**MEMORANDUM**

**From:**  Regional Office Lands Staff

**To:** Forest Supervisor, Huron-Manistee National Forest

**Date:** December, 2012

**Subject:** Regional Office Review of the Gardner Land Exchange

**I. Background Information**

This Regional Office review pertains to the Gardner land exchange on the Huron-Manistee National Forest (HMNF). This proposed land-for-land exchange would be conducted pursuant to the Weeks Act of 1911, the Federal Land Policy and Management Act of 1976 (FLPMA), and the Federal Land Exchange Facilitation Act of 1988. Under the current proposal, this exchange would involve approximately 3 acres of federal land and 3 acres of non-federal land.

The HMNF has submitted various case file documents for review and approval prior to the execution of the Agreement to Initiate (ATI) as required by FSM 5400 Regional Supplement No. R9 RO 5400-2007-3. These documents include a Feasibility Analysis (FA), a draft ATI, and additional supporting documentation. The following section contains the findings and recommendations of the Regional Office Lands staff.

**II. Findings and Comments**

**A. Feasibility Analysis and Supporting Documentation**

1. **Feasibility Analysis Document – Findings –** The FA describes the exchange proposal, which involves one tract of federal land (approximately 3 acres in size) and one tract of non-federal land (approximately 3 acres in size). The FA explains that the federal parcel is encroached upon by a portion of an improvement owned by the non-federal party and that the proposed exchange is intended to resolve this existing encroachment.[[1]](#footnote-1) The FA stipulates that the exchange proposal would meet the goals and objectives of the Forest Plan by consolidating NFS land and resolve an existing encroachment.

The FA indicates there are no resource concerns related to the exchange proposal with respect to threatened/endangered species, cultural/historic resources, or hazardous materials. The document also indicates that there are no floodplain or wetland acres on the subject properties.

The FA indicates the non-federal parcel is fee ownership and encumbered by a public utility easement and 10-foot easement to adjacent landowners.[[2]](#footnote-2) The FA and Certificate of Possession state the hunting blinds on the non-federal property will be removed prior to closing. The FA states that the federal land is not encumbered. The FA indicates legal access to the federal and non-federal properties is via Galloway Road.

The FA states that there are no anticipated objections and that support for the exchange by local governments and the congressional delegation is expected.

The FA explains that the alternative of requiring the removal of the structures encroaching on federal land would result in additional costs to the United States and economic hardship for the homeowners.

**Comments –** Although the assumption can be made that the future use of the federal property will be rural residence, the FA does not specifically discuss the future use of either the federal or non-federal properties.

The FA document adequately discloses support of the Forest Plan, but does not address the goals and objectives of the Forest Service Strategic Plan for Fiscal Years 2007-2012 in this exchange proposal.

As you are aware, the NEPA documentation and the decision document should contain a discussion of the public interest determination and related findings, as required by provisions of 36 CFR 254.3(b).[[3]](#footnote-3)

1. **Title-Related Information: Federal Tract – Findings –** The Federal Land Status Report indicates that the federal tract was acquired by the United States from the State of Michigan.[[4]](#footnote-4) The Report indicates that the federal land is not encumbered.

The FA states that the federal parcel is approximately 3 acres in size.

**Comments –** A copy of the deed to the United States was included with the FA.

There was no Land Description Verification (LDV) provided with this exchange proposal. The FA states an LDV will be prepared by the Forest Surveyor once the exchange is approved.

1. **Title-Related Information: Non-federal Tracts – Findings –** A commitment for title insurance (issued by Old Republic National Title Insurance with an effective date of June 12, 2012) stipulates that title to the non-federal property is vested in Timothy B. and Patricia A. Gardner. Schedule B of the policy sets forth a number of exceptions pertaining to taxes, public rights, and easements. Schedule B also contains a public utility easement to Consumers Power Company and a 10-foot easement to adjacent landowners (refer to Footnote #2). Schedule B also refers to the property being subject to full mineral rights.[[5]](#footnote-5) A copy of the warranty deed by which the Gardner’s acquired the non-federal parcel was included with the commitment.

The FA states the non-federal property is approximately 3 acres in size.

The Certificate of Possession for the non-federal parcel indicates that vehicular access to the parcel is via Galloway Road. The Certificate also references buried cable, fencing, and hunting blinds on the property, as well as the types of timber found.

**Comments –** As you are aware, a Phase I Environmental Site Assessment (ESA) report, which complies with the “all appropriate inquiries” requirements of 40 CFR Part 312, must be obtained with respect to the non-federal property.[[6]](#footnote-6)

There was no Land Description Verification (LDV) provided with this exchange proposal. The FA states an LDV will be prepared by the Forest Surveyor once the exchange is approved.

The title commitment states the ownership is in fee, but exception (b), Schedule B-Section II, states it is subject to full mineral rights. Although a copy of the referenced deed was provided, it was illegible. Please clarify the mineral ownership on the non-federal property. If ownership is not in fee, please provide the Regional Office with a Mineral Character Determination.

1. **Valuation Consultation – Findings –** There is nothing in the case package referencing valuation consultation.

**Comments –** Should you choose to prepare a Statement of Approximately Equal Value for this exchange, the HMNF should ensure that the approximately equal value “determination” required by 36 CFR 254.11 is adequately documented and supported in the decision document. If you choose to submit a Request for Appraisal Services (RFAS) it must clearly describe the federal and non-federal estates and should also describe the legal and physical vehicular access to the properties.

Should appraisals be completed and determined that there is a need for cash equalization funding, this should be communicated to the Regional Office as soon as the appraisals of the federal and non-federal lands have been approved and the amount of required cash equalization funding has been identified.[[7]](#footnote-7)

Based on the small acreage involved, it can be assumed the value of the federal land will not exceed $150,000, so this exchange proposal will not require congressional oversight.[[8]](#footnote-8)

**B. Draft Agreement to Initiate**

**Findings –** The draft ATI adheres to the suggested format in FSH 5409.13, Section 39 (Exhibit 10). The document identifies the parties to the exchange and the authorities under which the exchange would be executed. The non-federal and federal lands are described in Exhibits A and B, respectively. The reservations and outstanding rights of the non-federal and federal properties are described in Exhibits C and D, respectively. An implementation schedule is set forth in Exhibit E and projected costs are provided in Exhibit F. The draft ATI contains notice that the non-federal party is not entitled to relocation benefits. Compensation for costs pursuant to 36 CFR 254.7 is not authorized by the agreement.

**Comments –** In accordance with FSH 5409.13, Section 32.2, the Implementation Schedule shows the federal and non-federal parties share in the costs associated with exchange processing.

**Please note** that because there were not any Land Description Verification forms included with the case package, we ask you to review and confirm that the land descriptions on Exhibits A and B are accurate and consistent with the LDV’s.

**III. Conclusion**

Based upon the information in the FA package, this land exchange would appear to be feasible and in compliance with the Forest Plan.

In accordance with direction from the WO Director of Lands, a review of this proposed exchange by the National Landownership Adjustment Team (NLAT) will not be required. Also, because the value of the federal land will most likely not exceed $150,000, various congressional oversight requirements will not be applicable.

**Please address all issues identified above (as appropriate) prior to the execution of the ATI. Because the value of the federal lands should not exceed $150,000, a second, pre-decisional review of this case will most likely not be required. However, please be prepared to submit a copy of the draft Exchange Agreement to the RO for review prior to its execution.**

1. The FA states that portions of a house and propane tank, a water well, and 75 feet of irrigated lawn, belonging to the non-federal party, are located on the federal tract. [↑](#footnote-ref-1)
2. The utility easement is in favor of Consumers Power Company, Liber 43, Page 00423 and Liber 201, Page 12632. The 10-foot easement is for snow removal purposes – Judgment dated 2/3/1983 to Richard and Mary Schliskey, Liber 133, Pages 00039-00042 and Liber 134, Pages 00461-00464. [↑](#footnote-ref-2)
3. Based upon the information in the FA, it appears that the proposed exchange could be categorically excluded from NEPA documentation pursuant to FSH 1909.15, Section 31.12(7). The Section 31.12(7) categorical exclusion applies to the sale or exchange of land or interests in land where the resulting land uses would remain essentially the same. If this categorical exclusion would apply, the public interest determination and associated findings should be thoroughly documented in the Decision Memo. [↑](#footnote-ref-3)
4. Deed dated May 27, 1920, recorded December 1, 1920, in Oscoda County, in Liber 17 of Miscellaneous Deeds, at Pages 39-49. [↑](#footnote-ref-4)
5. The property is subject to full mineral rights as shown in Liber 122, Page 00409, Liber 124, Page 00108, and Liber 170, Page 00473. [↑](#footnote-ref-5)
6. Current regional policy, as set forth in the Regional Forester’s April 13, 2007 letter, requires that the “Guidance for Federal Land Managers on the Implementation of EPA’s All Appropriate Inquiries Regulation” be followed with respect to all real property acquisition. This direction requires that a Phase I Environmental Site Assessment be performed on the property to be acquired. With respect to any conveyance of federal land, including the conveyance of federal land in an exchange, the regional policy allows for the continued use of the “Land Transaction Screening Process” worksheets. [↑](#footnote-ref-6)
7. See 36 CFR 254.12 for direction related to cash equalization. [↑](#footnote-ref-7)
8. Pursuant to Section 17(b) of the National Forest Management Act of 1976 (16 U.S.C. 472a), a 30-day oversight period by the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry is necessary for all 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, approval by the Secretary of Agriculture is required for such exchanges when the value of the federal lands is $250,000 or more. See FSH 5409.13, Section 35.1. Also, pursuant to the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (112 Stat. 2681), a 30-day review period by the Appropriations Committees of the Senate and the House of Representatives is necessary if the estimated value of the federal lands is greater than $500,000. This 30-day review must occur during the publication of the Notice of Exchange Proposal (NOEP). See FSH 5409.13, Section 35.2. [↑](#footnote-ref-8)