



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240



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## Memorandum

To: Director, Bureau of Land Management (100)

From: Associate Solicitor, Division of Energy & Resources

Subject: Forest Service Survey Authority and Status of Public Lands Conveyed in Accordance With Forest Service Surveys

In several meetings with members of your Branch of Cadastral Survey and others of your staff, concern has been expressed over land surveys conducted by the USDA, Forest Service ostensibly in the performance of its duties authorized by the Forest Service's Small Tracts Act (STA), Pub. L. No. 97-465, 96 Stat. 2535, 16 U.S.C. § 521c-521i. The STA authorizes the Forest Service to sell, exchange or interchange by quitclaim deed, lands of less than 40 acres and \$150,000 in value that are difficult to manage due to their location or of less than 10 acres if encroached upon by improvements or used by private persons under claim of title based upon an erroneous survey. Your questions arise from the fact that the Forest Service has promulgated the following regulation:

[a]ll necessary tract surveys of National Forest System land shall be conducted by a licensed private surveyor under Forest Service instructions, contracted by the person applying for the conveyance, or by a Forest Service surveyor. The person will also be required to have all Federal property boundaries resulting from a conveyance marked and posted to Forest Service standards.

36 C.F.R. § 254.43.

We understand that the Forest Service has relied on this regulation to assume survey authority and that many such surveys have been performed without authorization from the BLM, with quitclaim deeds having issued on the basis of these surveys. We also understand that the BLM has not approved or filed any of these unauthorized Forest Service surveys. You have expressed concern that the Forest Service lacks the authority to survey and thereby establish legal boundaries for lands in the National Forest System and that the quitclaim deeds issued in accordance

with such surveys may be seriously flawed if not completely void. You have presented two specific questions for our consideration.

- I. Does 36 C.F.R. § 254.43 give the Forest Service the authority to establish legal boundaries for lands of the United States; and
- II. What is the status of the title of lands conveyed in accordance with surveys conducted by the Forest Service, or under Forest Service instruction, pursuant to 36 C.F.R. § 254.43?

For the reasons discussed below, we conclude that the Forest Service regulation in question is invalid as being promulgated without statutory authority, and that lands conveyed under its authority were technically not surveyed before conveyance, so that the boundaries they purport to establish cannot be recognized as official boundaries of the United States.

#### I. Congressional Delegations of Survey Authority

Article IV, section 3, clause 2 of the Constitution of the United States grants to Congress the authority to administer property of the United States. With respect to the survey of public lands, Congress has delegated this authority to the Secretary of the Interior.

The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States.

43 U.S.C. § 2. (Emphasis added.) Absent such a congressional delegation, no department of the executive branch may exercise authority vested in the Congress by the Constitution. Utah Power & Light Co. v. United States, 243 U.S. 389 (1917). Absent any specific law to the contrary, with respect to any grant of public land, the administration of that grant is within the jurisdiction of the Secretary of the Interior. Bishop of Nesqually v. Gibbon, 158 U.S. 155, 167 (1895).

The Secretary of the Interior has exclusive authority to conduct and approve surveys of any public lands of the United States. 43 U.S.C. §§ 2, 52; Kirwan v. Murphy, 189 U.S. 35, 54 (1903); Knight v. U.S. Land Association, 142 U.S. 161, 177 (1891); Cragin v. Powell, 128 U.S. 691, 697 (1888). The term "public lands" used in the context of the Secretary's survey authority, is very broad. Unless defined otherwise by a specific statute, the term, "public lands," as used by Congress since the late 1700's refers to the land now occupied by the 30 states west of Pennsylvania, West Virginia, Kentucky, Tennessee and Georgia (including Alaska and Florida, but excluding Texas and Hawaii), which the United States originally obtained from the prior

sovereigns of those lands. See State Selections of Onshore Lands Underlying Navigable Waters in the Geographic Area of Revoked Public Land Order 82, 91 I.D. 67, 68 (1983). The Act of March 3, 1899, 30 Stat. 1097, provided that the Secretary of the Interior is authorized to extend the public land surveys into national forests, except that when the boundaries of national forests do not conform to the rectangular system of survey (i.e., along a ridge line or watercourse), such boundaries are to be surveyed by the United States Geological Survey. This law also remains in effect today and is codified at 16 U.S.C. § 488. The Act of February 1, 1905, 33 Stat. 628, codified at 16 U.S.C. § 472, transferred jurisdiction over the public land in national forests from the Secretary of the Interior to the Secretary of Agriculture, but expressly excepted from the transfer the function of surveying public land in national forests. See Sweeten v. United States Department of Agriculture, 684 F.2d 679, 680 n.1 (10th Cir. 1982); Benton C. Cavin, 83 IBLA 107, 130 (1984).

The regulatory provision you have cited, 36 C.F.R. § 254.43, which purports to give survey authority to the Forest Service, was promulgated under Pub. L. No. 97-465, 96 Stat. 2535 (1982) (codified at 16 U.S.C. §§ 521c - 521i), commonly referred to as the Small Tracts Act. The STA does not authorize the Secretary of Agriculture to survey public lands, even if those lands are located in a national forest. The sole reference to survey in the STA is the provision that requires the party to whom land is conveyed pursuant to the Act to bear all costs of the administration of the conveyance, including the cost of survey. 16 U.S.C. § 521f.

This general reference to the survey function can in no way properly be construed as an authorization by Congress for the Forest Service to conduct surveys to establish official federal boundaries. It is an accepted rule of statutory construction that specific terms in one statute prevail over general terms in another statute. MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944); Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932). Therefore, any general language in the Small Tracts Act that authorizes the Secretary of Agriculture to convey qualifying lands, when read together with the specific delegations of survey authority to the Secretary of the Interior in 43 U.S.C. §§ 2, 52 and 16 U.S.C. §§ 474, 488, cannot be interpreted to give the Secretary of Agriculture survey authority. If clarification of Congress' intent is needed on this point, the legislative history of the STA quickly confirms that Congress, in passing the STA, did not consider itself to be granting independent survey authority to the Forest Service. The following statement is contained in a letter from former Secretary of Agriculture, John R. Block, to Senator Jesse Helms concerning the intent of the Small Tracts Act:

[t]he [Act] does not address the question of surveys of the tracts to be conveyed. Surveys of certain National Forest System lands covered by [the Act] would be carried out by the Department of the Interior, Bureau of Land Management. The Department of Agriculture, Forest Service, may perform certain of these surveys through authority delegated by the Bureau of Land Management in a March 1980 Memorandum of Understanding.

S. Rep. No. 97-332, 97th Cong., 2nd Sess. 11 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 4457, 4467-68.

Congress passed the STA with the clear understanding that the Forest Service would continue to rely on the Bureau of Land Management's survey authority. The Forest Service regulation imputing survey authority to the Forest Service is beyond the scope of its authorizing legislation and is to that extent invalid. BLM actions should not be predicated on the assumption that this regulation has any legal effect. The only authority by which the Secretary of Agriculture can conduct surveys for the conveyance of National Forest System lands is the March 1980 Memorandum of Agreement between the Forest Service and BLM, which specifies the terms under which survey authority can be delegated to the Forest Service. This agreement permits the Forest Service to conduct surveys only after first obtaining specific authorization and instructions from the BLM and requires that the survey be conducted in accordance with the Manual of Instructions for the Survey of the Public Lands of the United States, 1973. It further specifies that the field notes and plats of all Forest Service surveys are to be returned to BLM for approval in the same manner as BLM surveys are approved. Any surveys that do not comply with the Memorandum of Agreement are unauthorized, cannot be approved and are not effective to establish legal boundaries of lands belonging to the United States.

## II. Effect of Unapproved Surveys on Conveyances Under the Small Tract Act

Generally, public lands are not subject to entry and disposal under the general land laws until they have been surveyed by the Department of the Interior. Cox v. Hart, 260 U.S. 427 (1922); Nellie Campbell, 43 L.D. 103 (1914); See also Stark v. Starrs, 73 U.S. 402 (1867). Public lands of the United States are not considered officially surveyed until the plat has been approved and filed by the Department of the Interior. Cox v. Hart, 260 U.S. 427 (1922); United States v. Cowlshaw, 202 F. 317, 321 (D.C. D.Or. 1913); Nellie Campbell, 43 L.D. 103 (1914); and Arthur E. Meinhart, 6 IBLA 39 (1972). The lines created by official surveys become the boundaries by which public lands are conveyed. Cragin v. Powell, 128 U.S. 691 (1888). One reason for

the requirement of official surveys prior to conveying land under the general land laws is that the patent issued pursuant to those laws is the highest evidence of title to land and is conclusive against the United States. United States v. Stone, 69 U.S. 525 (1864). Therefore, it is important that patents only issue for lands described by a survey officially approved and recognized by the United States. Otherwise, there is no frame of reference by which the lands covered by a patent may be identified. A patent which issues upon a survey not approved by the authorized officer is void. Dalles City v. The Missionary Society of the M.E. Church, 6 F. 356, 363 (D.C. Or. 1879), affirmed 107 U.S. 336 (1882).

We now turn to an examination of the Small Tracts Act with the above considerations in mind. The Small Tracts Act does not authorize the issuance of a patent. It only authorizes the Secretary of Agriculture to convey lands by quitclaim deed. 16 U.S.C. § 521d. A quitclaim deed is a deed of conveyance which operates as a release and conveys any title the grantor has in the premises, but does not profess that such title is valid. Black's Law Dictionary, 1126 (5th ed. 1979); see United States v. Speldel, 562 F.2d 1129, 1132 (8th Cir. 1977). The deed is effective to convey whatever interest the United States has in the property the deed purports to convey. However, the boundaries of the land conveyed by such a deed can be determined only by reference to an approved official survey. Therefore, if land is conveyed by a quitclaim deed that describes the premises granted in accordance with an unapproved survey, there is no official boundary by which to reference the deed, and the purported boundaries are not binding against the United States.<sup>1/</sup>

For example, if a title dispute arises between the United States and a grantee under the Small Tracts Act, the grantee cannot rely on an unapproved Forest Service survey to locate his boundary with the United States. Because only an official survey creates boundaries to public lands, the preexisting official survey would continue to define the federal/private boundary. A quitclaim deed issued under the authority of the Small Tracts Act but relying on

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The Forest Service may conduct administrative surveys for its own use, but these surveys "are not based on necessary statutory authority to establish or reestablish the boundaries of federal lands, and they do not result in the filing of field notes and plats in the public land records. They do not establish legal ownership boundaries for title and/or taxation purposes. In general, administrative surveys are made to identify boundary lines of ownership previously established by a cadastral survey (Federal) or property line survey executed under the laws of a state or other authorized political entity. No legal property corner monuments are established or reestablished by the administrative process." Mr. and Mrs. John Koopmans, 70 IBLA 75 (1983). Benton C. Cavin, 83 IBLA 107, 130 (1984).

an unauthorized survey, does not act to change the boundaries of Federal land and is ineffective in its intended desirable result.

### III. Conclusion

Clearly, despite the language in 36 C.F.R. § 254.43, the Forest Service may only conduct official surveys of public land (even when the public land is in the National Forest System) when the survey conforms to the procedures, standards and instructions that apply to official surveys conducted by BLM. For a survey plat based on a Forest Service survey to become an official plat it must also be approved by BLM. These requirements are clearly delineated in the March 1980 Memorandum of Agreement between BLM and the Forest Service, which is the only authority available to the Forest Service by which it may conduct official boundary surveys of the federal lands it administers.

The Small Tracts Act only authorizes the issuance of quitclaim deeds. The quitclaim deeds issued under the authority of the STA, but without an officially recognized federal survey, are ineffective in settling any boundary disputes, because they do not reference an official boundary of land owned by the United States. The grantee's rights against the United States can be defined only by an official survey.

The uncertainty created by the Forest Service in conveying land in conformity with unofficial surveys pursuant to the Small Tracts Act presents many potential problems. Obviously the potential for future title disputes is enormous. See, e.g., Benton C. Cavin, 83 IBLA 107 (1984). We strongly recommend that steps be taken to rectify this situation. In the future, all surveys should be approved and recorded by BLM prior to issuance of quitclaim deeds.

If you have questions concerning this matter you may contact Scott Loveless of this office at 343-4444.

Sincerely,

*Tom Sansonetti*

Thomas L. Sansonetti