

Land Exchanges Which May Be Categorically Excluded

(Current as of 04/17/2009)

The use of a categorical exclusion (CE) allows significant streamlining and expediting of the land exchange process, but must be used judiciously or we risk losing this tool. Ensure that all appropriate factors have been considered and the use of a CE is defensible and appropriate for the case.

(Refer to FSH 1909.15, Chapter 30 and FSH 5409.13, Exhibit 24)

A proposed land exchange may be categorically excluded from further analysis and documentation in an EIS or EA only if:

- The resulting land use will remain essentially the same.
- There are no extraordinary circumstances related to the proposed land exchange, and

Extraordinary Circumstances

When determining whether there are extraordinary circumstances related to the proposed land exchange, consider the following resource conditions:

- Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species;
- Flood plains, wetlands, or municipal watersheds;
- Congressionally designated areas (e.g., wilderness, wilderness study areas, or national recreation areas);
- Inventoried roadless areas or potential wilderness areas;
- Research natural areas;
- American Indians and Alaska Native religious or cultural sites, and
- Archaeological sites, or historic properties or areas.

The mere presence of one or more of these resource conditions does not preclude the use of a CE; however, the responsible official must be able to demonstrate that the potential effects on the resources will be minor or non-existent.

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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.

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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.

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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.

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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,

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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.

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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

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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.

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- 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.

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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:

