chief

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**Posting Instructions:** Amendments are numbered consecutively by Handbook number 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 Handbook was 5409.13-94-2 to 5409.13,15.

<b>New Document</b>	5409.13_30-36	58 Pages
<b>Superseded Document(s) by Issuance Number and Effective Date</b>	!5409.13,30 Contents (Amendment 5409.13-91-1, 09/03/91)	2 Pages
	5409.13,30-33 (Amendment 5409.13-91-1, 09/03/91)	21 Pages
	5409.13,34-37 (Amendment 5409.13-91-1, 09/03/91)	17 Pages
	5409.13,38-39 (Amendment 5409.13-91-1, 09/03/91)	14 Pages

**Digest:**

This amendment makes revisions throughout the chapter to update, clarify, and recode direction.

30.1 - 30.12 - Establishes new authority sections that include a cross-reference to FSM 5430.1 (sec. 30.1) and list additional laws, Executive orders, and Departmental regulations applicable to land exchanges (sec. 30.11-30.12).

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

**Digest--Continued:**

30.2 - Establishes a new objective section and provides a cross-reference to FSM 5430.2.

30.3 - Establishes a new policy section and provides a cross-reference to FSM 5430.3.

31 - Changes the caption to “General Guidance” (formerly titled “Negotiations”) and provides a description of the various types and configurations of land exchanges. The direction formerly contained in this section has been updated and incorporated in other sections of this Handbook.

31.8 - Moves direction on third-party exchanges from this section to section 32.1.

32 - Changes the caption to “Development of Land Exchange Proposal” (formerly titled “Land Exchange Steps”) and provides new and revised guidance related to the development of a land exchange proposal.

32.1 - Revises direction for working with a third-party facilitator in the development and processing of a land exchange. This direction was formerly in section 31.8.

32.2 - Revises direction related to the sharing of costs and responsibilities associated with the land exchange process. This direction was formerly in section 31.3.

32.3 - 32.8 - Provides new guidance for preparing a feasibility analysis for a land exchange proposal. Sections 32.31 through 32.37 provide direction for determining whether the land exchange conforms to the Forest land and resource management plan; direction for reviewing preliminary title of the non-Federal land and status of the Federal land; and direction for completing boundary and water rights analysis, valuation consultation, and identification of potential issues and concerns for the land exchange. Sections 32.4 through 32.6 provide guidance on additional actions needed to assess the feasibility of the land exchange, including identification of structures, tribal consultation, and an analysis of access needs. Section 32.7 provides guidance for preparing the Agreement To Initiate. Section 32.8 provides guidance for identifying potential relocation actions and requirements.

33 - Changes caption to “Processing Exchanges” (formerly titled “Public Involvement”) and provides new and revised guidance related to processing a land exchange.

33.1 - Provides revised direction describing the requirements for segregation and serialization of Federal lands through the Bureau of Land Management. This direction was formerly in section 32.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

**Digest--Continued:**

33.2 - Revises direction and standards for preparing and securing legal description reviews formerly in section 32.

33.3 - 33.31 - Revises direction for providing public notice for land exchange. This direction was formerly in sections 33.1 through 33.5.

33.4 - 33.42 - Provides new and revised guidance related to conducting and documenting National Environmental Policy Act (NEPA) analyses and decisions for land exchange proposals, formerly in section 34. Section 33.41 provides general guidance for developing a purchase alternative, public interest determination, and identification of mitigation measures and deed restrictions. Section 33.42 provides direction on the scoping process.

33.5 - Changes the caption to “Valuation of the Federal and Non-Federal Land” (formerly titled “Objections”). This section provides general guidance related to the valuation of Federal and non-Federal lands and adds cross-references to FSM 5410 and FSH 5409.12. The direction previously contained in this section has been updated and revised in section 33.3.

33.6 - Provides new direction for use of cash equalization in land exchanges, including the requirement to limit cash equalization payments to twenty-five percent (25%) of Federal value.

33.7 - Provides new and revised direction for handling land use authorizations affected by a land exchange.

34 - Changes the caption to “Decision on Land Exchange” (formerly “National Environmental Policy Act Procedures”) and provides new and revised direction related to preparing the land exchange decision document and publishing the notice of the land exchange decision. This direction was formerly in section 33.

35 - Changes the caption to “Oversight and Review” (formerly “Tract Examination, Appraisals, and Surveys”) and provides new and revised direction related to oversight and reviews associated with land exchanges previously at section 36. The direction previously found in section 35 has been revised at section 33.

36 - Changes the caption to “Land Exchange Agreement” (formerly “Reviews, Recommendations and Decisions on Exchange Proposals”) and provides new and revised direction related to the use and preparation of an exchange agreement and exchange cutting agreements. The direction formerly in section 36 has been revised at sections 34 and 35.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

**Table of Contents**

30.1 - Authority.....	7
30.11 - Processing and Oversight .....	7
30.12 - Environmental Analysis and Protection .....	7
30.2 - Objectives.....	8
30.3 - Policy.....	8
30.4 - Responsibility.....	8
30.41 - Regional Foresters .....	8
30.5 - Definitions .....	8
30.6 - References .....	10
<b>31 - GENERAL GUIDANCE FOR LAND EXCHANGE PROCESS .....</b>	<b>11</b>
31.1 - Types of Land Exchanges .....	11
31.11 - Land-for-Land Exchange.....	11
31.12 - Land-for-Timber Exchange .....	12
31.12a - Bipartite Exchange.....	12
31.12b - Tripartite Exchange .....	13
31.13 - Legislated Exchanges .....	14
31.13a - Non-agency Proposals .....	14
31.13b - Agency Proposals .....	14
31.14 - Sisk Act Exchange.....	15
31.15 - Competitive Land Exchange.....	16
31.15a - Pre-screening Federal Land .....	16
31.15b - The Notice of Competitive Exchange Proposal.....	16
31.15c - Circulation of the Notice of Competitive Exchange Proposal.....	18
31.15d - Consideration of Cash Offers .....	18
31.15e - Cash in Combination with Land .....	18
31.15f - Review and Selection of Proposal.....	18
31.15g - Valuation Consultation for Competitive Exchanges .....	19
31.16 - Administrative Site Exchange .....	19
31.16a - Conveyance of Administrative Sites.....	20
31.16b - Acquisition of Administrative Sites.....	20
31.17 - National Grassland Exchange.....	21
31.18 - Land Exchange with States and Federally Recognized Tribes.....	21
31.18a - Land Exchange with States.....	21
31.18b - Land Exchange with Federally Recognized Tribes .....	22
31.19 - Land Exchange Through Bureau of Land Management.....	22
31.2 - Land Exchange Case Configuration.....	23
31.21 - Assembled Land Exchange.....	23
31.22 - Phased Closing .....	23
31.23 - Multiple Transactions .....	24
31.24 - Multiple Conveyances .....	24
31.25 - Dual Authority Exchange .....	24

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

<b>32 - DEVELOPMENT OF LAND EXCHANGE PROPOSAL.....</b>	<b>25</b>
32.1 - Overview .....	25
32.11 - Marketing Considerations.....	25
32.12 - Considering Deed Restriction and Reservations .....	26
32.2 - Utilizing Third-Party Facilitator.....	26
32.3 - Costs and Responsibilities.....	27
32.31 - Authority for Cost Sharing .....	27
32.32 - Assignment of Costs and Responsibilities.....	28
32.33 - Forest Service Payments.....	28
32.34 - Forest Service Reimbursement.....	28
32.35 - Assumption of Costs.....	29
32.4 - Feasibility Analysis .....	29
32.41 - Forest Land and Resource Management Plan Compliance and Public Interest Determination .....	30
32.42 - Preliminary Title Evidence.....	30
32.43 - Boundary Management Review .....	31
32.44 - Federal Land Status Report .....	31
32.45 - Water Rights Analysis .....	31
32.45a - Federal Lands.....	31
32.45b - Non-Federal Lands .....	31
32.46 - Valuation Consultation.....	32
32.47 - Identifying Issues, Concerns, and Support .....	32
32.5 - Acquisition of Structures.....	32
32.6 - Tribal Consultation.....	33
32.7 - Right-of-Way Reservations and Easements in Land Exchanges .....	33
32.71 - Right-of Ways Reserved or Acquired by United States.....	33
32.72 - Rights-of-Ways Reserved or Acquired by Non-Federal Party.....	34
32.73 - Right-of-Way Construction and Use Agreement Roads .....	34
32.8 - Agreement To Initiate.....	35
32.9 - Uniform Relocation Provisions.....	35
<b>33 - PROCESSING LAND EXCHANGE.....</b>	<b>36</b>
33.1 - Segregation of Federal Land Having Reserved Public Domain Status.....	36
33.2 - Land Description and Survey .....	36
33.21 - Land Descriptions.....	36
33.22 - Land Survey.....	37
33.22a - Land Survey on Federal Land.....	37
33.22b - Land Survey on Non-Federal Land .....	37
33.3 - Public Notice .....	38
33.31 - Publication of Notice of Exchange Proposal.....	38
33.31a - Minimum Requirements .....	39
33.31b - Republication.....	40
33.31c - Proof of Publication .....	40

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

33.32 - Notification to Federal Agencies, States, Local Governments, and Congressional Delegations .....	40
33.32a - Congressional Notification .....	41
33.32b - States, Clearinghouses, and Local Governments.....	41
33.32c - Other Federal Agencies .....	41
33.33 - Notification to Affected Users of National Forest System Lands and Adjoining Property Owners .....	41
33.33a - Special Use Authorization Holders.....	41
33.33b - Grazing Allotment Permittees .....	41
33.33c - Mineral Claimants.....	42
33.33d - Tenants on Non-Federal Land .....	42
33.33e - Adjoining Property Owners .....	42
33.4 - National Environmental Policy Act Analysis.....	42
33.41 - General Requirements .....	42
33.41a - Purchase and Other Exchange Configuration Alternatives .....	43
33.41b - Public Interest Determination.....	43
33.41c - Mitigation.....	43
33.42 - Scoping .....	44
33.43 - Specialist Reports and Property Inspection Documentation .....	44
33.43a - Certificate of Possession.....	45
33.43b - Hazardous Substances .....	46
33.43c - Wetlands and Floodplains.....	46
33.43d - Biological Evaluation .....	47
33.43e - Heritage Resources .....	47
33.43f - Minerals.....	48
33.43g - Prime Farmland, Rangeland, and Timberland.....	50
33.5 - Valuation of Federal and Non-Federal Lands .....	50
33.51 - Approximately Equal Value .....	50
33.52 - Resolving Value Disputes .....	51
33.52a - Bargaining.....	51
33.52b - Arbitration .....	52
33.6 - Cash Equalization and Waivers.....	52
33.7 - Land Use Authorizations.....	52
33.71 - Recreation Residence Special Use Permit.....	53
<b>34 - DECISION ON LAND EXCHANGE .....</b>	<b>53</b>
34.1 - Decision Documents.....	54
34.2 - Notice of the Exchange Decision .....	55
<b>35 - OVERSIGHT AND REVIEW .....</b>	<b>55</b>
35.1 - Weeks Law Land Exchanges.....	55
35.2 - All Exchanges in Excess of \$500,000 .....	56
35.21 - National Landownership Adjustment Team Review.....	56
<b>36 - LAND EXCHANGE AGREEMENT .....</b>	<b>57</b>
36.1 - Exchange Cutting Agreement.....	58

## FSH 5409.13 - LAND ACQUISITION HANDBOOK CHAPTER 30 - LAND EXCHANGE

### 30.1 - Authority

In addition to the general land exchange authorities found in FSM 5430.1, the laws, regulations, and Executive Orders set forth in sections 30.11 and 30.12 also apply to the land exchange process.

#### 30.11 - Processing and Oversight

Act of August 30, 1890 (ditches or canals) (26 Stat. 391; 43 U.S.C. 945). This act requires the reservation of ditches and canals in patents.

Uniform Relocation Assistance and Real Property Acquisitions Policy Act of 1970 (84 Stat. 1894; 42 U.S.C. 4601 et seq.). This act sets forth policy and procedures related to Federal real property acquisition practices and the relocation of qualified displaced persons and businesses.

National Forest Management Act of October 22, 1976 (16 U.S.C. 472a et seq.). This act requires congressional oversight for land exchanges when the value of the Federal land is more than \$150,000.

Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub.L. 105-277). This act requires a 30-day review period by House and Senate appropriations committees for all land exchanges where the value of the Federal land is more than \$500,000.

#### 30.12 - Environmental Analysis and Protection

National Historic Preservation Act of October 15, 1966 (80 Stat. 915, as amended; 16 U.S.C. 470 et seq.). Section 106 of this act establishes requirements for the disposal of heritage properties which are eligible or are potentially eligible for the National Register of Historic Places.

National Environmental Policy Act of January 1, 1969 (83 Stat. 852; 42 U.S.C. 4321-4346). This act requires that the land exchange process consider the effects the exchange will have on the quality of the human and natural environment.

Comprehensive Environmental Response, Compensation, and Liability Act of December 11, 1980, as amended (94 Stat. 2767; 42 U.S.C. 9601, et seq.). This act requires the Forest Service to identify and disclose the presence of hazardous materials on Federal and non-Federal lands considered in a land exchange.

Coastal Barrier Resources Act of October 18, 1982 (96 Stat. 1658, 16 U.S.C. 3501-3505). This act prohibits the Forest Service from acquiring structures within the coastal barriers and adjacent wetlands, marshes, estuaries, inlets, and nearby waters along the Atlantic and Gulf coasts.

## **FSH 5409.13 - LAND ACQUISITION HANDBOOK CHAPTER 30 - LAND EXCHANGE**

Small Business Liability Relief and Brownsfield Revitalization Act of January 11, 2002 (115 Stat. 2356, 42 U.S.C. 9601, et seq.). This act amended the Comprehensive Environmental Response, Compensation, and Liability Act to limit the liability of purchasers of contaminated property through the Bona Fide Purchaser and Innocent Purchaser exemptions and procedures.

Executive Order 11988, Issued May 24, 1977 (E.O. 11988). This Executive order requires Federal agencies to avoid adverse impacts associated with the occupancy, development, modification, and disposal of lands located in floodplains.

Executive Order 11990, Issued May 24, 1977 (E.O. 11990). This Executive order requires Federal agencies to avoid adverse impacts associated with the occupancy, development, modification, and disposal of land classified as wetlands.

Departmental Regulation 9500-3 (DR 9500-3). This Departmental regulation requires the Forest Service to consider the effect of converting prime farmland, rangeland, or timberland to other uses.

### **30.2 - Objectives**

See FSM 5430.2 for direction concerning the objectives of the land exchange program.

### **30.3 - Policy**

See FSM 5430.3 for direction concerning policies relating to the land exchange program.

### **30.4 - Responsibility**

For additional responsibilities, see FSM 5404 and 5430.

#### **30.41 - Regional Foresters**

Regional Foresters in Regions 3, 4, 5, 6, 8, 9, and 10 have the authority to process, without review by the Washington Office, National Landownership Adjustment Team (NLAT) (sec. 35.21), those land exchanges where the value of the Federal land is less than \$500,000. Regional Foresters in Regions 1 and 2 have the authority to process, without NLAT review, those land exchanges where the value of the Federal land is less than \$5,000,000.

### **30.5 - Definitions**

The following terms are used throughout this chapter. For additional terms related to the land exchange program, see FSM 5430.5 and Title 36, Code of Federal Regulations, Part 254 - Land Ownership Adjustment, Subpart A - Land Exchange (36 CFR part 254, subpart A).



**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

Acquired Land. Non-Federal lands received into Federal ownership through purchase, donation, or exchange. Acquired lands within the established exterior boundary of a National Forest have Weeks Act status under the Act of September 2, 1958 (16 U.S.C. 521a) and are not open for entry under the mining laws.

Administrative Site. An area of land acquired, withdrawn, or leased specifically for Forest Headquarters, Ranger Stations, research projects, dwellings, warehouses, guard stations, interpretive centers, and similar facilities used for Forest Service administrative activities.

Adverse Possession. A method of title acquisition by possession for a specified period. Generally, possession must be actual, under claim of right, open, and notorious.

Authorized Officer. A Forest Service line or staff officer who has been delegated authority and responsibility to make decisions and perform the duties described in 36 CFR part 254, subpart A.

Estate To Be Appraised. The rights and interests in property proposed for acquisition or conveyance that must be appraised to determine market value.

Interest. A partial or undivided right in real property that is less than the complete fee or estate.

Land. Any land or interest in land.

Land-for-Land Exchange. Non-Federal land or interests conveyed to the United States in exchange for National Forest System land or interests in land.

Land-for-Timber Exchange. Acquisition of non-Federal land, or interest in land, in exchange for National Forest timber or the value generated from the timber harvested in accordance with a National Forest timber sale. These exchanges can be either bipartite or tripartite exchanges (sec. 31.12).

Person. An individual, corporation, or other party legally capable of holding title to and conveying land or interests in land. An individual must be a citizen of the United States and a corporation must be subject to the laws of the United States or a State.

Public Domain Lands. Original public domain lands that have never left Federal ownership; lands in Federal ownership that were obtained by the Federal government in exchange for public domain lands or for transfer from public domain lands.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

Reserved Public Domain Land. Land withdrawn or reserved for use as part of the National Forest System. It includes previously patented land acquired by the Federal government through the exchange of reserved public domain lands or for transfer on reserved public domain lands.

Status. Status in reference to National Forest lands refers to the way the Federal lands became part of the National Forest System. The majority of National Forest lands have public domain (PD) status because they are lands which were never in state or private ownership, and which were reserved from the public domain for National Forest purposes by Presidential proclamation or by statute. National Forest lands having PD status are generally open to the operation of the mining laws. Other National Forest lands have acquired status because they were previously patented and subsequently reacquired by the United States for National Forest purposes. Lands having acquired status are generally closed to the operation of the mining laws.

Third-Party Facilitator. A non-profit or for-profit entity operating as an individual, a firm, or a conservation group whose role is to assist the buyer and seller in reaching agreement in a real estate transaction. Third-party facilitators are not agents of the Federal government.

Timber-for-Timber or Timber-for-Land Exchange. An exchange where the land is acquired by the United States subject to reserved or outstanding timber rights and the United States subsequently extinguishes the reserved or outstanding timber right. In these cases, the timber may be acquired through an additional exchange of either National Forest timber or land. The Chief must approve these exchanges.

### **30.6 - References**

U.S. Department of Agriculture, Forest Service. 1999. Forest Service Guide to Land Transactions. EM-2160-2. Washington, DC: U.S. Department of Agriculture, Forest Service. 58 pages.

U.S. Department of Justice. 2001. Department of Justice Title Standards 2001, a guide for the preparation of title evidence in land acquisitions by the United States of America. Washington, DC: U.S. Department of Justice.

U.S. Department of the Interior, Bureau of Land Management. 1973. Manual of Instruction for Survey of the Public Lands of the United States. Washington, DC: Department of Interior, Bureau of Land Management. 333 pages.

U.S. Department of the Interior, Bureau of Land Management, Cadastral Survey. 1979. Specifications for Descriptions of Tracts of Land for Use in Land Orders and Proclamations. Cadastral Survey. Washington, DC: U.S. Department of the Interior, Bureau of Land Management, Cadastral Survey. 26 pages.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

## **31 - GENERAL GUIDANCE FOR LAND EXCHANGE PROCESS**

A land exchange is a discretionary and voluntary real estate transaction between the Federal government and a non-Federal party and may be initiated by either party. A non-Federal party may be a person, State, or local governmental entity. The non-Federal party to a land exchange must be the owner of the non-Federal land or be in a position to acquire and convey it prior to initiating the land exchange process. Do not request the non-Federal party to acquire land in anticipation of the exchange.

Consider a land exchange only if it is in the public interest and is consistent with the forest land and resource management plan. Identify potential concerns or issues involving cultural resources, threatened and endangered species, floodplains, wetlands, hazardous materials, mineral estates, and other outstanding rights early in the process.

Unless otherwise provided by law, all land exchange cases shall be processed in accordance with Forest Service land exchange regulations at Title 36, Code of Federal Regulations, part 254, subpart A (36 CFR, part 254, subpart A), except for land exchanges and interchanges authorized by the Small Tracts Act of January 12, 1983 (16 U.S.C. 521c - 521i) which are subject to 36 CFR part 254, subpart C (FSM 5570 and FSH 5509.11).

A flowchart depicting the land exchange process is displayed in section 39, exhibit 01.

### **31.1 - Types of Land Exchanges**

There are several types of land exchanges based on the estates acquired or conveyed, the statute authorizing the transaction, configuration of the transaction, or other requirements. Sample implementation schedules are provided as exhibits in section 39 of this Handbook to display differences in processing requirements for each type of land exchange.

#### **31.11 - Land-for-Land Exchange**

A land-for-land exchange involves the acquisition of non-Federal land, or interests in land, by the United States in exchange for National Forest System lands, or interests in land. These exchanges adjust ownership patterns to support direction in forest land and resource management plans and to create efficient and effective ownership patterns (FSM 5403.1). Partial interests in land may be acquired or conveyed when it is in the public interest to do so. Partial interests may include, but are not limited to, severed mineral estates, rights-of-way easements, leasehold interests, and long-term or perpetual easements. The implementation schedule for a land-for-land exchange is displayed in section 39, exhibit 02.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **31.12 - Land-for-Timber Exchange**

A land-for-timber exchange involves the acquisition of non-Federal land, or interests in land, in exchange for National Forest timber. Timber sale funds generated for use in a land exchange are not managed as National Forest receipts and are not subject to payments to States as provided for by the Twenty-five Percent Fund Act (25 Percent Fund Act) of May 23, 1908 (16 U.S.C. 500 et seq.) and the Payment in Lieu of Taxes (PILT) Act of 1976 (31 U.S.C. 1601-1607), as amended by the Act of September 13, 1982 (31 U.S.C. 6901-6904). For this reason, written notice of a land-for-timber exchange proposal shall be provided to all counties within the proclaimed Forest boundary, in part or in whole, in which the National Forest timber to be sold is located. The approval of a land-for-timber exchange rests with the Chief when a directly affected county objects to the exchange because of lost revenue from the PILT or the 25 Percent Fund Act payment (FSM 5403.1, para. 8). Land-for-timber exchanges can be either bipartite or tripartite exchanges.

#### **31.12a - Bipartite Exchange**

In a bipartite exchange, the United States grants the right to cut National Forest timber in exchange for non-Federal land or interest in land. The right to cut timber may apply either to timber currently under contract (sec. 36.1, para. 1) to the non-Federal landowner or to cutting rights to timber not currently in a timber sale contract (sec. 36.1, para 2).

1. Sale Under Contract. In a sale under contract bipartite exchange, the non-Federal landowner is the purchaser of an existing National Forest timber sale. The United States may use receipts from the timber sale to acquire land the timber sale purchaser owns. The value of the non-Federal property, upon acceptance of title by the United States, is the amount credited to the non-Federal party's timber sale account. Timber sale contracts that contribute a portion of their funds to bipartite exchange shall have, or be amended to include, provision CT 8.72 as follows:

**CT 8.72 - Bipartite Land Exchange. (4/82) Purchaser has offered to exchange land owned by Purchaser as described in a separate exchange agreement. When title to offered land has been accepted by the United States, Forest Service agrees that the value of the offered land is a land exchange credit and shall be applied to charges for timber in lieu of cash deposits under B 4.22. If purchaser desires to cut timber prior to acceptance of title by the United States, cash deposits shall be refunded when title to an equivalent value of land is accepted, to the extent such deposits are not needed to satisfy other charges.**

See FSM 2495.5 and FSH 6509.17 for the procedures for establishing and recording the exchange credit.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

2. Direct Cutting Rights. In an exchange that grants direct cutting rights, the non-Federal landowner receives the right to harvest National Forest timber identified and marked for removal by the Forest Service outside the competitive timber sale process. The value of the timber cutting rights must be equal to the value of the non-Federal lands. A timber sale cutting agreement shall cite the rates by species developed in the timber appraisal. Timber must be cut and removed until the value of the non-Federal land is reached. Cutting may begin when the United States accepts title for the non-Federal land or when the non-Federal landowner posts the appropriate bond. The authority to approve a direct cut land-for-timber exchange is limited to the Chief.

Direct cutting rights exchanges should seldom be used due to the impact in lost revenues to counties because these transactions withhold timber sales from the competitive market.

### **31.12b - Tripartite Exchange**

A tripartite exchange may be used when the non-Federal landowner is unable to harvest or use the timber harvested from Federal lands. A tripartite exchange involves three parties: the United States, a non-Federal landowner, and a timber sale contractor. The contractor pays for and cuts the timber under a timber sale contract. The amount the contractor pays is not affected by the tripartite exchange. The United States acts as a broker for contractor payments, which are turned over in exchange for the non-Federal party's land, or interest in land. Timber sale contracts that contribute a portion of their funds to tripartite exchange shall have, or be amended to include, provision CT 8.71 as follows:

**CT 8.71 - Tripartite Land Exchange. (4/99) The purchaser agrees that the cash consideration required by BT 4.0 paid for the contracted timber may be utilized by the United States in a tripartite land exchange where by the United States may assign and pay such funds to a land exchange proponent as consideration for lands to be granted to the United States.**

Transfers of stumpage deposits from the Timber Sale Deposit Fund are made monthly to the authorized land exchange account as cutting occurs. The distribution of funds to the land exchange suspense account occurs during the normal distribution process and is displayed on the monthly timber sale Statement of Account. Deposits to the land exchange suspense account may occur once an Agreement To Initiate is finalized that executed that identifies the non-Federal land, or interest in land, to be acquired, and the timber sale(s) from which deposits would be collected.

Funding for a tripartite exchange from a timber sale can occur only after satisfaction of National Forest Fund deposits, Knutsen-Vandenberg collections, and Salvage Sale Fund requirements. Any receipts remaining in the land exchange suspense account after closing of a tripartite exchange shall be deposited in the National Forest Fund. An implementation schedule for a tripartite exchange is displayed in section 39, exhibit 03.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **31.13 - Legislated Exchanges**

Specific legislation may authorize or direct the Forest Service to initiate a land exchange. Legislative proposals may be initiated by the Forest Service or a non-agency entity. However, Forest Service personnel are prohibited from supporting or opposing a legislative proposal until the Secretary of Agriculture determines the official position of the Administration (FSM 1510.1). Forest Service personnel are also statutorily prohibited by anti-lobbying laws (18 U.S.C. sec. 1913) from attempting to influence a member of Congress to support or oppose the proposal. The non-Federal exchange party, or other interested parties, may promote legislation on their own behalf (sec. 31.13a).

Appropriation acts may also prohibit the use of appropriated funds for certain purposes, such as producing publications or literature that would promote public support or opposition to a proposed legislative exchange pending in Congress. (See section 303, Department of Interior and Related Agencies Appropriation Act of 1999 and section 637, Treasury and General Agencies Appropriation Act of 1999 for examples of such language).

Legislated land exchanges often include provisions that conflict with standard land exchange authorities or with Forest Service land exchange regulations at Title 36, Code of Federal Regulations, part 254, subpart A (36 CFR part 254, subpart A). When a legislative exchange contains direction that conflicts with current regulation or policy, the legislation overrides the requirements of regulation and policy. In these situations it may be desirable to prepare an analysis that determines the applicability of the requirements of 36 CFR part 254, subpart A, relative to the direction in the legislation. Any such analysis should be prepared in consultation with the Office of the General Counsel (OGC).

#### **31.13a - Non-agency Proposals**

A non-Federal entity or member of Congress may request the Forest Service to assist in preparing a non-agency legislative exchange proposal. In these situations, Forest Service personnel should provide only information that explains the land exchange process and advise on how to request legislative drafting services from the Forest Service (FSM 1514). Do not provide input to draft proposals without first obtaining concurrence from the Washington Office, Director of Legislative Affairs and Director of Lands.

#### **31.13b - Agency Proposals**

Agency legislative proposals should be developed through the Forest Service's legislative program in conjunction with annual program and budget estimates. Legislative proposals shall be developed according to Departmental Manual 1260-1 (DM1260-1) and coordinated with the Legislative Affairs Staff and Lands Staff in the Regional and Washington Offices.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **31.14 - Sisk Act Exchange**

For related direction, see Title 36, Code of Federal Regulations, part 254, subpart A.

1. The Exchange for Schools Act (Sisk Act) of December 4, 1967 (16 U.S.C. 484a), allows for the exchange of not more than 80 acres of National Forest System (NFS) land to a State, county, municipal government, or a public school authority without limitation to the amount of cash equalization payment made by the non-Federal party (FSM 5430.12, para. 4). Cash equalization payments received under this authority are deposited in a special fund that, when appropriated, are used to acquire replacement NFS land. While it is not unusual for the Forest Service to acquire land from the non-Federal party in Sisk Act transactions, this authority is typically used when a qualifying non-Federal party cannot provide adequate land, or interests in land, to equalize the value of the NFS land proposed for conveyance in a single transaction.

2. The Sisk Act was amended by section 8 of the Small Tracts Act of January 12, 1983 (16 U.S.C. 521c-521i) to authorize conveyance of NFS land to a State, county, or municipal government when the following two conditions are met:

- a. The State, county, or municipal government was using the land on January 12, 1983, and
- b. The land conveyed could be used only for the purposes for which it was being used prior to conveyance.

However, these two conditions are not required for Sisk Act exchanges with a public school district or public school authority. Consult with the Office of the General Counsel to obtain the appropriate deed language to effect this condition.

3. A Sisk Act exchange is completed when the United States conveys land and receives an equal value in land, money, or a combination of money and land. The subsequent purchase of land by the United States using proceeds from a Sisk Act exchange is a land transaction independent from the previous exchange of Federal land. Purchases are, however, constrained by the previous exchange in terms of the State where the purchase can occur and mitigation measures noted in the original exchange environmental analysis and decision.

4. An implementation schedule for cases in which the United States receives a 100 percent cash equalization payment is displayed in section 39, exhibit 04. Use the implementation schedule for a land-for-land exchange (sec. 39, ex. 02) when the United States is compensated through land or a combination of land and cash for a Sisk Act exchange.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **31.15 - Competitive Land Exchange**

For related direction on a competitive land exchange, see Title 36, Code of Federal Regulations, sections 254.9b(3) and 254.3(c) (36 CFR 254.9b(3) and 254.3(c)).

Consider a competitive land exchange when the Federal land is unique and similar private party transactions are limited or non-existent or there is a known competitive interest in the Federal land.

Competitive land exchanges are developed through issuance of a notice of competitive exchange proposal (sec. 31.15b). "Offers to exchange" are evaluated and the one selected becomes the land exchange proposal. In a competitive land exchange the competitive process is used to determine market value of the Federal and non-Federal lands to satisfy the equal value requirement. However, the Regional Appraiser should be involved early in the development of a competitive land exchange proposal to obtain a summary appraisal report for the Federal lands proposed for conveyance. This assistance does not result in a formal appraisal report, but rather consultation work in support of the decision process. The summary appraisal report shall be removed from the record when a final proposal is selected.

A sample implementation schedule for a competitive land exchange is displayed in section 39, exhibit 05.

#### **31.15a - Pre-screening Federal Land**

Prior to developing the notice of a competitive land exchange proposal, conduct a preliminary examination of the Federal land to identify issues and concerns related to cultural resources, threatened and endangered species, floodplains and wetlands, hazardous materials, minerals, outstanding rights, and water rights. Information from these examinations may affect requirements in the solicitation, such as a requirement for the non-Federal lands to contain wetlands if wetlands exist on the Federal land. The preliminary examination may require consultation with the State Historic Preservation Officer, United States Fish and Wildlife Service, or other Federal and State agencies.

#### **31.15b - The Notice of Competitive Exchange Proposal**

The notice of competitive exchange proposal shall be in a format that the public can easily understand and should include, at a minimum, the following information:

1. A complete description of the Federal land, including any associated improvements and structures. Include maps and color photographs that accurately depict the property and its location. Emphasize the positive features of the Federal property.



**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

2. The characteristics of non-Federal land that would be suitable for the exchange, such as consistency with the forest land and resource management plan. Non-Federal lands offered must be in the same State, within the exterior boundary of a National Forest System (NFS) unit, or adjoin existing NFS land. The notice of competitive exchange proposal should not identify any specific non-Federal lands.

3. Notice to the non-Federal party that they must either own or have a valid option to purchase the offered non-Federal property. The notice of competitive exchange proposal must also inform the non-Federal parties of the requirement to include a legal description of the non-Federal land; interests being offered; any outstanding rights or proposed reservations; a title commitment or other acceptable evidence of title; and an estimate of value of the non-Federal land being offered.

4. A threshold or "lower limit" of value for the Federal lands may be included if the Regional Appraiser determines it is appropriate. If a threshold value is needed, a summary appraisal report shall be prepared by a qualified staff appraiser or private contract appraiser in accordance with provisions in Forest Service Manual (FSM) 5410. A Qualified Review Appraiser (QRA) shall review the appraisal; however, the QRA shall not prepare a technical report approving the appraisal (FSH 5409.12, sec. 14.5).

5. Dates for scheduled tours of the Federal property and sources for additional information.

6. A response due date that allows sufficient time (usually 2 to 3 months) for circulation and exposure to the market and an estimated date when the land exchange should be finalized.

7. Itemized costs for documents, reports, and other related items that the non-Federal party should be expected to provide or pay for, including a requirement for selected non-Federal party to provide an appraisal of the non-Federal lands (this requirement is applicable only to competitive land exchanges (sec. 32.3)) in accordance with Forest Service appraisal instructions or other documentation that supports, to the satisfaction of the authorized officer, the value of the non-Federal land. Specific appraisal instructions shall be provided to the successful bidder after selection of the competitive exchange proposal.

8. Documentation of the financial capability of the selected non-Federal exchange party to complete the exchange in a reasonable specified period of time following the Forest Service exchange decision.

9. When considering a cash offer alternative, require the selected non-Federal party to establish an escrow account of not less than 5 percent of the cash offer to show good faith in following through with the transaction and notification that if the non-Federal exchange party defaults, the funds would be forfeited and deposited in the United States Treasury.

See section 39, exhibit 07, for a sample Notice of Competitive Exchange proposal.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **31.15c - Circulation of the Notice of Competitive Exchange Proposal**

The authorized officer has the responsibility to provide wide circulation of the notice of competitive exchange proposal to all interested parties, including real estate companies and other National Forests within the same State or vicinity. The notice of competitive exchange proposal should be advertised in trade journals, local and regional newspapers, and through news releases to local and regional media outlets.

### **31.15d - Consideration of Cash Offers**

The notice of competitive exchange proposal may allow for offers of a cash commitment that the non-Federal party is willing to expend toward acquisition of private land offered in an exchange. In this situation, the notice of competitive exchange proposal shall clearly explain that cash cannot be accepted for the exchange, but that the amount offered would be applied toward non-Federal land suitable for purchase and conveyance in an equal value exchange.

If a cash commitment offer is the best exchange proposal, the authorized officer has the responsibility to identify priority tracts of non-Federal land and ensure that those lands are appraised and reviewed in accordance with Federal standards (sec. 31.15g). The non-Federal party is responsible for providing the appraisal and for negotiating and securing acceptable title to the property or properties included in the exchange proposal. The proposal may be terminated, the deposit forfeited, and the next best proposal considered if the initially selected non-Federal exchange party fails to secure all the non-Federal lands needed to complete the land exchange in a timely manner.

### **31.15e - Cash in Combination with Land**

A notice of competitive exchange proposal may provide for exchange proposals that allow for a combination of land and cash that is committed for purchase of lands that the Forest Service identifies. The non-Federal lands shall be evaluated using the criteria in the notice of competitive exchange proposal in combination with the value of the property expected to be acquired with the cash commitment.

### **31.15f - Review and Selection of Proposal**

Use an interdisciplinary team, including a Qualified Review Appraiser, to evaluate proposals for a competitive land exchange using the criteria and selection procedures described in the notice of competitive exchange (sec. 39, ex. 07). The interdisciplinary team has the responsibility to provide the authorized officer a written evaluation of all of the proposals along with the team's recommendation of the best proposal.

## **FSH 5409.13 - LAND ACQUISITION HANDBOOK CHAPTER 30 - LAND EXCHANGE**

The authorized officer has the responsibility to notify all parties of the selected proposal and to immediately schedule a meeting with the selected non-Federal party to begin development of an implementation schedule (sec. 39, ex. 05). If land needs to be acquired, the authorized officer should assist the non-Federal party in identifying available priority tracts to secure and provide information on appraisal requirements.

Once a proposal is selected, the exchange shall be evaluated in accordance with the provisions of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321-4346) (FSM 1950). Unless categorically excluded, competitive land exchange decisions are subject to administrative appeal (36 CFR part 215).

### **31.15g - Valuation Consultation for Competitive Exchanges**

The authorized officer has the responsibility, after selecting a competitive exchange proposal, to request in writing that a Qualified Review Appraiser (QRA) prepare the appraisal instructions for valuing the non-Federal land. The non-Federal exchange party is responsible for obtaining the appraisal in accordance with Forest Service appraisal instructions as specified by the QRA. After review and approval of the appraisal of the non-Federal property, the QRA notifies the authorized officer by letter of the agency-approved value for non-Federal lands. The value assigned to the non-Federal land determines the value of the Federal land due to the market competition inherent in the competitive proposal process.

The non-Federal party, or the party's representative, may use the appraisal for negotiations to secure non-Federal lands. When the non-Federal party purchases multiple ownerships of non-Federal land, the sum of the individual ownership values, as assembled (FSH 5409.12, sec. 14.2), is the agency-accepted value of the Federal lands. As previously stated, the QRA prepares a letter to the authorized officer assigning the non-Federal agency-approved assembled values for both the Federal and non-Federal lands.

### **31.16 - Administrative Site Exchange**

Administrative sites are usually limited to the area occupied by support buildings and grounds and may be located within, adjacent to, or some distance from a National Forest System (NFS) unit. Administrative site land exchanges may facilitate acquisition of new administrative sites, conveyance of sites that are no longer needed to accomplish the Forest Service mission, or both. Each National Forest and Research Station should document the need to acquire new administrative sites or convey existing administrative sites in a Facility Master Plan (FSM 7312).

Administrative sites and research facilities that are determined excess to Forest Service needs should be given priority consideration for conveyance, through existing land exchange authorities, to exchange them for administrative facilities or resource lands that support the mission of the Forest Service.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

Do not convey National Forest resource lands, including resource lands with an administrative site, for a new administrative site. National Forest resource lands, including those on which administrative sites are located, may be conveyed in exchange for other resource lands if the conveyance is in compliance with forest land and resource management plans and the facility master plan.

### **31.16a - Conveyance of Administrative Sites**

Land status has a direct bearing on the authority and process used to convey administrative sites. The land status records show the authority and purpose for which a site was acquired. There are three general categories of administrative sites based on the status of the land on which they are located:

1. Acquired Administrative Sites. Sites acquired for administrative purposes only are usually located outside the boundary of an administrative unit. Administrative sites acquired for administrative purposes only may be conveyed in exchange for other administrative sites or in exchange for resource lands within the exterior boundary of a National Forest.

2. Administrative Sites on Resource Lands within the National Forest System. Administrative sites may be located on NFS land reserved from the public domain or on lands acquired for resource management purposes and are located within the administrative boundaries of a National Forest or National Grassland. Land status records should show whether the NFS land on which the site is located has reserved public domain status or acquired status. If the land has acquired status, the land status records should show the authority and purpose for the acquisition. Resource lands, including resource lands on which administrative sites are located, may be exchanged only for other resource lands.

3. Sites Located on BLM Lands. Some Forest Service administrative sites are located on public lands administered by the Bureau of Land Management (BLM) and have been withdrawn from mineral entry for NFS purposes. The Forest Service does not have the authority to convey these lands, so any exchange of these lands must be processed by BLM under its authorities. The Federal Land Policy and Management Act (FLPMA) of October 21, 1976 (30 U.S.C. 185) provides the BLM with the authority to convey these lands in exchange for non-Federal lands within the boundaries of a unit of the NFS.

### **31.16b - Acquisition of Administrative Sites**

A land exchange may be used to acquire an administrative site if the acquisition is in compliance with the applicable facility master plan. Approval by the Department of Agriculture, Assistant Secretary for Administration is required prior to initiating action to acquire an administrative site with a value exceeding \$25,000 for land or \$250,000 for land with buildings. Initiate the approval process by submitting a Preliminary Project Analysis as provided in FSH 7309.11, section 32, and Departmental Regulation (DR) 104-18.5007 (FSH 6409.31; FSM 5403.1, para. 14; FSM 5430.41, para. 4; FSM 5430.42b, para. 2).

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

A land exchange may also be used in combination with other authorities to acquire administrative sites. For example, land may be acquired through exchange and the facility may be constructed with appropriated funds. Proposals to acquire administrative sites shall not allow for facility construction at any time during the land exchange process when the value of the facility is used for all or part of the value of the Federal lands conveyed. An implementation schedule for acquiring an administrative site in a land-for-land exchange is displayed in section 39, exhibit 06.

### **31.17 - National Grassland Exchange**

Land exchanges within the National Grasslands are authorized by Title III of the Bankhead-Jones Farm Tenant Act of July 22, 1937 (7 U.S.C. 1010-1012) (FSM 5430.11). Lands acquired under the Bankhead-Jones Farm Tenant Act are commonly called "Title III lands".

In order to effectuate the purposes for which Title III lands were acquired, the Forest Service may:

1. Sell, exchange, lease, or otherwise dispose of Title III lands to public authorities and agencies, with or without consideration, and condition the sale, exchange, lease, or disposal to ensure that the property is used for public purposes.
2. Exchange Title III lands with private owners, subdivisions, or agencies of a State government if the exchange does not conflict with the purposes of the Bankhead-Jones Farm Tenant Act and the value of the property received in exchange is substantially equal to that of the property conveyed.

Title III exchanges involving private owners and public agencies, including State entities, may be completed without a "public purpose" reversionary clause if the Forest Service documents through a determination of consistency that the exchange does not conflict with the purposes of the Bankhead-Jones Farm Tenant Act.

The land status of National Grasslands may be complicated due to the mixture of acquired and public domain status and the presence of severed mineral estates. Therefore, more than one conveyance document for a single parcel of National Grassland lands may be necessary to complete the land exchange.

### **31.18 - Land Exchange with States and Federally Recognized Tribes**

#### **31.18a - Land Exchange with States**

Public Law 103-397 (Pub. L. 103-397) amended the Payment-In-Lieu-of-Taxes (PILT) Act of October 20, 1976 (90 Stat. 2662; 31 U.S.C. 1601-1607) pertaining to the state's eligibility for PILT payments for land acquired from the United States by exchange. Include the following provision in all deeds involving land exchanges with States:

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

**Upon subsequent conveyance out of State ownership of all or any part of the property described in this deed, written notification of this action shall be provided to the USDA, Forest Service, within 30 days.**

### **31.18b - Land Exchange with Federally Recognized Tribes**

The United States may pursue a land exchange under current exchange authorities with a Federally Recognized Tribe for land not held in trust by the United States. Lands held in trust by the United States require a special act for interchange authority and a determination by the Secretary of the Interior that an exchange is in the public interest. The Secretary of the Interior may, under Title II of the Indian Land Consolidation Act (25 U.S.C. 2208), remove the trust status of Indian trust lands and convey them to a non-Federal or Federal party at the request of the Federally Recognized Tribe.

The Bureau of Indian Affairs should be notified of all exchanges with Federally Recognized Tribes due to their fiduciary relationship.

### **31.19 - Land Exchange Through Bureau of Land Management**

The Forest Service may acquire lands through land exchanges initiated by the Bureau of Land Management (BLM). These exchanges are processed under BLM's authority and are subject to BLM's approval.

Several Regions have developed memorandums of understanding with the BLM establishing general procedures for processing these exchanges. However, case-specific responsibilities and a description of the estate desired for acquisition shall be documented in an executed Agreement To Initiate (ATI). Generally, the role of the Forest Service is as a cooperating agency and signatory of the feasibility analysis and the ATI. The Forest Service is also a cooperating agency during analysis under the National Environmental Policy Act (NEPA) of January 1, 1969 (42 U.S.C. 4321-4326). However, the Forest Service authorized officer is not the deciding officer in these processes and, therefore, is not a signatory to the decision document.

The Forest Service authorized officer has the responsibility to provide oversight during the exchange process to ensure that the non-Federal lands proposed for acquisition by the BLM on behalf of the Forest Service are consistent with the forest land and resource management plan objectives; are free of encroachments and hazardous substances; and have a defensible boundary description and acceptable title. Oversight may involve reviewing and approving specialist reports, property inspections, boundary descriptions, and deed preparation. Title review, deed preparation, and closing procedures for the lands being acquired must follow standard Forest Service procedures for acquisitions, including the Office of the General Counsel review and title

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

approval. In addition, a Forest Service lands specialist has the responsibility to certify that the physical and legal description of the estate appraised is identical with the interests identified in the ATI for acquisition. However, the final appraisal review and value approval authority, including use of bargaining and/or arbitration to settle value disputes, remains with the BLM. Any assumption of cost authorization and compensation associated with the transaction are the responsibility of the BLM.

Lands located within the boundaries of the National Forest System or management unit immediately acquire reserved status and become part of the unit or area in which they are located when the United States, through the Secretary of the Interior, accepts title for lands acquired under the authority of the Federal Land Policy and Management Act (FLPMA) of 1976 (43 U.S.C. 1716(c)) (36 CFR 254.3(e)). This jurisdiction is effected as a matter of law and does not require further action by the Secretary of the Interior.

## **31.2 - Land Exchange Case Configuration**

### **31.21 - Assembled Land Exchange**

For related direction see FSH 5409.12, section 14.2.

In an assembled land exchange, the non-Federal party assembles two or more non-Federal ownerships into a single entity for conveyance to the United States for equal value Federal lands. An ownership, which may include multiple tracts, is defined as a property under common title by the same party(ies). Assembled land exchanges often result in reduced administrative costs. Specific appraisal considerations apply to assembled land exchanges.

Valuation implications associated with an assembled exchange must be documented in the Feasibility Analysis, and the decision to process an assembled land exchange must be documented in the Agreement To Initiate through the addition of Exhibit E (sec. 39, ex. 10).

### **31.22 - Phased Closing**

For related direction see FSH 5409.12, section 14.3.

A phased closing occurs when the entire transaction cannot be closed in a single action. For example, title curative measures on a portion of either the Federal or non-Federal land would be completed at a later date (usually within 3 months or less). However, a portion of the lands may be conveyed with clean title. Phased closings may be used either in assembled or nonassembled exchanges. In either case, the Exchange Agreement shall accommodate phased closings by specifying the legal descriptions of property conveyed in each phase and ensuring that values are equalized in each phase. Each phase closing must stand alone as equal in value, and the total cash equalization for all phased closings cannot exceed 25 percent of the total transaction.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

Do not consider a phased closing in situations when the entire land exchange transaction, as evaluated through the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321-4326) process and documented in the decision document, is not likely to occur.

An Exchange Agreement must be used in cases where a phased closing will occur.

### **31.23 - Multiple Transactions**

In some situations it may be necessary to utilize more than one transaction to acquire a large property and may involve one or more land exchanges in combination with purchase or Small Tracts Act actions. The timeframe for a multiple transaction project should be as short as possible, but should not exceed 4 years. Do not include a provision to pay interest in these cases. However, the appraisal of the whole property may be updated, as appropriate, to reflect market changes (FSH 5409.12, sec. 14.4).

### **31.24 - Multiple Conveyances**

It may be desirable to utilize multiple conveyances, also referred to as direct deeding, in closing a land exchange by receiving and conveying title to individual parcels directly to and from various parties involved in a facilitated or assembled land exchange transaction. However, the increased Federal administrative closing and title costs associated with preparing, conveying, and receiving multiple deeds shall be considered.

When Federal lands are conveyed into private ownerships using separate conveyance documents (patents or deeds), the property described in each conveyance shall be valued independently. The authorized officer has the responsibility to determine the contributory value of each parcel and how cash equalization should be handled. Closing instructions, executed by the parties receiving and granting conveyances, shall clearly describe how the transaction should be closed. To the extent practical, utilize escrow or trust arrangements as a means of dispensing deeds and cash equalization payments in multiple party transactions.

### **31.25 - Dual Authority Exchange**

Dual authorities shall be used when a land exchange involves Federal lands with both reserved public domain and acquired status. The General Exchange Act of 1922 (16 U.S.C. 485, 486) applies to reserved lands, and the Weeks Act of 1911 (16 U.S.C. 516 et seq.) applies to lands with acquired status. The exchange can be documented in one decision document, one exchange agreement, and one appraisal, with the value and acres allocated as proportional to the applicable authority. However, separate digests, patents, and deeds for each authority are required.



**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

## **32 - DEVELOPMENT OF LAND EXCHANGE PROPOSAL**

### **32.1 - Overview**

Ensure agency personnel involved in land exchanges are knowledgeable of the policies and authorities for land exchanges (FSM 5400 and 5430) so that they are able to discuss with the non-Federal party the process, requirements, and timeframes for completion of the exchange, and the responsibilities and expenses that each party would incur.

Agency personnel should ensure that the Forest Service does not commit to indemnify a non-Federal exchange party who puts up cash or buys land in anticipation of concluding an exchange. A non-Federal party's purchase of land to exchange with the government is at their own risk. The non-Federal party may reduce that risk by optioning exchange lands rather than actually buying them. However, ensure that the option is of sufficient duration to allow for the exchange procedures to be completed. Advise the non-Federal exchange parties that it may be beneficial for them to secure legal counsel in proceeding with these types of purchases or options.

#### **32.11 - Marketing Considerations**

The authorized officer has the responsibility to design land exchange transactions that consider the best marketing configuration of the Federal lands or interest in lands. For example:

1. If the highest and best use of the Federal land is for subdivision development, and the amount of Federal land offered at one time would saturate the market reducing the value of the Federal lands, reduce the exchange to a size the market can handle.
2. If the current zoning for the area is for agricultural use, and there is a possibility that future zoning would change to commercial or industrial use, do not to include the Federal land in an exchange at this time since the potential for increased value would be lost.
3. If an exchange involves commercial timberland in a depressed timber market where the value of the Federal timber estate is greater than the value of the non-Federal timber estate, delay the exchange until the timber market improves or re-packages the exchange so as to equalize the timber component.
4. If the lack of legal access to the Federal land would have a significant negative effect on value, consider deferring the exchange until assignable access is secured.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

## **32.12 - Considering Deed Restriction and Reservations**

Due to the reduced value of the Federal estate and perpetual obligations that may be imposed on the United States, initiate or agree to a reservation or restriction on the Federal lands only when needed to protect the public interest or to satisfy a requirement of law, such as those concerning wetlands, floodplains, heritage sites, and so forth (36 CFR 254.3(h)). For example, if the highest and best use of the Federal lands is for subdivision development, a deed restriction limiting development to protect a heritage site from ground-disturbing activities could have a negative impact on the value of the Federal land. The costs of deed reservations and restrictions shall be considered in the appraisal and decision processes.

When a proposal is accepted by both parties, an Agreement To Initiate an exchange (ATI) (sec. 32.7) is executed that defines the proposal and documents the assignment of responsibilities and costs of each party (36 CFR 254.4). Modifications to the terms and agreements to the ATI must be documented through an amendment.

## **32.2 - Utilizing Third-Party Facilitator**

A third-party facilitator assists a buyer and seller in reaching an agreement in a real estate transaction. Facilitators, whether non-profit or for-profit, are not agents of the Federal government and participate in the real estate action at their own risk. The authorized officer has the responsibility to closely monitor the development of land exchanges involving third-party facilitators to ensure consistency with the applicable forest land and resource management plan and with Forest Service policy and regulations.

When developing transactions that involve facilitators, consider all interested entities to minimize situations where a single facilitator is used exclusively. Invite facilitators to participate in specific transactions, and when their assistance is necessary to achieve agency objectives, and utilize the entity that best serves Forest Service needs.

Third-party facilitators may be useful in transactions involving assembled land exchanges (sec. 31.21), phased closings (sec. 31.22), and multiple transactions (sec. 31.23). Third-party facilitators may also be useful in situations where:

1. Agency funding is not currently available and land must be secured quickly.
2. The non-Federal landowner requires payment prior to signing an option.
3. There is a need to build public support for priority land adjustment projects.
4. It is useful to facilitate a concurrent acquisition involving several public agencies.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

5. Timely expertise and assistance is needed to facilitate a land exchange case, such as providing National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321-4326) documentation; obtaining appraisals and surveys; securing outstanding property interests; conducting title curative work; and so forth.

When studies or reports are provided by facilitators, the authorized officer has the responsibility to ensure that the appropriate agency resource specialist and/or Review Appraiser review and approve all final reports prior to agency use.

The role of a third-party facilitator shall be clearly defined in land exchange proposals. A sample letter outlining the roles and responsibilities with a third-party facilitator is displayed in section 39, exhibit 11.

### **32.3 - Costs and Responsibilities**

Land exchanges benefit Federal and non-Federal parties to the exchange and each should share in the costs of processing the exchange. At a minimum, require the non-Federal party to pay for title insurance, advertising, hazmat cleanup, and land surveys associated with the non-Federal land. Generally, appraisal costs should not be shared. Whenever possible, with the exception of competitive land exchanges (sec. 31.15b, para. 7), the Forest Service should pay for all appraisals (FSH 5409.12, sec. 61.3). To reduce administrative costs, consider using assembled and third-party facilitated transactions.

An Agreement To Initiate (ATI) (sec. 32.8) shall include an assignment of responsibility and costs for each party to the land exchange (36 CFR 254.4(6)). Transaction steps and their associated costs are summarized in Exhibit C, Implementation Schedule, and Exhibit D, Projected Costs and Allocation (sec. 39, ex. 10), and are attached to the ATI. No other collection agreements are needed when these provisions are documented as part of the ATI.

The Forest Service cannot pay non-Federal parties for non-contractual work they perform.

#### **32.31 - Authority for Cost Sharing**

Regulations at Title 36, Code of Federal Regulations, part 254 (36 CFR part 254) provide the authority for parties to the land exchange to share the costs associated with reviews, studies, and appraisals necessary to process and complete a land exchange.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **32.32 - Assignment of Costs and Responsibilities**

Each party should share costs by assigning complete components to an individual party rather than sharing the costs of individual components. For example, one party should provide 100 percent of the cultural resource work and another party should provide 100 percent of a threatened and endangered species survey. This is the simplest way to share costs and should be based on best-cost estimates with no subsequent adjustments for cost overruns.

When it is necessary to share the costs of a specific report or study, the terms for cost sharing shall be documented in the ATI. For example, if each party agrees to pay 50 percent of the cost of the heritage survey, the provisions of this 50/50 arrangement shall be defined in the ATI with the specific responsibilities assigned to each party for contracting the work, expected timeframes, and provisions on how payment will be made and by whom. Document specific cost estimates and allocations on Exhibit D, Projected Cost Allocations (sec. 39, ex. 10).

### **32.33 - Forest Service Payments**

Payments made to non-Federal parties under the ATI shall be from funds set aside at the Regional Office or field unit for this purpose. The non-Federal party may contract for the report(s) and bill the Forest Service for its share of the costs after the report(s) are accepted. However, the Forest Service cannot make advance payments or partial payments while the reports are being prepared. When a non-Federal party contracts for a product or service, the ATI shall specify the Forest Service's requirements for an acceptable product or service. The authorized officer, or authorized representative, has the responsibility to participate with the non-Federal party in the screening and selection of the contractor, as well as to provide information and requirements at pre-work meetings documenting standards to be met. However, the Forest Service should avoid assuming the role of the contractor, or paying the non-Federal party's contractor directly when the report(s) is received and accepted.

### **32.34 - Forest Service Reimbursement**

The Forest Service may be reimbursed by the non-Federal party for the agency's share of the costs associated with the review of reports and studies associated with the land exchange. The provisions for reimbursement shall be documented in the ATI and collected through issuance of a Bill for Collection, Form FS-6500-89, to the non-Federal party. The ATI must also include one of the following statements on overhead costs:

**“Overhead costs at the standard rate of the collecting unit may be assessed on the money received from the non-Federal party” or**

**“Overhead costs shall be waived.”**

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **32.35 - Assumption of Costs**

Regulations at Title 36, Code of Federal Regulations, section 254.7 (36 CFR 254.7) allow exchange parties to assume all or part of the costs, responsibilities, and requirements borne by the other party. When authorized, assumption of costs does not provide for payments during the exchange process, but rather is carried as a credit at closing by adjusting relative values through the use of cash.

Do not authorize the use of assumption of costs when initially negotiating and developing the ATI, since an assumption of costs should be considered only due to an unexpected condition that prevents the exchange party from fulfilling the party's responsibilities identified in the ATI (FSM 5403.1, para. 18). Exhibit D, Projection of Costs and Allocation (sec. 39, ex. 10), should be completed to demonstrate the contributions of each party. If either party cannot fulfill its assigned responsibilities during the case processing, the other party should assume this responsibility and the associated costs without compensation. If this is not feasible, the exchange should be deferred until funding is available. If funding does not become available within a reasonable amount of time, the case should be abandoned. However, if the land exchange meets the public interest requirements specified in 36 CFR 254.7, the authorized officer may assume costs without compensation or may request approval by the Washington Office, Director of Lands, for the use of assumption of costs (FSM 5430.41c, para. 6, FSM 5430.42b, para. 12). If the compensation for assumption of costs request is approved, the ATI, including Exhibit D, shall be amended to include this provision and display the adjustment in cost allocation. The combined amount of any cash equalization payment needed to balance the land values in the exchange and/or the amount of adjustment agreed to as compensation for assumption of costs may not exceed 25 percent of the value of the Federal land conveyed.

### **32.4 - Feasibility Analysis**

Prior to signing an Agreement To Initiate (sec. 32.7), the authorized officer has the responsibility to conduct a feasibility analysis of the proposed exchange as a first level screen to:

1. Ensure compliance with the applicable forest land and resource management plan.
2. Identify public benefits.
3. Ensure the availability of resources to complete the proposed exchange.
4. Identify title and property description problems.
5. Identify potential support and opposition.

Include high-quality color maps that display both the Federal and non-Federal lands and their relationship to the overall landownership pattern.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

Applicable information pertaining to the non-Federal lands, such as title, legal description, or environmental characteristics and condition, should be solicited from the non-Federal party to facilitate the feasibility analysis. However, the feasibility analysis and preparation of the feasibility analysis report is the sole responsibility of the authorized officer, and under no circumstance shall this analysis be conducted by the non-Federal party or a third-party facilitator.

**32.41 - Forest Land and Resource Management Plan Compliance and Public Interest Determination**

Document in the feasibility analysis how the exchange proposal supports the standards and guidelines of the applicable forest land and resource management plan. Provide a narrative disclosing the anticipated use of the Federal lands after conveyance into non-Federal ownership and document the non-Federal party's prospective and legal use of the property based on county zoning. In many cases this disclosure determines the level of National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321-4326) documentation that may be necessary to analyze the proposed exchange (sec. 33.4).

Identify which resources or programs would benefit or could be adversely affected by the exchange, and summarize the public interest factors that are associated with the proposal (36 CFR 254.3(b)). At a minimum, the preliminary review should address implications on threatened and endangered species, known cultural and historic resources, American Indian issues, wetlands and floodplains, hazardous materials, and management efficiency associated with the proposal. Describe all structural improvements on the non-Federal estate and their disposition when acquired by the United States.

**32.42 - Preliminary Title Evidence**

Include a copy of the preliminary title evidence for the non-Federal lands with the feasibility analysis. Title evidence documents existing ownership rights, such as the mineral estate, water, and so forth held in the land as well as encumbrances or restrictions that may make a proposal unacceptable. The preferred form of preliminary title evidence is a commitment to insure title.

Ensure that the non-Federal party is in, or would be in, a position to convey the full property interest desired by the United States should the exchange ultimately be approved. Identify leases and other encumbrances or occupancies on the non-Federal land that are not of record and document them in the Certificate of Possession (sec. 33.43a).

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **32.43 - Boundary Management Review**

Ensure a Forest Service land surveyor conducts a boundary management review for the Federal and non-Federal lands that includes the legal description; acreage verification; land boundary locations, both record and field; and a determination of additional land survey needs. Document the boundary management review on the Form FS-5400-41, Land Description Verification Federal Land (sec. 39, ex. 08), and on Form FS-5400-40, Land Description Verification Non-Federal Land (sec. 39, ex. 09).

### **32.44 - Federal Land Status Report**

Attach a copy of the Federal land status report documenting relevant title and occupancy information in the Federal land and identify the legal land status as either acquired or reserved public domain. Identify encumbrances, such as special use permits, rights-of-way, grazing allotments, withdrawals, outstanding rights, leases, and so forth on the public land using the master plats, mining claim records, land status records, the special uses database system (SUDS), and other automated record keeping systems. Address the need to reserve public access, easements, or other rights on the Federal lands.

### **32.45 - Water Rights Analysis**

Complete a water right analysis that addresses ground or surface water rights associated with both the Federal and non-Federal lands. If necessary, request a water rights search from the State Engineer (FSM 2541.41) for the Federal and non-Federal lands. Obtain copies of all pertinent documents, such as applications, permits, decrees, certificates, or other water rights documents, that may be used in a particular State.

#### **32.45a - Federal Lands**

If the ownership of the water rights on the Federal land is in the name of the United States, determine whether the rights should be reserved or conveyed. If title to the water rights on Federal land is held by a non-Federal entity, document this outstanding right in the analysis.

#### **32.45b - Non-Federal Lands**

Provide copies of the water right documents and a description of the land to the hydrologist or water rights specialist when water rights are associated with non-Federal lands. Request the hydrologist or water rights specialist to:

1. Render an opinion of the current status and the quality and quantity of the non-Federal water rights.
2. Report alternative uses of the water as if it were in the ownership of the United States.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

3. Determine the actions necessary to effectively transfer, utilize, and preserve ownership of these rights by the United States.
4. Determine the contributory value of the water rights.
5. Estimate the costs associated with the use and management of the water rights if they are acquired by the United States.

### **32.46 - Valuation Consultation**

Valuation consultation is needed to ensure that the proposal is in compliance with the equal value requirement of the Federal Land Policy and Management Act (FLPMA) of 1976 (43 U.S.C. 1701 et seq.), or can be brought into compliance through the addition or the reduction of acreage or cash equalization. Valuation consultation is also useful to the authorized officer in determining value attributable to water rights or improvements on the non-Federal property and potential valuation issues associated with the Federal and non-Federal lands when considering the use of an assembled exchange. Ensure that a Forest Service staff appraiser participates during the feasibility analysis to determine the scope of appraisal participation in the proposed exchange and provides advice for the feasibility report (FSH 5409.12).

### **32.47 - Identifying Issues, Concerns, and Support**

Document in the feasibility analysis report anticipated public support or opposition to the proposed exchange, including the position of local and State government officials and congressional delegations. In the feasibility analysis, consider the potential cost to the Government to relocate lawful tenants and their businesses and to acquire their real property improvements. Identify issues and concerns related to heritage resources, threatened and endangered species, old growth, timber, wetlands, floodplains, and so forth.

### **32.5 - Acquisition of Structures**

In some situations it may be desirable to acquire land with structural improvements because of the resource value of the structures or the potential to use the structures for administrative purposes. However, structures should be removed prior to closing when they are not needed and the parcel is being acquired solely for the resource benefits of the land.

When a structure is acquired because of its resource benefit, such as a historic building, the land and structure shall be appraised on the basis of its market value. No premium for the historic nature of a structure can be recognized in the appraisal unless the market recognizes the added value.



**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

When a structure is acquired for administrative use, approval by the Department of Agriculture, Assistant Secretary for Administration, Secretary of Agriculture approval is required if the land and buildings are valued at more than \$250,000 (sec. 31.16b and FSH 6409.31 - AGPMR 104-25.302-1).

Document the type and size of the structure in the feasibility analysis and Agreement To Initiate in all situations where a structural improvement is being acquired. Document the purpose of acquiring the structure and how its acquisition supports the forest land and resource management plan in the feasibility analysis. Ensure that the decision document approving acquisition of a structure documents how the acquisition serves the public interest and discloses the future disposition of the structure, including the funding source for future maintenance or the disposal of the structure plans, such as sale, demolition, and so forth.

### **32.6 - Tribal Consultation**

The authorized officer has the responsibility to initiate government-to-government consultation with potentially affected Federally Recognized Tribes (FSM 1563.03) upon receipt of a land exchange proposal and prior to signing an Agreement To Initiate. The authorized officer determines if a tribe has reserved rights or other interests on the National Forest System lands affected by the proposed exchange and seeks the advice of the Office of the General Counsel (OGC) in applying those rights.

### **32.7 - Right-of-Way Reservations and Easements in Land Exchanges**

For related direction, see FSM 2730; FSM 5460; FSH 2709.12; FSH 5409.13, chapter 60; and FSH 5409.17.

A right-of-way can be granted, acquired, or retained through a deed reservation in the exchange or warranty deeds, or through a stand-alone easement deed. When possible, use an easement deed because it is easier to track and identify in county and agency records. Whether by deed reservation or stand-alone easement, the language used is essentially the same and must meet requirements identified in FSH 2709.12 for grants; FSH 5409.13, chapter 60 for reservations; and FSH 5409.17 for right-of-way acquisitions.

### **32.71 - Right-of Ways Reserved or Acquired by United States**

For additional direction on reservations, including approved reservation language, see FSH 5409.13, section 64.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

The authorized officer determines the need to reserve on the Federal land, or acquire on the non-Federal land, a road or trail right-of-way after considering the agency's present and future resource and management needs. Acquire or reserve full access rights, including the right of public access and the right of the United States to assign and grant future use of the road or trail to others (FSH 5409.17). A raw land reservation may be used to reserve future road or trail access to National Forest System lands.

**32.72 - Rights-of-Ways Reserved or Acquired by Non-Federal Party**

The non-Federal party may reserve or acquire an existing or future right-of-way across the non-Federal land conveyed to access other non-Federal land; FSH 5409.13, section 62, provides direction and recommended reservation language to use, including language to include when there is a potential for future subdivision on the land served by the right-of-way.

When acceptable to the non-Federal party, issue after the exchange is finalized a Forest Land Policy and Management Act (FLPMA) of October 21, 1976 (43 U.S.C. 1701 et seq.) easement or a Forest Road and Trails Act (FRTA) of October 13, 1964 (16 U.S.C. 532-538) easement in lieu of a reservation. For the qualifications for a FRTA easement, see FSH 2709.12, section 35. The authorized officer should consult with the Office of the General Counsel to determine what easement interests are appropriate to convey from the United States to the non-Federal party.

**32.73 - Right-of-Way Construction and Use Agreement Roads**

For additional direction, see FSM 5467 and FSH 5409.17, chapter 60.

When an established Road Right-of-Way Construction Use Agreement (cost-share) area is involved in a land exchange, conduct a cost-share analysis as a part of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321-4326) analysis. Identify in the analysis roads that:

1. Currently are or previously were authorized under a cost-share agreement for which FRTA easements were conveyed by the cooperating parties.
2. Involve easement grants to landowners who cooperated in the construction of National Forest System roads that did not involve a cost-share agreement.

The granting or exchanging of cost-share or FRTA easements, or development of cost-share supplements impacted by a land exchange, should be accomplished as a separate proceeding apart from the land exchange process.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **32.8 - Agreement To Initiate**

All prospective parties to the exchange shall finalize and sign a nonbinding Agreement To Initiate (ATI) when a feasibility analysis is completed and the determination is made to continue with the exchange. The ATI may be amended at any time with the consent of both parties. At a minimum, the ATI shall include the items listed in Title 36, Code of Federal Regulations, section 254.4(c) (36 CFR 254.4.4(c)). See section 39, exhibit 10 for a sample ATI.

### **32.9 - Uniform Relocation Provisions**

The Uniform Relocation Assistance and Real Property Acquisition Polices Act of 1970 (Pub. L. 91-646) provides for relocation payments to persons displaced from residences, businesses, farms, and non-profit organizations by Government actions to acquire property. The Department of Transportation regulations at Title 49, Code of Federal Regulations, part 24 (49 CFR 24) provide direction to all Federal agencies on relocation payments to displaced persons. United States Department of Agriculture Regulations (7 CFR 21.1) incorporate by reference the Department of Transportation regulations.

Voluntary fee-simple land exchanges which are not legislated, court-ordered, or administratively mandated are not subject to the payment of relocation benefits to the owner-occupant when the Forest Service provides a written voluntary affirmation notice as specified in 49 CFR 24.101(a)(1)(iii) and (2)(i). However, any lawful-occupant tenant who qualifies as a person displaced by an exchange or purchase and who moves after “initiation of negotiations” (49 CFR 24.2(k)) to acquire the non-Federal land may be eligible for certain relocation benefits (49 CFR 24.2(g) and (k)). Likewise, lawful tenants conducting business or farm operations on non-Federal land who move their personal property from the non-Federal land may be eligible for relocation assistance, advisory services, and moving expenses (49 CFR 24.2(g)(1)(iii)).

The Forest Service shall offer fair market value for tenant-owned real property improvements located on non-Federal land involved in an exchange or purchase (49 CFR 24.105) when:

1. The tenant has the right or obligation to remove the improvements.
2. The tenant is willing to convey all rights to the improvements.
3. The owner of the non-Federal land disclaims all interest in the tenant-owned improvements.

The Forest Service shall provide the owner-occupant with a written notice affirming the voluntary nature of the land exchange proposed. The written notice should be included as an element of the Agreement To Initiate.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

## **33 - PROCESSING LAND EXCHANGE**

### **33.1 - Segregation of Federal Land Having Reserved Public Domain Status**

When an exchange involves Federal lands with reserved public domain status, the authorized officer requests the appropriate State Office of the Bureau of Land Management (BLM) to segregate the Federal lands from appropriation under the public land and mineral laws, subject to valid existing rights, for a period not to exceed 5 years (36 CFR 254.6). In addition to segregation, the authorized officer requests that the parcel be serialized and that copies be provided of the Master Title Plats and historical indexes, mining claim information, and status of the lands. This request may also state that a separate formal withdrawal revocation request would be forthcoming. Promptly notify the BLM of a change in the status of the Federal or non-Federal land.

Segregation of the Federal land terminates when one of the following conditions are met:

1. A patent or other conveyance document is issued.
2. A decision is made to not proceed with the exchange.
3. The lands are removed from the exchange proposal as specified in an opening order published in the Federal Register by the BLM State Office.
4. The termination of the segregation period or 5 years has passed from the date of notation in the public land records, whichever occurs first.

### **33.2 - Land Description and Survey**

For related direction on land descriptions and surveys, see section 32.43.

#### **33.21 - Land Descriptions**

The Federal and non-Federal lands shall be accurately described so that the land descriptions may be used for appraisals, identification of existing or suspected encroachments, and to ensure accurate land parcel mapping in the Forest Service land status records.

In Public Land Survey System (P.L.S.S.) States, a description based upon the most recent official land survey by aliquot parts may be sufficient to adequately identify the property. For the proper format for an aliquot part description, see the Bureau of Land Management (BLM) publication "Specifications for Descriptions of Tracts of Land for Use in Land Orders and Proclamations" (sec. 30.6).

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **33.22 - Land Survey**

When required, cadastral surveys of lands with reserved public domain status must be approved by the BLM and completed to BLM standards as provided for in the BLM publication “Manual of Instruction for Survey of the Public Lands of the United States” (sec. 30.6). When required, surveys of non-Federal lands or re-acquired Federal lands shall be completed to applicable State and Forest Service standards and submitted to a State-licensed Forest Service land surveyor for approval.

#### **33.22a - Land Survey on Federal Land**

Land surveys may be required when Federal lands are proposed for conveyance under the following conditions:

1. The parcels are not aliquot parts, Government lots, or Government tracts established by an official Government land survey.
2. The parcel is a fractional part of a Government lot or a Government tract.
3. The parcel is described by an outdated metes and bounds survey.
4. The parcel’s land survey or description is inaccurate or vague and lacks sufficient information to verify the acreage and location of the land parcel.
5. There is potential for encroachment or trespass.
6. An investigation indicates the actual acreage of the subject parcel differs enough from the official acreage to make a significant difference in the valuation of the parcel.

#### **33.22b - Land Survey on Non-Federal Land**

Land surveys may be required for non-Federal lands proposed for acquisition under the following conditions:

1. The parcel is described by a metes and bounds description that lacks sufficient information to verify or support its acreage and location.
2. The location and extent of the lands to be acquired are in doubt, or there is potential for encroachment.
3. A portion of a parcel has not been surveyed or there is an inadequate description to locate the partition line.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

4. A preliminary survey review indicates the actual acreage of the parcel differs enough from the official acreage to make a significant difference in the valuation of that parcel.

It is the responsibility of the authorized officer to ensure that new National Forest System land boundary lines resulting from the land exchange are monumented, marked, and posted to Forest Service standards.

### **33.3 - Public Notice**

For related direction, see Title 36, Code of Federal Regulations, section 254.8 (36 CFR 254.8) and section 39, exhibits 13 and 14, of this Handbook.

All land exchanges require public notification. However, the method and extent of public involvement may vary depending on the amount of public interest, the complexity of the exchange proposal, and the resources that may be impacted. Do not develop a firm proposal or attempt to convince the public that the land exchange is desirable when soliciting public input on the proposed exchange.

The authorized officer has the responsibility to acknowledge and respond as appropriate to comments received and should explain to parties who object to the land exchange that no decision has been reached and that their comments would be considered in developing the final proposal or discontinuing the exchange process. When there is strong local opposition to the land exchange, the authorized officer should consider holding a public meeting(s) to further inform the public of the details of the exchange proposal and to facilitate opportunity for additional public input.

All land exchange proposals shall follow notification requirements provided in sections 33.31 through 33.33. See section 31.15b for direction on notification requirements for a competitive land exchange.

### **33.31 - Publication of Notice of Exchange Proposal**

Publication of a Notice of Exchange Proposal (NOEP), also known as the 4-week notice, is required after the agreement to initiate (ATI) is finalized (36 CFR 254.8). The purpose of this notice is to invite the public to submit comments and concerns about the exchange proposal, including knowledge of any liens, encumbrances, or other claims involving the lands considered for exchange.

The NOEP shall be published once a week for 4 consecutive weeks in a newspaper of general circulation in the area in which the Federal and non-Federal lands are located. Publish a separate NOEP for each area where the proposed exchange parcels are located, unless a single newspaper has general circulation in all of the areas. In this situation, the authorized officer has the responsibility to certify that the designated newspaper has general circulation in all of the areas involved and that the original certificate is kept in the original title docket

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

submitted to the Office of the General Counsel. All comments to the NOEP must be made in writing and must be postmarked or delivered within 45 days after the initial date of publication. The NOEP may also serve as notification for scoping under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321-4326), except when the proposed exchange is complex or controversial and a more extensive notice and comment process is needed to address the issues and concerns required under NEPA. In either situation, all comments received in response to the NOEP must be considered in the NEPA analysis.

The authorized officer is responsible for coordinating the publication directly with the publisher. However, the non-Federal party usually pays for the publication. If the non-Federal party pays for the cost of publication, the authorized office ensures that the publisher understands that the Forest Service assumes no responsibility for payment. A sample letter to the publisher is displayed in section 39, exhibit 12.

The authorized officer is also responsible for ensuring that notices are distributed to interested parties, including adjacent landowners, State and local governments, and congressional delegations and that the notification process is consistent with local public notification plans and procedures for proposed Forest Service activities and actions.

### **33.31a - Minimum Requirements**

At a minimum, the Notice of Exchange Proposal (NOEP) shall contain the following information:

1. The identity of the exchange parties.
2. A concise description of the Federal and non-Federal lands involved in the exchange in accordance with the standards of a public land survey. When lengthy metes and bounds descriptions are involved, describe the land as all or a designated portion of a well-known local tract. For example, describe a tract as having 30 acres located at the headwaters of a Rocky Stream and bounded by the Triple X Ranch.
3. A statement of the effects of segregation from appropriation of the public land and mineral laws.
4. An invitation to the public to submit written comments or concerns on the exchange proposal, including a request that the agency be advised as to any liens, encumbrances, or other claims relating to the lands being considered for exchange.
5. A date by which comments must be received and the name, title, and address of the official to whom comments may be sent and from whom additional information may be obtained.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

6. A statement that the Forest Service is interested in acquiring the non-Federal parcels and that the exchange proposal is currently being analyzed to determine whether or not it is in the public interest.

7. When applicable, a statement that the proposed exchange involves floodplains on the Federal land and/or the non-Federal land as required by Executive Order 11988 issued May 24, 1977 (E.O. 11988). A sample statement is displayed in section 39, exhibit 14.

8. A reference to the Federal Land Policy and Management Act of October 21, 1976, as amended, (43 U.S.C. 1716) as the authority for the land exchange and references to other applicable general land exchange authorities (FSM 5430.1) and specific Regional authorities (FSM 5430.13) for the particular exchange. Sample statements for providing a referencing land exchange authorities are found in section 39, exhibits 13 and 14.

### **33.31b - Republication**

Republish the Notice of Exchange Proposal (NOEP) when there is a need to amend the original NOEP due to:

1. Errors in the land description or in another item that would make a significant change in the exchange proposal.
2. Substitutions or additions to the exchange lands.
3. Changes in timber designated in direct-cut exchanges.

Changes in exchange parties usually would not require republication, nor would changes in timber to be cut within an existing timber sale contract.

The NOEP amendment must meet the same requirements as the 4-consecutive-week notice (36 CFR 254.8(c)). See section 39, exhibit 15, for a sample format for amending a NOEP.

### **33.31c - Proof of Publication**

Include proof of publication in the original title docket. See section 39, exhibit 16, for a sample Affidavit of Publication.

### **33.32 - Notification to Federal Agencies, States, Local Governments, and Congressional Delegations**

Notification to affected or interested Federal agencies, States, and local governments, and to congressional delegations shall be made simultaneously with the Notice of Exchange Proposal (NOEP) and contain the minimum information found in section 33.31a.



**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **33.32a - Congressional Notification**

1. Land Exchanges When the Estimated Value of the Federal Land is less than \$500,000.  
The authorized officer has the responsibility to notify local congressional delegations by letter (sec. 39, ex. 17) of proposed land exchanges affecting the applicable congressional district.

2. Land Exchanges When the Estimated Value of the Federal Land is \$500,000 or more.  
In addition to the requirement contained in paragraph 1, the authorized officer has the responsibility to, in a land exchange where the estimated value of the Federal land is \$500,000 or more, to forward a copy of the NOEP to the Regional Office, Director of Lands, or equivalent, when the NOEP is sent to the publisher. The Regional Office, Director of Lands, or equivalent, has the responsibility to forward the NOEP to the Director of Lands, Washington Office, to initiate congressional and Secretarial oversight and review (sec. 35).

### **33.32b - States, Clearinghouses, and Local Governments**

The Regional Forester or Forest Supervisor has the responsibility to establish procedures for notifying States and local governments of a proposed land exchange. Document the notification of these entities in the case file and consider responses received during the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321-4346) analysis of the land exchange proposal.

### **33.32c - Other Federal Agencies**

The authorized officer has the responsibility to notify other affected Federal agencies that may have an interest in the exchange. See exhibit 17 in section 39 for an example of a letter used to notify Federal agencies of a proposed land exchange.

## **33.33 - Notification to Affected Users of National Forest System Lands and Adjoining Property Owners**

### **33.33a - Special Use Authorization Holders**

The authorized officer has the responsibility to notify affected special use authorization holders in writing of the pending land exchange and the potential effect the land exchange may have on their future use of National Forest System lands.

### **33.33b - Grazing Allotment Permittees**

For additional direction, see 36 CFR 222.4 (a).

The authorized officer has the responsibility to inform grazing allotment permit holders in writing of the pending land exchange. The formal 2-year notification of a termination or modification to their permit starts upon receipt of the letter. If the exchange is consummated in less than 2 years from the date of receipt of the letter and a voluntary waiver is not obtained from

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

the permittee, the grazing permit shall be reserved in the deed or patent for the remainder of the 2-year period. Consult with the Regional Office Range Staff on the appropriate format to use to document the voluntary waiver of the 2-year notification. See section 39, exhibit 18, for a sample letter to a grazing permittee and a sample 2-year waiver form.

### **33.33c - Mineral Claimants**

The authorized officer must notify claimants of unpatented mining claims in writing of the proposed land exchange and the effect the land exchange may have on their mining claim.

### **33.33d - Tenants on Non-Federal Land**

Tenants on the non-Federal land shall be notified in writing of their eligibility for benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (sec. 32.9).

### **33.33e - Adjoining Property Owners**

The authorized officer has the responsibility to make a reasonable effort to notify landowners whose lands adjoin the boundaries of the Federal lands involved in the land exchange proposal. The notification may be by direct mailing or documented personal contact.

## **33.4 - National Environmental Policy Act Analysis**

For additional direction related to environmental analysis for a land exchange, see Title 36, Code of Federal Regulations, section 254.3(b) (36 CFR 254.3(b)).

### **33.41 - General Requirements**

When the Agreement To Initiate (ATI) (sec. 32.8) is signed, the authorized officer has the responsibility to proceed with the appropriate level of environmental analysis in accordance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321-4346) and Forest Service environmental policies and procedures (FSM 1950 and FSH 1909.15).

Land exchanges convey land, interests in land, and the resources associated with them. However, the act of conveyance has no environmental effects. Therefore, the environmental analysis should focus on the future use and management of the lands acquired and conveyed and the effect of the exchange on the lands that adjoin them.

Concentrate on issues related to implementation of the forest land and resource management plans and issues raised in scoping when preparing environmental documents. Follow the direction in FSH 1909.15 in determining the appropriate form of documentation, such as a decision memo, an environmental assessment, or an environmental impact statement.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **33.41a - Purchase and Other Exchange Configuration Alternatives**

Land exchange evaluations shall consider a purchase alternative in the National Environmental Policy Act (NEPA) analysis and document the non-Federal party's position on the United States' direct purchase of the proposed exchange parcels documented in the administrative record. The evaluation should also include other exchange configurations that were considered, including a deed restriction alternative when appropriate (36 CFR 254.3(h) and sec. 32 of this Handbook).

### **33.41b - Public Interest Determination**

The authorized officer has the responsibility to determine if the proposed exchange serves the public interest (36 CFR 254.3 (b)(2)) and supports the direction and guidance in the forest land management plan. Factors that must be considered in a public interest determination for a proposed land exchange are listed in Title 36, Code of Federal Regulations, section 254.3(b)(1) (36 CFR 254.3(b)(1)). The public interest determination must show that the resource values and the public objectives of the non-Federal lands equal or exceed the resource values and the public objectives of the Federal lands and that the intended use of the conveyed Federal land would not substantially conflict with established management objectives on adjacent Federal lands, including Indian trust lands. The findings and supporting rationale shall be made part of the decision (sec. 34.1).

### **33.41c - Mitigation**

Reservations of interests, or other types of deed restrictions, are often proposed as mitigation for effects related to conveyance of Federal lands. Generally, the purpose of the deed restriction should be to limit use or development of the Federal lands after conveyance as a means of addressing an environmental concern. Reservations and restrictions should not be used to address a social or political issue.

Deed restrictions result in the following:

1. A perpetual responsibility of the United States to administer and enforce the deed restriction.
2. A potential reduction in the appraised value of the Federal estate in its restricted condition, causing more Federal acreage to be conveyed to equalize the value of the non-Federal land.

Deed restrictions controlling future use and development of Federal lands conveyed into non-Federal ownership should be used only when required by law, regulation, or Executive order, or when the intended use of the conveyed Federal land would substantially conflict with established management objectives on adjacent Federal lands. The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321-4346) analysis must support any proposal to reserve deed restrictions on the Federal lands.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

Remove Federal lands from a land exchange proposal when restrictions on the Federal lands appear to be warranted, but when imposing the restrictions would result in a significant reduction in value or would create a significant administrative obligation to the United States.

### **33.42 - Scoping**

Scoping is an integral part of the environmental analysis process (FSH 1909.15, sec. 11). The scoping process provides the opportunity for participation by affected Federal, State and local governments, affected Indian tribe(s), parties to the exchange, and other interested persons. If scoping is initiated through the notification process described in section 33.3, ensure that all interested parties are notified of the proposed land exchange and are provided with the necessary information to participate in the scoping process.

### **33.43 - Specialist Reports and Property Inspection Documentation**

Specialist reports should be current and at a minimum consider:

1. Sensitive, threatened, and endangered species.
2. Heritage resources.
3. Floodplains.
4. Wetlands.
5. Minerals, including locatable, leaseable, and saleable minerals.
6. Hazardous substances.
7. Water rights.
8. A cost share review, if the land exchange involves a cost share agreement area.
9. Conformance with the Secretary of Agriculture's land use policy on prime farmland, rangeland, and timberland.
10. The net miles of roads to be gained or lost and the cost to bring acquired roads up to Forest Service standards. If the acquired roads are not needed or road use would conflict with planned management objectives, disclose the cost to close them and rehabilitate the area.
11. Other resource issues pertinent to the lands considered for exchange.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

The authorized officer has responsibility to closely monitor situations when a non-Federal entity performs resource analysis and documentation and to ensure that the appropriate Forest Service resource specialist provides the appropriate oversight and approves the final report.

### **33.43a - Certificate of Possession**

When both exchange parties sign the Agreement To Initiate (ATI) (sec. 32.8) and the preliminary title evidence is received and reviewed, an on-the-ground inspection of the non-Federal land shall be made to determine actual uses or occupancies.

1. Form FS-5400-37, Certificate of Possession. All physical items that can be seen on the ground, such as roads, power lines, abandoned vehicles, structures, fences, garbage, and so forth shall be documented on Form FS-5400-37, Certificate of Possession. Unauthorized occupancies, potential trespass, and adverse possession (sec. 30.5) shall be documented and immediately brought to the attention of the landowner. Identify any potential adverse claims that might contribute to a mechanic's lien, as evidenced by lumber or other building supplies located on the property. The employee who conducts the on-the-ground review is responsible for completing and signing the Form FS-5400-37.

The original signed Form FS-5400-37, Certificate of Possession, and a map showing the location of the property, as well as the recorded and unrecorded encumbrances, shall be submitted as part of the original title package. The date of examination should be as current as deemed necessary to reflect up-to-date uses and occupancies on the land. However, the date of examination cannot be more than 6 months prior to the Office of General Counsel's (OGC's) review.

2. Form FS-5400-38, Supplement Certificate of Possession. An additional on-the-ground inspection shall be made immediately prior to closing the transaction and shall be documented on Form FS-5400-38, Supplemental Certificate of Possession. The examiner who executes Form FS-5400-38 certifies to personal knowledge of boundary lines and corners of the property being examined and the presence or absence of physical items that would indicate the use and occupancy of the property. If the examination discloses that there are physical items indicating occupancy, the examiner shall document the location of those items on a map attached to the Form FS-5400-38. Incomplete or inaccurate examinations may result in the loss of the acquired lands to occupants who claim title to the lands.

The authorized officer should require the non-Federal party to remove any personal property that is not part of the exchange proposal prior to the United State's acceptance of title, unless the authorized officer and the non-Federal party agree to an alternative specified date or period. If the personal property is not removed prior to acceptance of title, or within the specified period,

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

the property is deemed abandoned and becomes the property of the United States (36 CFR 254.15(c)(1)(iii)). In unusual circumstances, the authorized officer may allow personal property to remain on the property if the non-Federal party signs a Disclaimer of Ownership (sec. 39, ex. 20).

### **33.43b - Hazardous Substances**

Both the Federal and non-Federal lands shall be inspected for hazardous substances, materials, and petroleum products (FSM 2160). The inspection, referred to as transaction screening, shall be documented on worksheets 1 through 5 in the Forest Service Guide to Land Transactions (EM-2160-2) (sec. 30.6). Completion of the five worksheets documents the review of historic and current aerial photos, maps, records, interviews, and site inspections. Both the ATI and exchange agreement shall include a statement that if evidence of hazardous substances or petroleum products is found, either party may reject, without liability or penalty, the tract affected or refuse to complete the exchange. In addition, the presence of hazardous substances or petroleum products shall be disclosed in the National Environmental Policy Act (NEPA) of 1969 (43 U.S.C. 4321-4346) analysis. The exchange agreement shall detail requirements and responsibilities for any remediation identified as a condition of the acceptance or conveyance of title.

The authorized officer has the responsibility to contact the Regional Environmental Engineer or Comprehensive Environmental Response Compensation and Liability Act (CERCLA) coordinator if there is a suspicion or actual evidence of hazardous substances or petroleum products to further define the level of contamination, if any. The authorized officer shall not proceed with an exchange involving contaminated property until an assessment of the potential clean up costs and long-term liability of acquiring or conveying the property is provided by the Office of the General Counsel (OGC) and the Regional Environmental Engineer or CERCLA Coordinator. Procedures for the “bona fide prospective purchaser exemption” (sec. 30.12) shall be followed if the decision is made to acquire contaminated property.

The results of the transaction screening and subsequent investigations shall be given to the appraiser to ensure that this factor is considered in establishing the market value of exchange properties.

### **33.43c - Wetlands and Floodplains**

Both the Federal and non-Federal lands shall be inspected and evaluated for wetlands in accordance with Executive Order 11990 issued May 24, 1977 (E.O. 11990) and for floodplains in accordance with Executive Order 11988 issued May 24, 1977 (E.O. 11988) (FSM 2527). See section 39, exhibit 22, for a sample of a wetland and floodplain analysis report.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

Evaluate wetlands separately from floodplains even if their acres overlap. E.O. 11990 requires that the exchange preserve wetland functions with no net loss to the Federal estate. E.O. 11998 requires that the exchange not increase flood hazards to the non-Federal estate. Since the intent of each Executive order differs, the authorized officer has the responsibility to balance qualitative and quantitative factors to meet the intent of both Executive orders.

See the following list of three conditions that satisfy the requirements of E.O. 11990 and E.O. 11998:

1. The value of the wetlands or floodplains for properties received and conveyed is equal (balancing test) and the land exchange is in the public interest.
2. Reservations or restrictions are retained on the unbalanced portion of the wetlands and floodplains on the Federal lands when the land exchange is in the public interest but does not meet the balancing test.
3. The Federal property is removed from the exchange proposal when the conditions described in the preceding paragraphs 1 or 2 cannot be met.

### **33.43d - Biological Evaluation**

Conduct a biological evaluation (BE) on both the Federal and non-Federal lands (FSM 2670) as part of the environmental analysis process. The BE is used to identify listed and proposed threatened, endangered, or sensitive species that may be affected by the proposed exchange. The BE is also used to determine if consultation or conferencing with the United States Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) is required (FSM 2671.45). Informal consultation with the FWS or the NMFS in the early stages of the proposed exchange provides the best opportunity for formulation of alternatives or mitigation measures that should prevent or minimize adverse effects on listed or proposed species or their habitats.

### **33.43e - Heritage Resources**

Conduct a heritage resource (HR) survey on the Federal lands involved in a proposed land exchange (FSM 2360). A HR survey is not required on the non-Federal land unless there is a likelihood that there are heritage sites that may require protection. Any potential or identified heritage sites observed on the non-Federal lands should be reported to the Forest Service Heritage Specialist.

Submit completed HR survey reports to the State Historic Preservation Officer (SHPO) for the officer's review and concurrence. Include in the environmental assessment that heritage resources were given the appropriate level of consideration as required by Executive Order

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

11593; the National Historic Preservation Act of 1966 (16 U.S.C. 470); and Title 36, Code of Federal Regulations, Part 800 (36 CFR part 800). Include the SHPO's comments in the National Environmental Policy Act (NEPA) of 1969 (43 U.S.C. 4321-4346) analysis.

The exchange may proceed after receiving SHPO concurrence that there are no significant heritage resources or sites on the Federal property. Where potentially significant heritage resources or sites are found, a formal analysis should be conducted to determine eligibility to the National Register of Historic Places.

Sites that are determined eligible for the National Register of Historic Places shall be dropped from consideration in a land exchange proposal or the adverse effects mitigated. Since mitigation costs for archeological and historic sites may be substantial, the authorized officer has the responsibility to take into account the potential costs related to future management and protection of newly acquired heritage sites.

Proposed mitigation measures shall be developed in consultation with the SHPO and Advisory Council on Historic Preservation. Commonly employed mitigation measures for exchanges include, but are not limited to the following:

1. Recording of the site by mapping, photography, archival work, or architectural drawings.
2. Recovering a sample of the scientific information present in a site by archeological excavation.
3. Placing protective covenants on or reserving interests in the tract. A sample heritage resource reservation provision is found in section 39, exhibit 19.
4. Dropping tracts containing significant sites from an exchange and maintaining them in Federal ownership.

### **33.43f - Minerals**

1. Mineral Report. The Bureau of Land Management (BLM) Manual 3060.11 requires that all non-Federal and Federal lands identified for acquisition or conveyance by the United States have a mineral assessment documented in a mineral report. This report should document the mineral potential of the Federal land, evaluate surface uses that would interfere with potential development of the mineral estate, and recommend action that should be taken toward disposal or retention of the Federal mineral estate. At a minimum, a mineral report shall include:

- a. The estimated value of the mineral estate of the lands involved.
- b. A recommendation for the equitable treatment of unpatented mining claims on the Federal land.



**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

- c. An assessment of the liabilities associated with a mineral estate.
- d. An identification of potential resource conflicts.
- e. An identification of potential liabilities associated with past or present mineral exploration or production of the acquired lands and their potential to generate undesirable conditions, such as acid mine drainage.

Ensure that mineral reports are prepared by a Forest Service geologist or mineral examiner who is familiar with the lands involved. When appropriate, mineral assessments may be prepared by a non-Federal contractor with expertise in preparing mineral assessments, and must be reviewed and approved by a Forest Service Certified Mineral Examiner (CME). However, a non-Federal contractor may not prepare a mineral report that addresses the validity of an unpatented mining claim (FSM 2803, para. 10).

For all land exchanges involving reserved public domain lands, the BLM reviews the mineral report. BLM's concurrence with the Forest Service's conclusions and recommendations contained in the mineral report must be obtained before the Forest Service can use the report to assess the mineral estate.

2. Split Estates. Avoid creating "split estates" which is the separation of mineral and surface estates when both parties can convey the mineral estate with the surface estate. However, if the non-Federal party cannot convey the mineral estate, the authorized officer determines whether it is in the public interest to acquire the property without the mineral estate. This determination shall be documented in the mineral report and disclosed in the NEPA analysis and decision document.

3. Unpatented Mining Claims. Location and recordation of unpatented mining claims, even when there is no discovery of valuable minerals, constitutes an encumbrance on the title to the Federal lands. This encumbrance must be removed before conveyance or must be conveyed subject to the encumbrance. Federal lands should be eliminated from the land exchange proposal when a CME determines there is a valid discovery of a valuable mineral on an unpatented mining claim.

When a CME determines that there is not a valid discovery on an unpatented mining claim on the Federal land and that a mineral contest (FSM 2819) would likely succeed, advise the non-Federal party that they should attempt to extinguish the claim(s) by obtaining a voluntary relinquishment or by purchasing the claim(s) from the claimant. If it is not feasible to extinguish the claim, the Forest Service may consider initiating a mineral contest. However, mineral contest proceedings are expensive and time-consuming and these factors shall be considered when deciding whether to proceed with a land exchange that may require a contest action.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

When a mineral contest of unpatented mining claims is not feasible because of time or funding constraints, conveying lands subject to rights under the Act of May 10, 1872 (General Mining Law) (30 U.S.C. 22, 28, 28b) may be considered. However, a conveyance under these conditions is risky for non-Federal parties because the right to patent may be allowed under the General Mining Law if the claimant can prove a discovery of a valuable mineral. When a mineral patent is issued it is superior to the exchange conveyance document. Therefore, conveyances of this nature should be considered only when the mining claim validity report clearly demonstrates that the unpatented claim(s) may be successfully contested. An example of the wording to be used in the patent or quitclaim deed in these situations is provided in section 39, exhibit 22.

### **33.43g - Prime Farmland, Rangeland, and Timberland**

Departmental Regulation 9500-2 (DR 9500-2) establishes Department of Agriculture policy concerning prime farmlands, rangelands, and timberlands (FSH 1909.15, sec. 65.21). This policy requires that careful consideration be given when an action may result in the conversion of these resources to other uses. The appropriate resource specialist documents the effect, if any, a land exchange may have on identified prime farmlands, rangelands, or timberlands.

### **33.5 - Valuation of Federal and Non-Federal Lands**

Direction for the valuation of Federal and non-Federal lands in land exchanges is found in FSM 5403, 5404, and 5410; FSH 5409.12; and Title 36, Code of Federal Regulations, section 254.9 (36 CFR 254.9).

The authorized officer should solicit the non-Federal party's early involvement in the appraisal process to minimize the potential for dispute over values. The non-Federal party may be authorized to contract for appraisal reports upon approval of the Regional Appraiser in compliance with FSM 5410 and FSH 5409.12. Failure by the non-Federal party to follow Forest Service valuation procedures shall result in the submitted appraisal reports being considered unsolicited appraisal reports, and they shall be returned without review (FSM 5410.42c, para. 15).

### **33.51 - Approximately Equal Value**

For further information related to appraisal considerations in approximately equal value land exchanges, see FSH 5409.12.

Federal Land Policy and Management Act of 1976, as amended, (43 U.S.C. 1716) provides for approximately equal value land exchanges without a formal appraisal of either the Federal or non-Federal lands when the conditions cited at Title 36, Code of Federal Regulations, section 254.11(a) (36 CFR 254.11(a)) are met. The use of approximately equal value exchanges is limited to situations in which all of the following conditions are met:

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

1. The Federal land is not valued at more than \$150,000.
2. The authorized officer determines that the exchange is in the public interest.
3. Utilizing this provision would expedite the consummation of the exchange.
4. The Federal and non-Federal lands are substantially similar in location, acreage, use, physical attributes, and there are no significant elements of value requiring complex analysis (36 CFR 254.11).

The authorized officer, not the non-Federal party, determines whether the Federal and non-Federal lands are approximately equal in value and shall document how that determination was made.

State-certified appraisers cannot sign a Statement of Approximately Equal Value because these documents do not comply with the Uniform Standards of Professional Appraisal Practice (USPAP). Therefore, a Statement of Approximately Equal Value must be completed by delegated individuals under the direct supervision of a Regional Appraiser.

For direction on processing approximately equal value under Small Tracts Act authority, see 36 CFR 254, subpart C.

### **33.52 - Resolving Value Disputes**

Direction for resolving Federal and non-Federal value disputes in land exchanges is found in FSM 5403, 5404, 5410; FSH 5409.12, and Title 36, Code of Regulations, section 254.10 (36 CFR 254.10).

#### **33.52a - Bargaining**

Direction on the use of bargaining procedures to resolve value disputes is found in FSH 5409.12.

The Regional Forester may submit to the Washington Office, Director of Lands, a request to use bargaining if a value disagreement cannot be reconciled informally. This request shall document the basis for the value disagreement and describe the resource priorities accomplished by the land exchange. Action to begin the bargaining process shall be initiated at the Washington Office level if the Director of Lands determines that bargaining is warranted.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **33.52b - Arbitration**

Direction on the use of arbitration procedures to resolve value disputes is found in FSH 5409.12.

Arbitration may be used when bargaining (sec. 33.52a) fails and the authorized officer determines that it is in the public interest to go forward with the land exchange. All requests for arbitration shall be made to the Director of Lands, Washington Office (FSM 5404.14, para. 10) and shall be conducted in accordance with the real estate rules of the American Arbitration Association. Arbitration is limited to the disputed values of the exchange. If the parties agree to proceed with an exchange after arbitration, the values established by arbitration are binding on all parties for a period not to exceed 2 years from the date of the arbitration decision. The parties may mutually agree on a value that is different from the award.

### **33.6 - Cash Equalization and Waivers**

For related direction on cash equalization and waivers, see Title 36, Code of Federal Regulations, section 254.12 (36 CFR 254.12) and FSM 5430.42b, paragraph 8.

The amount of cash used to equalize the values between the Federal and non-Federal lands in a land exchange cannot exceed 25 percent of the value of the Federal lands conveyed. Cash equalization payments due the United States cannot be waived. However, the parties to the exchange may agree to waive cash equalization payments due the non-Federal party if the amount does not exceed 3 percent of the value of the Federal land to be conveyed or \$15,000, whichever is less. No party to a land exchange may use a reservation to equalize land exchange values.

### **33.7 - Land Use Authorizations**

In a land exchange proposal the Federal land may be occupied or encumbered by a special use authorization. Although the Forest Service may terminate or revoke a special use authorization under the terms of the authorization when in the public interest as provided by Title 36, Code of Federal Regulations, Part 251, subpart B (36 CFR 251, subpart B), the authorized officer should encourage the non-Federal exchange party and the authorization holder to decide on the terms for continuing or terminating the use on Federal land prior to finalizing the exchange. When the holder of the authorization is a party to the exchange, document in the Agreement To Initiate and the Exchange Agreement the holder's intent to voluntarily revoke or terminate the holder's special use authorization upon or before conveyance of the Federal land.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

Prior to completion of the exchange, the authorized officer shall not agree to issuance of a special use authorization for the use of non-Federal lands following acquisition by the United States. Any decisions concerning the issuance of a special use land authorization for land the United States acquires shall be made through the application and authorization process found in 36 CFR 251, subpart B, and FSH 2709.11, chapter 10. For efficiency, the application and authorization process may occur in conjunction with the land exchange analysis and decision.

### **33.71 - Recreation Residence Special Use Permit**

For related direction on recreation residence special uses, see FSM 2721.23 and FSH 2709.11, chapter 40.

Before formally considering an exchange proposal involving Federal land on which recreation residences are located, the authorized officer should try to obtain 100 percent concurrence and participation of affected permit holders. Where it is not possible to obtain 100 percent concurrence of the permit holders affected by the exchange, pursue exchanges involving recreation residence tracts only when all of the following conditions are met:

1. A significant majority of the permit holders support the exchange, and the recreation residence tract has an established association or other administrative entity that is supportive of the exchange.
2. The association or administrative entity has the resources to consummate the exchange and can negotiate with permit holders who do not concur with the exchange proposal by either:
  - a. Issuing a replacement authorization for 10 years or the remaining term of the Forest Service special use permit, whichever is greater; or
  - b. Compensating holders when the association or administrative entity discontinues the recreation residence use without a minimum 10-year term from the date of conveyance out of Federal ownership or prior to the termination of their existing permit if the remaining term of that permit is more than 10 years following conveyance out of Federal ownership.

The United States, or any other entity, is not obligated to compensate a recreation residence special use permit holder when a decision to discontinue the recreation residence use provides a recreation residence permit holder a minimum of 10 years of continued use and occupancy.

## **34 - DECISION ON LAND EXCHANGE**

Land exchanges are discretionary and voluntary real estate transactions between the Federal Government and a non-Federal party. The authorized officer has the delegated authority to approve or disapprove a land exchange proposal ( FSM 5404.22).

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

A National Environmental Policy Act (NEPA) of 1969 (43 U.S.C. 4321-4346) analysis is not required to disapprove a proposed land exchange. However, a decision to approve a land exchange proposal shall be documented through the NEPA process (sec. 33.4).

### **34.1 - Decision Documents**

Use the appropriate decision document (sec. 39, ex. 23 and ex. 24) to issue NEPA based decisions (FSH 1909.15). Prepare a Record of Decision as provided in FSH 1909.15, section 27, when the proposed exchange involves an environmental impact statement.

All land exchange decision documents shall contain either expressly or by reference the following:

1. The location of the estates to be acquired and conveyed and the physical location of the tracts relative to roads, towns, and counties.
2. A description of the estates acquired and exchanged, including any outstanding interests or reservations, such as water rights to be conveyed.
3. An Equal Value Statement disclosing the approved values for the Federal and non-Federal lands and any cash equalization payments that may be required.
4. The alternatives considered. At a minimum, include alternatives that provide for:
  - a. No action.
  - b. The proposed exchange.
  - c. Direct purchase.
  - d. Deed restriction, when appropriate.
5. A summary of the public interest determination (sec. 33.41b; 36 CFR 254.3(b)) and documentation that the decision meets the requirements of all applicable laws, regulations, policies, and Executive orders.
6. Documentation that the proposed exchange is consistent with the applicable forest land and resource management plan.
7. Documentation of public involvement.
8. Appeal rights, as provided in Title 36, Code of Federal Regulations, part 215 (36 CFR 215) and 36 CFR part 251, subpart C. Appeal rights under 36 CFR part 251, subpart C, are limited to special use authorization holders directly affected by the land exchange.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

9. Documentation of congressional oversight and Secretary of Agriculture approval, when required.

10. The name, address, and telephone number of an agency contact for further information.

### **34.2 - Notice of the Exchange Decision**

Publish a notice of the availability of the decision in the newspapers of general circulation (36 CFR 215.9(a)). Provide a copy of the decision notice to State and local governments, the non-Federal party, special use authorization holders and other authorized users occupying or using the Federal land to be exchanged, landowners with property adjoining the Federal exchange lands, appropriate congressional delegations, and individuals who expressed an interest in the exchange.

## **35 - OVERSIGHT AND REVIEW**

Section 39, exhibit 25, contains a flow chart displaying the required congressional and Secretarial oversight for land exchanges under various authorities and value thresholds.

### **35.1 - Weeks Law Land Exchanges**

Section 17(b) of the National Forest Management Act of 1976 (16 U.S.C. 472a) requires a 30-day oversight by the House Committee on Agriculture and Senate Committee on Agriculture, Nutrition, and Forestry for land exchange cases processed under the Act of March 1, 1911 (Weeks Law) (16 U.S.C. 516), when the value of the Federal lands is \$150,000 or more. In addition, Secretary of Agriculture approval is required for Weeks Law land exchanges when the value of the Federal land is \$250,000 or more.

It is the responsibility of the Regional Office, Director of Lands, or equivalent, to forward the following documents to the Washington Office, Director of Lands, for submission to the appropriate congressional committees and Secretary of Agriculture when this level of oversight is required:

1. Decision document.
2. Exchange agreement.
3. Appraisal review.
4. Wetland and floodplain report.
5. Hazardous substances report.
6. Certificate of use and consent.

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

7. Case summary (not needed for Weeks Law cases under \$250,000).
8. Exchange digest, Form FS 5400-10, Proposed Exchange.
9. Two full-size forest maps that identify the Federal and non-Federal lands involved in the exchange and contain a legend and name of the exchange. Only one map is needed for Weeks Law cases valued under \$250,000.

The Washington Office, Director of Lands, is responsible for submitting the necessary documents to the Secretary of Agriculture and congressional committees for oversight and for notifying the Region when the oversight period ends. Unless notified otherwise, the Region may proceed with the exchange after completion of the 30-day oversight.

### **35.2 - All Exchanges in Excess of \$500,000**

The Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (112 Stat. 2681) directs the Forest Service to submit land exchange proposals with an estimated Federal land value of more than \$500,000 to the House and Senate Committees on Appropriations for a 30-day review period. To satisfy this requirement, the Regional Office, Director of Lands, or equivalent, forwards a copy of the Notice of Exchange Proposal (36 CFR 254.8) to the Washington Office, Director of Lands, for submission to the congressional committees for oversight. The Washington Office notifies the Region when the oversight period ends.

#### **35.21 - National Landownership Adjustment Team Review**

1. It is the responsibility of the Washington Office, National Landownership Adjustment Team (NLAT), to review all land exchange proposals when the estimated value of the Federal lands is:
  - a. Greater than \$500,000 or
  - b. Exceeds the Region's delegated review level.
2. When a land exchange review is required, NLAT has the responsibility to conduct the review:
  - a. After the feasibility analysis is completed (sec. 32.4) and prior to signing the Agreement To Initiate (sec. 32.8).
  - b. Prior to signing the National Environmental Policy Act (NEPA) of 1969 (43 U.S.C. 4321-4346) decision document (sec. 34) or Exchange Agreement (sec. 36).



**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

3. Regions with delegated review levels greater than \$500,000 provide the NLAT with a copy of the Regional land exchange review and decision document for exchanges in excess of \$500,000, but within their delegated review level, within 10 days of the projected signing of the decision document.

### **36 - LAND EXCHANGE AGREEMENT**

An exchange agreement (sec. 39, ex. 26) is a contract between the Forest Service and a non-Federal party where the terms and conditions of the exchange, such as values, cash equalization payments, responsibilities of each party, title curative provisions, reservations, and so forth are identified prior to closing. An exchange agreement may also be used to specify contractual obligations on the exchange parties after closing. However, in these situations the action(s) to be accomplished after closing shall be clearly identified and shall include timeframes to be met, acceptable standards, enforcement measures, and so forth. Any provisions in the exchange agreement that impose an obligation on either party after closing should be reviewed and approved by the Regional Office of the General Counsel.

Either party may withdraw from and terminate an exchange proposal without penalty or liability prior to executing an exchange agreement. However, after signing the exchange agreement, the party that fails to perform or comply with the terms of a land exchange agreement is liable for all costs borne by the other party (36 CFR 254.14).

An executed exchange agreement also commits both parties to accept as final, the approved appraised values with no further updating necessary, unless there is a change to the estate to be conveyed or acquired. Prior to executing an exchange agreement, consider how long it would take to formally close the transaction and the possibility of market values changing during that timeframe. If it appears that consummation of the exchange may be delayed for several months or there is expected volatility of market values, it may not be in the public interest to execute the exchange agreement and lock in the current values. Rather, it may be better to execute an exchange agreement at a later date when an updated appraisal is completed that more accurately reflects the market value of the exchange properties.

Although the use of an exchange agreement is optional in most situations, it is recommended that it be used in all land exchanges and is mandatory in the following situations:

1. Hazardous substances are present (36 CFR 254.14).
2. Cases which require phased-closings (sec. 31.22).
3. There are contractual agreements, other than title warranties, that survive closing.
4. There is direct deeding to more than one non-Federal party (sec. 31.24).

**FSH 5409.13 - LAND ACQUISITION HANDBOOK  
CHAPTER 30 - LAND EXCHANGE**

### **36.1 - Exchange Cutting Agreement**

If the consideration granted by the United States is cutting rights to timber, prepare a Schedule B Exchange Cutting Agreement (sec. 39, ex. 27). Do not substitute National Forest timber identified in the exchange cutting agreement, except when there is an undisputed benefit to the Government and concurrence has been obtained from the Regional Office of the General Counsel.

1. Timber cut in conjunction with a land exchange is authorized by either:
  - a. An existing timber sale contract or
  - b. A “direct cutting” agreement.
2. The method in which the timber is authorized for removal dictates the terms and conditions in the timber sale contract or in the direct cutting agreement attached to the exchange cutting agreement.

Consider the following when preparing an exchange cutting agreement:

- a. Timber Sale Contract that Includes Exchange Timber. The rates established in the timber sale contract establish the value of the timber cut and the conditions of utilization. The United States’ acceptance of title to the non-Federal land creates a land exchange credit and is treated the same as an advance timber deposit that can be applied to the total timber value, including the base rate (FSM 2495.5; FSH 2409.15, ch. 40). Maintain as part of the permanent case file (sec. 38.7), statements of account that identify timber designated for removal for the land exchange totaling the value specified in the exchange agreement.
- b. Direct Cutting Agreement. A direct cutting agreement identifies the terms and conditions for cutting timber when a timber sale contract is not used. The requirements and conditions of a direct cutting agreement shall conform to the standards in a timber sale contract. However, a direct cutting agreement cannot provide for re-evaluation, because the rates developed in the agreement reflect the value of the timber at the time the exchange occurred. Timber cutting may begin when the United States accepts title to the non-Federal land. Timber may be cut and removed until the value of the timber removed equals the value of the non-Federal land that is acquired.