Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products

BACKGROUND


Subject to certain exceptions, the Pilot Program requires the Forest Service (also referred to as the Agency) to sell forest botanical products for an amount that includes at least a portion of a product’s fair market value and a portion of certain costs associated with administering the Pilot Program. The funds are deposited into a special account in the Treasury of the United States. Funds collected and retained through September 30, 2014, are available for expenditure, without further appropriation from Congress, through September 30, 2015, unless Congress extends the Pilot Program. The funds may be used to conduct inventories of forest botanical products; determine sustainable levels of harvest; monitor and assess the impacts of harvest levels and methods; conduct restoration activities, including any necessary vegetation; and cover the costs of the Department of Agriculture described in the Pilot Program law. Expenditures must be associated with the National Forest System land where the funds were collected.

In 2002, the Forest Service submitted a proposal, to the Office of Management and Budget (OMB), to promulgate regulations for managing forest botanical products and special forest products. When finalized, the regulations would implement the Pilot Program and guide the Forest Service in the administration of the broader category of special forest products.

In early 2004, the Forest Service started a review of its existing manual and handbook direction related to the management of special forest products and developed two draft documents; an interim final rule (which was never published) and accompanying draft changes to Forest Service direction regarding the Pilot Program and special forest products (at Forest Service Handbook (FSH) 2409.18, chapter 80).

In April 2004, the Agency entered into government-to-government consultation with federally recognized Indian tribes on the draft (interim final rule) regulation and accompanying draft changes to FS direction at FSH 2409.18, chapter 80. The tribal consultation generated numerous written responses, and the Forest Service also documented the input received during face-to-face meetings. All of the information received during tribal consultation was considered in development of the Proposed Rule Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products, which was published in the Federal Register (FR) on October 22, 2007 (72 FR 59496 - 59506).
The Proposed Rule provided a 60-day notice and comment period, which was extended, on December 20, 2007, for an additional 30 days based on specific requests from several Indian tribes (72 FR 72319). All comments received were carefully reviewed and considered by the Forest Service. The Agency made numerous changes to the Proposed Rule, and published the Final Rule Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products on December 29, 2008 (73 FR 79367 - 79392). For the specific changes made, refer to the discussion under the Final Rule’s Comments on the Proposed Rule and Changes Made in Response section (see 73 FR 79369 – 79375).

The Final Rule was published with an effective date of January 28, 2009 (73 FR 79367). However, on January 26, 2009, a Memorandum for the Heads of Executive Departments and Agencies (Memo) from Rahm Emanuel, Assistant to the President and Chief of Staff, was published in the Federal Register (74 FR 4435 - 4436). Item 3 of the Memo, at the direction of President Obama, requested that the Heads of Executive Departments and Agencies “consider extending for 60 days the effective date of regulations that have been published in the Federal Register but not yet taken effect…[and] reopen the notice-and-comment period for 30 days to allow interested parties to provide comments…” . The U.S. Department of Agriculture (Department) complied with the request, delaying the Final Rule’s effective date until March 30, 2009 and reopening the comment period through March 2, 2009 (74 FR 5017). The Department’s January 28, 2009 news release stated: “…Secretary of Agriculture Tom Vilsack today announced the delay of implementing the Sale and Disposal of Special Forest Products and Forest Botanical Products Final Rule… “In keeping with President Obama’s recent pledge for a more transparent and inclusive government that works for the people, this extension will afford the public an opportunity to participate in the rulemaking process,” he said. “This rule is especially important to American Indians and Alaska Natives and we want to make sure that they, and other stakeholders, have an opportunity to have their voices heard.” ”

Subsequently, the Department provided another 60-day extension to the March 30, 2009 effective date, ending May 29, 2009, to provide the Agency with more time to respond to comments and consider changes to the Final Rule (74 FR 14049). On June 1, 2009, the Department delayed the Final Rule’s effective date indefinitely, to allow the Forest Service additional time to respond to the comments received during the reopened comment period and to consider potential changes to the Final Rule (74 FR 26091).

The Forest Service recorded a total of 195 comments as received, in response to reopening the Final Rule to public comment. The comments were mostly from Indian tribes and organizations representing Indian tribes. The 195 comments recorded include 43 received outside the Federal Register notice and comment period; specifically, between publication of the Final Rule on December 29, 2008 and the start of the reopened comment period on January 29, 2009 and those received after March 2, 2009 with the final comment received on July 15, 2009. All 195 comments were considered in development of the draft revised final rule.
QUESTIONS AND ANSWERS

General

What does the Forest Service intend to do?

• Extend government-to-government consultation (for a 120-day period), to ensure tribal perspectives are heard and fully considered, as nearly 10 years has passed since the original consultation period during 2004.
• Consider the comments received during the extended government-to-government consultation period, in development of the revised final rule.
• Publish, in the Federal Register, a final rule that would become effective 30 days from the date of publication.

What changes have been made to the Final Rule published on December 29, 2008 (73 FR 79367 - 79392)?
The majority of changes made to the Final Rule published on December 29, 2008 are in response to comments obtained from Indian tribes and tribal partners as well as other important stakeholders, as a result of the additional public comment period (74 FR 5017). The draft revised final rule is inclusive of the various stakeholders’ comments/concerns. Changes include, but are not limited to, the following:

• Clarifying Indian tribes’ valid treaty or other reserved rights shall continue in accordance with those rights thereby exempting Indian tribes with valid treaty or other reserved rights from the permit/contract requirements (reference draft revised final rule section 223.243);
• Eliminating distinctions made between federally recognized Indian tribes with and without valid treaty or other reserved rights regarding free use without a permit;
• Simplifying the allowable harvest level procedures that were in the Final Rule published on December 29, 2008;
• Clarifying the rule’s (subpart G) consistency with Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA, 26 U.S.C. 3101), and emphasizing nothing in the rule (subpart G) shall change, alter, affect, or override subsistence uses implemented under ANILCA (reference draft revised final rule section 223.242); and
• Removing regulatory language regarding Section 8105 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246, sec. 8105, 122 Stat. 1651 (2008)) whereby the Secretary [of Agriculture] may provide free of charge to federally-recognized Indian tribes any trees, portions of trees, or forest products from National Forest System land for non-commercial traditional and cultural purposes. The Forest Service intends to publish, for public notice and comment, a proposed rule specifically regarding section 8105.

What is the purpose of the Final Rule?
The draft revised final rule is intended to provide, to individuals, personal use of special forest products and forest botanical products while also helping to ensure the products continued sustainability.
Definitions

What are Special Forest Products?
Special forest products are products collected from National Forest System lands that include, but are not limited to bark, berries, boughs, bryophytes, bulbs, burls, Christmas trees, cones, epiphytes, fence material, ferns, firewood, forbs, fungi (including mushrooms), grasses, mine props, mosses, nuts, pine straw, posts and poles, roots, sedges, seeds, shingle and shake bolts, transplants, tree sap, rails, and wildflowers. (Reference draft revised final rule section 223.216.)

What are not Special Forest Products?
Special forest products do not include animals, animal parts, cull logs, derrick poles, house logs, insects, minerals, non-sawlog material removed in log form, pulpwood, rocks, sawtimber, small roundwood, soil, telephone poles, water, and worms. (Reference draft revised final rule section 223.216.)

What are Forest Botanical Products?
Forest botanical products are: Naturally occurring special forest products, including, but not limited to bark, berries, boughs, bryophytes, bulbs, burls, cones, epiphytes, ferns, fungi (including mushrooms), forbs, grasses, mosses, nuts, pine straw, roots, sedges, seeds, shrubs, transplants, tree sap, and wildflowers. (Reference draft revised final rule section 223.277.)

What are not Forest Botanical Products?
Forest botanical products are not animals, animal parts, Christmas trees, cull logs, derrick poles, fence material, firewood, house logs, insects, mine props, minerals, non-sawlog material removed in log form, posts and poles, pulpwod, rails, rocks, sawtimber, shingle and shake bolts, small roundwood, soil, telephone poles, water, and worms. (Reference draft revised final rule section 223.277.)

How is Indian tribe defined?
The term “Indian tribe” means any Indian or Alaska Native tribe, band, nation, pueblo, village, or other community the name of which is included on a list published by the Secretary of Interior pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a-1). (Reference draft revised final rule section 223.216.)

Forest Botanical Products
The Forest Service is implementing a program to charge and collect fees for the harvest of forest botanical products. What law authorizes this? The Forest Service’s Pilot Program for the disposal of forest botanical products was authorized by the Department of the Interior and Related Agencies Appropriations Act of 2000 (as authorized by section 339(h) of the Department of the Interior and Related Agencies Appropriations Act of 2000 (as contained in section 1000(a)(3) of division B of Pub. L. 106-113, 113 Stat. 135, as amended by section 335 of the Department of the Interior and Related Agencies Appropriations Act, 2004 (Pub. L. 108-108, 117 Stat. 1312) and section 420 of the Department

**What does the Pilot Program law do?**
The Pilot Program law provides a mechanism to fund the environmental analyses and administrative tasks necessary to implement it. Generally, the law requires charging and collecting a fee to cover at least a portion of the fair market value for the harvest of forest botanical products and a portion of the costs the Agency incurs in administering the program.

**What is the disposition of fees that are collected under the Pilot Program?**
The fees collected under the Pilot Program may be used to:
- Prepare environmental analyses;
- Pay for the costs of conducting inventories of forest botanical products;
- Determine sustainable levels of harvest;
- Monitor and assess the impacts of harvest levels and methods; and
- Conduct restoration activities, including any necessary vegetation.

**Can the FS waive the fees for personal non-commercial use of forest botanical products?**
Yes. Gathering amounts of forest botanical products below the personal-use harvest level is exempt from fees. (Reference draft revised final rule section 223.279.) Additionally, the Forest Service may waive the collection of fees, when a Regional Forester or Forest Supervisor, having proper authorization from the Chief, makes a written determination that (a) The harvest of a specified forest botanical product will facilitate non-commercial scientific research; or (b) A forest botanical product is salvage because other management activities will destroy or damage the product. (Reference draft revised final rule section 223.281 *Waiver of fees and/or fair market value.*

**How long will the Pilot Program last and what will happen when the Pilot Program is over?**
The Pilot Program and the regulation under subpart H allow collection of fees until September 30, 2014, and expenditures of fees, where collected, until September 30, 2015. After September 30, 2015, all remaining collected fees will be returned to the Treasury, unless Congress authorizes an extension of the Pilot Program.

**Since the Pilot Program will end so soon, what are the chances that it will be extended or become permanent?**
Only Congress can make the decision on whether the Forest Botanical Products Pilot Program will be extended or made permanent.

**Why is the Forest Service starting to charge for forest botanical products?**
The Forest Service has already been charging for the sale forest botanical products under 36 CFR 223.1 and the Pilot Program authority.
**Sustainable Harvest**

**How does the Forest Service plan to help ensure sustainability of special forest products?**
Before a special forest product is offered for sale or use, the responsible forest officer must ensure the amount of that product offered will not exceed its sustainable harvest level pursuant to the Multiple-Use Sustained-Yield Act of 1960, as amended (16 U.S.C. 528-531). In determining a sustainable harvest level, the responsible forest officer may consider previous harvest levels, local knowledge and insight, year-to-year and site-to-site variability, climate, weather change, geographic scale, and available scientific data. (Reference draft revised final rule section 223.219(a)).

**May Tribes, regardless of federal recognition status, assist the responsible officer in determining sustainable harvest levels?**
Yes. Responsible forest officers may engage interested parties, including Indian tribes, to help determine sustainable harvest levels. (Reference draft revised final rule section 223.219(a)).

**Is monitoring of the established harvest levels required and, if so, how?**
Yes. As established by the Regional Forester, the responsible forest officer shall monitor the effects of harvest and use. The monitoring may include, but is not limited to, on-site examination of the product, including both harvested and non-harvested areas, and a review of past and projected harvest levels to the extent such information is available. The sustainable harvest level for a special forest product may be revised, as appropriate based on information obtained through monitoring. (Reference draft revised final rule section 223.219(c) and (d)).

**Personal Use**

**Are permits necessary for personal use of special forest products or forest botanical products?**
Whether or not a permit, contract, or other authorizing instrument is required is dependent upon the amount and use the person is seeking.

A person may harvest special forest products and forest botanical products from National Forest System lands without a permit, contract, or other authorizing instrument and free of charge for personal use up to the personal-use harvest level. However, a person seeking personal use of a special forest product or forest botanical product in an amount exceeding the personal-use harvest level must comply with the requirements of section 223.240 **Authorization for amounts above personal use: No charge, charge, or bioprospecting** and obtain a permit, contract, or other authorizing instrument (Reference sections 223.239, 223.279, and 223.280).

An exception to the permit requirements is made for Indian tribes with valid treaty or other reserved rights. (Reference draft revised final rule sections 223.239, 223.240, and 223.243.)

**What is the personal-use harvest level?**
Responsible forest officers must establish personal-use harvest levels for every known special forest product. Personal-use harvest levels must be consistent with section 223.219 **Sustainable**
**harvest of special forest products.** (See the draft revised final rule at sections 223.219 and 223.239.)

**May Tribes, regardless of federal recognition status, assist in determining personal use harvest levels?**
Yes. Responsible forest officers may engage interested parties, including Indian tribes, to help determine personal-use harvest levels. (Reference draft revised final rule section 223.239(b).)

**How do I obtain amounts of special forest products or forest botanical products above the personal-use harvest level?**
No person, except as identified in section 223.243 *Indian tribes with valid treaty or other reserved rights* may harvest products in amounts exceeding the personal use harvest level without first obtaining a permit, contract, or other authorizing instrument. (Reference draft revised final rule section 223.240.)

**How will the FS determine whether to charge a fee for personal non-commercial use of special forest products?**
The Forest Service must establish a “personal-use harvest level” for special forest products. If an individual person’s use is below that level, that person will be exempt from fees; if it is above the “personal-use harvest level”, they may be charged a fee. Personal non-commercial use in amounts above the personal-use harvest level, may be no charge (i.e. free use), if authorized by the designated forest officer, Forest Supervisor, or Regional Forester up to the value or quantity consistent with their delegations of authority. (Reference draft revised final rule sections 223.239 and 223.240.)

**Can the FS waive the fees for personal non-commercial use of forest botanical products?**
Yes. Gathering amounts of forest botanical products below the personal-use harvest level is exempt from fees. (Reference draft revised final rule section 223.279.) Additionally, the Forest Service may waive the collection of fees, when a Regional Forester or Forest Supervisor, having proper authorization from the Chief, makes a written determination that (a) The harvest of a specified forest botanical product will facilitate non-commercial scientific research; or (b) A forest botanical product is salvage because other management activities will destroy or damage the product. (Reference draft revised final rule section 223.281.)

**Commercial Use**

**Are permits necessary for commercial use?**
Yes, except for Indian tribes with valid treaty or other reserved rights. Persons gathering any amount of special forest products for commercial use must first obtain a permit, contract, or other authorizing instrument, except as identified under section 223.243 *Indian tribes with valid treaty or other reserved rights*. (Reference draft revised final rule section 223.240.)
What if I’m a member of a non-treaty Tribe or non-federally recognized Tribe seeking commercial use?
Members of non-treaty Tribes and non-federally recognized Tribes are subject to the same procedures as the public in the draft revised final rule. (Reference draft revised final rule section 223.240.)

What happens if a Tribe wants to harvest forest botanicals and medicinals and sell them commercially?
Commercial harvest of special forest products by Indian tribes pursuant to valid treaty or other reserved rights shall continue in full accordance with those existing rights. (Reference draft revised final rule sections 223.240 and 223.243.)

American Indians and Alaska Natives

Will the Rule affect American Indian and Alaska Native gathering rights?
No. Per draft revised final rule section 223.243 Indian tribes with valid treaty or other reserved rights, harvest of special forest products by Indian tribes pursuant to valid treaty or other reserved rights shall continue in full accordance with those existing rights. Per section 223.243(b), valid treaty or other reserved rights may only be restricted: (1) As allowed by Federal law; (2) To protect public health and safety; or (3) To ensure the sustainability of a special forest product. Regional Foresters or designated forest officers shall consult with Indian tribes with valid treaty or other reserved rights, before restricting the harvest of any special forest product pursuant to section 223.243(b). If harvest of a special forest product pursuant to valid treaty or other reserved rights is restricted, Regional Foresters shall provide the affected Indian tribe(s) with written documentation explaining the reasons for the decision.

Are Indian tribes with valid treaty or other reserved rights required to obtain a permit?
No. Harvest of special forest products by Indian tribes pursuant to valid treaty or other reserved rights shall continue in full accordance with those existing rights. Harvest by Indian tribes in accordance with valid treaty or other reserved rights is not subject to the requirements of section 223.240 Authorization for amounts above personal use: No charge, charge, or bioprospecting. (Reference draft revised final rule sections 223.239, 223.240, and 223.243.)

Can an Indian tribe’s valid treaty or other reserved rights to harvest special forest products be restricted in any way?
Valid treaty or other reserved rights may only be restricted: (1) As allowed by Federal law; (2) To protect public health and safety; or (3) To ensure the sustainability of a special forest product. (Reference draft revised final rule section 223.243(b).)

Must the Forest Service consult with Indian tribes with valid treaty or other reserved rights before restricting any harvest?
Yes. Regional Foresters or designated forest officers shall consult with Indian tribes with valid treaty or other reserved rights before restricting the harvest of any special forest product pursuant to section 223.243(b) of the rule which states: “Valid treaty or other reserved rights may only be restricted: (1) As allowed by Federal law; (2) To protect public health and safety; or (3) To
ensure the sustainability of a special forest product.” (Reference draft revised final rule section 223.243(c.).)

Are Tribal members required to obtain a permit?
Members of Tribes without valid treaty or other reserved rights and members of non-recognized Tribes are subject to the same procedures as the public in the draft revised final rule. (Reference draft revised final rule sections 223.239, 223.240, and 223.243.)

Traditional Gathering

If a traditional native practitioner wants to go out on the forest and pick medicinal plants for a traditional cultural ceremony, do they need to get a permit? What if the amount requested is under the “personal-use harvest level”?
Personal non-commercial use up to the personal-use harvest level does not require a permit, per draft revised final rule section 223.239 Personal use. If the amounts desired are above the personal-use harvest level, then a permit is required, per draft revised final rule section 223.240 Authorization for amounts above personal use: No charge, charge, or bioprospecting. If the traditional native practitioner is a member of a federally recognized Indian tribe, the Indian tribe could also consider making the request under Section 8105 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246, § 8105, 122 Stat. 1651 (2008)).

What if I’m a traditional gatherer and a member of a non-treaty or non-federally recognized Tribe; do I need a permit?
Members of non-treaty Tribes and non-federally recognized Tribes are subject to the same procedures, as the public, in the draft revised final rule.

What if I’m a traditional gatherer but not an American Indian or Alaska Native; do I need to get a permit?
A person who is a traditional gatherer but not an American Indian or Alaska Native is subject to the same procedures as the public.

Alaska Native Subsistence

Will the Rule affect Alaska Native subsistence?
No. Per draft revised final rule section 223.242 Subsistence in Alaska, the rule’s subpart G for Special Forest Products is consistent with Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA, 16 U.S.C. 3101). Therefore, nothing in subpart G shall change, alter, affect, or override subsistence uses implemented under ANILCA.
**Disposal of seized special forest products**

How will the FS dispose of seized special forest products illegally obtained from NFS land? The Forest Service may dispose of special forest products that have been seized by Law Enforcement because they were illegally obtained from National Forest System lands by sale or other method. However, the seized special forest products cannot be sold to the person who collected them illegally.

What happens if the seized products are threatened, endangered, or sensitive species? The Forest Service is not allowed to dispose of seized products by sale or other method if they are (a) Listed or proposed for listing as threatened or endangered under the Endangered Species Act; (b) Identified as prohibited for sale or trade under the Convention on International Trade in Endangered species of Wild Fauna and Flora (CITES); or (c) Listed on the Regional Forester’s sensitive plant list, species of concern list, or species of interest list. (Reference draft revised final rule section 223.244.)

**Memorandums of Agreement and Memorandums of Understanding**

What effect does the rule have on the Agency’s ability to enter in memorandums of agreement (MOA’s) and memorandums of understanding (MOU’s), or on existing MOA’s and MOU’s? The Forest Service agrees that the local flexibility provided by MOU’s and MOA’s with Tribes and gatherers have been valuable tools and should continue to be used to address local tribal and gatherers concerns regarding the harvest of special forest products and forest botanical products. To that end, the rule stipulates in section 223.245 Supplemental guidance, memorandum of agreements and memorandum of understandings, that Regional Foresters may issue supplemental guidance, consistent with the regulations, and approve MOU’s and MOA’s to promote local collaboration, issue resolution, and local implementation of the regulations. Any existing MOAs and MOUS related to special forest products must be made consistent with the rule within 24 months from the rule’s publication date, which provides sufficient time for any needed revisions.

**Section 8105 – 2008 Farm Bill**

Why was Section 8105 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246, sec. 8105, 122 Stat. 1651 (2008)) removed from the Final Rule? Section 8105 authorizes that the Secretary of Agriculture may provide free of charge to federally recognized Indian tribes any trees, portions of trees, or forest products from National Forest System land for traditional and cultural purposes. The trees, portions of trees, or forest products provided may not be used for commercial purposes.

The Forest Service carefully weighed the expressed desire of some federally recognized Indian tribes to implement section 8105 as soon as possible against the expression by others that government-to-government consultation should occur before implementation. The Agency
decided to propose promulgation of a separate regulation implementing section 8105 after engaging in government-to-government consultation with federally recognized Indian tribes on the subject. The consultation occurred during April-December 2010. The Agency is reviewing the consultation comments received and developing a proposed directive, which will be published in the Federal Register for public notice and comment. Because this process is taking some time to complete, Forest Service Handbook Interim Directive (ID) 2409.18-2009-2 was issued on December 2, 2009. The ID has been reissued (twice); first as ID 2409.18-2011-1 effective March 8, 2011, and subsequently as ID 2409.18-2012 effective June 7, 2012. The ID establishes foundational policy by which to consider requests from federally recognized Indian tribes for trees, portions of trees, or forest products free of charge for non-commercial traditional and cultural purposes, pursuant to section 8105. (The ID may be viewed on the World Wide Web at http://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsh?2409.18!.. )

Prohibitions

Has the Forest Service considered comments received regarding removal of the 36 CFR 223.261.6(f) prohibition on exchanging any timber or other forest product, including special forest products and forest botanical products, obtained under free use or personal use?
Yes. The draft revised final rule, at section 261.6(f) only prohibits “selling any timber or other forest product obtained under free use or personal use pursuant to sections 223.5 through 223.11, section 223.239, section 223.240, section 223.279, or section 223.280.