

ACCESS PROBLEM

A copy of the Forest Service regulations (36 C.F.R. 251, subpt. D) follow the questions. Please consult the separately posted map of the area.

Your client, Edna Axsom, owns a quarter section of land within the boundaries of the Hoosier National Forest (HNF), near Lake Monroe. Her parents were hold-outs in the area during the 1930s when the federal government purchased most of the land for the HNF. Axsom's land is surrounded by federally-owned land on three sides. Axsom's land is undeveloped with the exception of a ramshackle cabin and an outhouse. Currently, the only access to Axsom's land is along a footpath through the HNF. Note that R.S. 2477 would not apply to this area because it is purchased, not reserved, federal land.

Edna is getting on in years and is unable to make the hike into the cabin for her rustic summer weekends. She would like to be able to drive onto her property. This will require a road. The closest road access is a county road just one half mile north of the Axsom property, across HNF land. (See map.) A spur off this road would be the cheapest and shortest route. The only other possible route, through adjacent private land, is longer and would require building through a wetland. Constructing on a wetland would be expensive and require a permit from the Army Corps of Engineers under the Clean Water Act. The Army Corps is known to consider this wetland to be very ecologically important to the region.

QUESTION 1:

Can Axsom construct a gravel road across federal land to gain access to her cabin? Consult the ANILCA provision (16 U.S.C. 3170(a)) and the Forest Serv. regulations (36 C.F.R. 251, subpt. D).

What additional information would you need before counseling your client?

QUESTION 2:

Suppose Axsom is more ambitious. She would like to earn some income on her land to provide for her retirement. She has plans to build a commercial, recreational-vehicle campground to cater to the Winnebago crowd. To accommodate the large motorized campers, she will need a two-lane, paved road. Can she build such a road across federal land?

QUESTION 3:

Two years later, having built a gravel road across federal land, Axsom would like to bring electricity to her cabin. Can she lay a power line under her right of way?

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TITLE 36--PARKS, FORESTS, AND PUBLIC PROPERTY

CHAPTER II--FOREST SERVICE, DEPARTMENT OF AGRICULTURE

PART 251_LAND USES--Table of Contents

Subpart D_Access to Non-Federal Lands

Sec. 251.110 Scope and application.

Source: 56 FR 27417, June 14, 1991, unless otherwise noted.

(a) The regulations in this subpart set forth the procedures by which landowners may apply for access across National Forest System lands and the terms and conditions that govern any special use or other authorization that is issued by the Forest Service to permit such access.

(b) These regulations apply to access across all National Forest System lands, including Congressionally designated areas, and supplement the regulations in subpart B of this part, and in parts 212 and 293 of this chapter. The regulations of this subpart do not affect rights-of-way established under authority of R.S. 2477 (43 U.S.C. 932); rights-of-way transferred to States under 23 U.S.C. 317; access rights outstanding in third parties at the time the United States acquired the land; or the rights reserved in conveyances to the United States and in other easements granted by an authorized officer of the Forest Service. Except for the aforementioned rights-of-way, currently valid special-use authorizations will become subject to the rules of this subpart upon expiration, termination, reversion, modification, or reauthorization.

(c) Subject to the terms and conditions contained in this part and in parts 212 and 293 of this chapter, as appropriate, landowners shall

be authorized such access as the authorized officer deems to be adequate to secure them the reasonable use and enjoyment of their land.

(d) In those cases where a landowner's ingress or egress across National Forest System lands would require surface disturbance or would require the use of Government-owned roads, trails, or transportation facilities not authorized for general public use, the landowner must apply for and receive a special-use or road-use authorization documenting the occupancy and use authorized on National Forest System lands or facilities and identifying the landowner's rights, privileges, responsibilities, and obligations.

(e) Where ingress and egress will require the use of existing Government-owned roads, trails, or other transportation facilities which are open and available for general public use, use by the landowner shall be in accordance with the provisions of part 212 of this chapter.

(f) The rules of this subpart do not apply to access within conservation system units in Alaska which are subject to title XI of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101), except for access to inholdings authorized by section 1110(b) of that Act.

(g) Where there is existing access or a right of access to a property over non-National Forest land or over public roads that is adequate or that can be made adequate, there is no obligation to grant additional access through National Forest System lands.

Sec. 251.111 Definitions.

In addition to the definitions in subpart B of this part, the following terms apply to this subpart:

Access means the ability of landowners to have ingress and egress to their lands. It does not include rights-of-way for power lines or other utilities.

Adequate access means a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land and that minimizes damage or disturbance to National Forest System lands and resources.

Congressionally designated area means lands which are within the boundaries of a component of the National Wilderness Preservation System, National Wild and Scenic River System, National Trails System, and also National Monuments, Recreation, and Scenic Areas within the National Forest System, and similar areas designated by Federal statute.

Landowner(s) means the owner(s) of non-Federal land or interests in land within the boundaries of the National Forest System.

Sec. 251.112 Application requirements.

(a) A landowner shall apply for access across National Forest System lands in accordance with the application requirements of Sec. 251.54 of this part. Such application shall specifically include a statement of the intended mode of access to, and uses of, the non-Federal land for which the special-use authorization is requested.

(b) The application shall disclose the historic access to the landowner's property and any rights of access which may exist over non-federally owned land and shall provide reasons why these means of access do not provide adequate access to the landowners property.

(c) The information required to apply for access across National Forest lands under this subpart is approved for use under subpart B of this part and assigned OMB control number 0596-0082.

Sec. 251.113 Instrument of authorization.

To grant authority to construct and/or use facilities and structures on National Forest System lands for access to non-Federal lands, the authorized officer shall issue a special-use authorization in conformance with the provisions of subpart B of this part or a road-use permit. In cases where Road Rights-of-way Construction And Use Agreements are in effect, the authorized officer may grant an easement in accordance with the provisions of part 212 of this chapter.

Sec. 251.114 Criteria, terms and conditions.

(a) In issuing a special-use authorization for access to non-Federal

lands, the authorized officer shall authorize only those access facilities or modes of access that are needed for the reasonable use and enjoyment of the land and that minimize the impacts on the Federal resources. The authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria.

(b) Landowners must pay an appropriate fee for the authorized use of National Forest System lands in accordance with Sec. 251.57 of this part.

(c) A landowner may be required to provide a reciprocal grant of access to the United States across the landowner's property where such reciprocal right is deemed by the authorized officer to be necessary for the management of adjacent Federal land. In such case, the landowner shall receive the fair market value of the rights-of-way granted to the United States. If the value of the rights-of-way obtained by the Government exceeds the value of the rights-of-way granted, the difference in value will be paid to the landowner. If the value of the rights-of-way across Government land exceeds the value of the rights-of-way across the private land, an appropriate adjustment will be made in the fee charged for the special-use authorization as provided in Sec. 251.57(b)(5) of this part.

(d) For access across National Forest System lands that will have significant non-Forest user traffic, a landowner may be required to construct new roads or reconstruct existing roads to bring the roads to a safe and adequate standard. A landowner also may be required to provide for the operation and maintenance of the road. This may be done by arranging for such road to be made part of the local public road system, or formation of a local improvement district to assume the responsibilities for the operation and maintenance of the road as either a private road or as a public road, as determined to be appropriate by the authorizing officer.

(e) When access is tributary to or dependent on forest development roads, and traffic over these roads arising from the use of landowner's lands exceeds their safe capacity or will cause damage to the roadway, the landowner(s) may be required to obtain a road-use permit and to

perform such reconstruction as necessary to bring the road to a safe and adequate standard to accommodate such traffic in addition to the Government's traffic. In such case, the landowner(s) also shall enter into a cooperative maintenance arrangement with the Forest Service to ensure that the landowner's commensurate maintenance responsibilities are met or shall make arrangements to have the jurisdiction and maintenance responsibility for the road assumed by the appropriate public road authority.

(f) In addition to ensuring that applicable terms and conditions of paragraphs (a) through (e) of this section are met, the authorizing officer, prior to issuing any access authorization, must also ensure that:

- (1) The landowner has demonstrated a lack of any existing rights or routes of access available by deed or under State or common law;
- (2) The route is so located and constructed as to minimize adverse impacts on soils, fish and wildlife, scenic, cultural, threatened and endangered species, and other values of the Federal land;
- (3) The location and method of access is as consistent as reasonably possible with the management of any congressionally designated area and is consistent with Forest Land and Resource Management Plans or the plans are amended to accommodate the access grant, and;
- (4) When access routes exist across the adjacent non-Federal lands or the best route as determined by the authorizing officer is across non-Federal lands, the applicant landowner has demonstrated that all legal recourse to obtain reasonable access across adjacent non-Federal lands has been exhausted or has little chance of success.

(g) In addition to the other requirements of this section, the following factors shall be considered in authorizing access to non-federally owned lands over National Forest System lands which are components of the National Wilderness Preservation System:

- (1) The use of means of ingress and egress which have been or are being customarily used with respect to similarly situated non-Federal land used for similar purposes;
- (2) The combination of routes and modes of travel, including nonmotorized modes, which will cause the least lasting impact on the wilderness but, at the same time, will permit the reasonable use of the

non-federally owned land;

(3) The examination of a voluntary acquisition of land or interests in land by exchange, purchase, or donation to modify or eliminate the need to use wilderness areas for access purposes.