

Rules and Processes Governing the Harvest of Culturally Important Forest Products on National Forest Lands

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Introduction

The Eastern Band of Cherokee Indians (EBCI) perceived a lack of clarity surrounding rules governing access to culturally important forest products on U.S. Forest Service (USFS) lands, specifically regarding ambiguity of harvesting laws on the ground in the Pisgah and Nantahala National Forests. The EBCI expressed interest in achieving clarity on rules governing the harvest of these culturally important forest products for tribal members, as well as opportunities for greater flexibility in the harvest permitting system. The latter reflects the tribe's evolving needs, as culturally significant species for the EBCI may change over time. The EBCI hope to ultimately gain greater tribal authority to grant access to members seeking to harvest these products on USFS lands. The USFS recognizes its trust and fiduciary responsibilities to federally recognized tribes.¹ The aim of this policy brief is to aid the EBCI in their efforts to access culturally important forest products on parts of their historical homelands under the jurisdiction of the national forests and to serve as a tool for aiding in their communication with USFS line officers/district rangers.

There is a certain amount of decentralization in the USFS, wherein districts within a national forest are under the auspices of the FS district ranger (also known as Forest Service line officer) (**Figure 1**). Because of the vast nature of FS lands, and due to the decentralization of the USFS, permitting is largely at the discretion of the district ranger.

Objectives

- To provide background on current laws and regulations governing Native American traditional and cultural forest product use in Pisgah and Nantahala National Forests.
- To illuminate opportunities for greater flexibility in the harvest permitting system, in light of changing tribal needs over time and the EBCI desire for greater tribal authority to grant access to members seeking to harvest these products on USFS lands based on permitting systems in other U.S. National Forests and per codified federal regulations.

This has led to differences in rule interpretation among district rangers as well as differences in how the permitting process for harvesting traditional and cultural forest products is managed. However, numerous national forests across the country have codified agreements between Native American (NA) tribes as a means to advance tribal interests and agree on norms of engagement. These agreements provide an opportunity for codifying expectations to ensure more consistency in the permitting process. Examples are discussed at the end of this document.

The general structure of the Forest Service is shown in **Figure 1**. As an example, the Pisgah National Forest is in the Southern Region and is divided into three ranger districts: Appalachian Ranger District, Grandfather Ranger District, and Pisgah Ranger District. Note that in the Forest Service system, “ranger” often refers to a District Ranger (also known as a line officer), who is the supervisor of a ranger district, whereas Forest Service employees are known as “forest officers.”

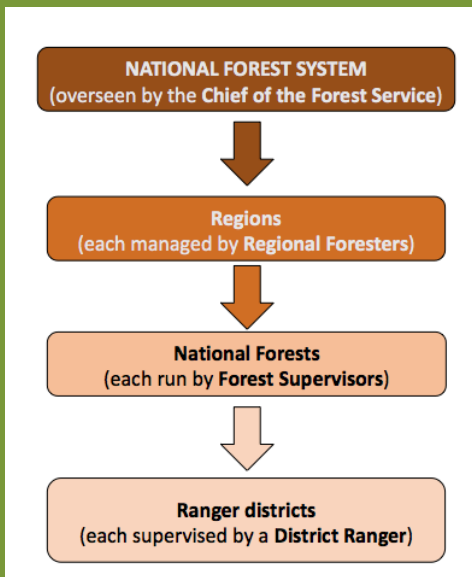


Figure 1. General Structure of the Forest Service.

Legal Authorities: Published Rules Governing Tribal Rights to Harvest on USFS Land

To understand the rules governing tribal harvesting rights on USFS lands, it is important to clarify the primary types of permits: Special Forest Products, and Forest Products for Traditional and Cultural Purposes.² The dividing line between these two types of permits, is tribal status.¹ They may be issued for the same species, but the Special Forest Products permit would only apply if the individual harvesting is not a member of a federally recognized tribe. Here, we outline the laws governing the harvest of Forest Products for Traditional and Cultural Purposes (FPTCP) as this is the permit of most interest and relevance to the EBCI.

The primary references for rules governing FPTCP may be found in the Food, Conservation, and Energy Act of

2008 (the “Farm Bill”);³ the Cultural and Heritage Cooperation Authority (CHCA) and accompanying Technical Guide; and the Code of Federal Regulations.^{4,5} Additional information on each can be found in the citations and websites listed in the footnotes at the bottom of each page.

Food, Conservation, and Energy Act of 2008 (Public Law 110-234, The Farm Bill)

Following recognition by Congress of the need to “facilitate stronger federal-tribal relationships” among the USFS, American Indians and Alaska Native Tribes, the U.S. Department of Agriculture sought to clarify and improve several key policies, administrative procedures, and legal authorities so that these relationships could be enhanced.⁶

These measures were introduced into the 2008 Food, Conservation, and Energy Act (also known as the 2008 Farm Bill) in Section 3055: Forest Products for Traditional and Cultural Purposes. This act qualified enrolled members of the EBCI and other federally recognized Tribes for free access to forest products on USFS National Forest land.³

This legislation authorized the Secretary of Agriculture to provide certain forest products free of charge to Indian Tribes and Alaska Native Tribes, when used for Traditional and Cultural Purposes (**Box 1**).⁶ These new provisions were later codified in the US Code of Federal Regulations as the Cultural and Heritage Cooperation Authority (CHCA).



Figure 2. White oak tree. (*Quercus* spp.). Photo from [Wikimedia Commons](https://commons.wikimedia.org/wiki/File:White_oak_tree.jpg).

Cultural and Heritage Cooperation Authority (CHCA) and CHCA Technical Guide

The CHCA, codified as 25 U.S. Code, chapter 32A, sections 3051-3057, provides legal authority to improve numerous matters of concern regarding relations between federally recognized Indian Tribes, the National Forest System, and the Research and Development arm of the USFS.

Among other things, the CHCA “provides forest products free of charge for traditional and cultural purposes.”⁴ This authority can be used to grant trees, portions of trees, or forest products to federally recognized Indian Tribes for a wide variety of noncommercial uses that serve to promote traditional native culture, activities, and practices, and may be used where treaty-reserved rights may be absent or ambiguous. Commercial refers to the sale of timber products in mass quantities and not commercial sale for artisanal purposes.

Box 1: Defining Traditional and Cultural Purpose

As defined in the Food, Conservation, and Energy Act of 2008, the term “Traditional and Cultural Purpose,” refers to any use, area, or practice identified by an Indian Tribe as traditional or cultural because of the long-established significance or ceremonial nature of the use, area, or practice to the Indian Tribe.³

It should be noted that educational and research purposes may not necessarily fall under the definition of traditional and cultural uses, and may require a request from a Tribal Executive to Forest Leadership.⁷

The 2019 Tribal Cultural and Heritage Cooperation Authority Technical Guide is a companion to the U.S. Forest Service Directives for implementing the CHCA. The guide is intended for use as a complementary reference to Forest Service directives for tribal relations (Forest Service Manual 1563 and Forest Service Handbook 1509.13)⁶ and provides additional recommendations derived from best management practices within the Agency.

Chapter Three specifically details harvest practices for Forest Products for Traditional and Cultural Purposes, and was developed to help Forest Service managers apply this authority.⁵

Regulations

The US Code of Federal Regulations further codifies the “free use” authority giving discretionary authority to the Secretary of Agriculture (through the USFS and USFS district rangers) to provide trees, portions of trees, or forest products to federally recognized Indian Tribes for a wide variety of noncommercial uses for traditional and cultural purposes.

The code further states that:²

- There are no limitations on the number of requests made by tribes (individual tribal members, or representatives of the tribal government).
- There are no limitations on the number of trees, portions of trees, or forest products that may be requested by tribes.
- There are limitations regarding who may grant the request, and to whom it may be granted (**Box 2**). USFS Forest Supervisors have the authority to grant harvest requests *but usually redelegate this authority to USFS district rangers*. These rights are only granted to federally recognized Tribes.

Box 2: Rules Governing Who May Grant Requests

The various policies stemming from the legal authorities, as they pertain to harvest referring to free use by individuals, state that:⁸

- Regional USFS foresters may approve tribal harvest requests exceeding \$5,000 in value.
- Requests exceeding \$10,000 in value require prior review by the USFS Chief.
- District rangers may provide material not exceeding \$25,000 in value in any one fiscal year to a tribe.
- Forest supervisors may provide material not exceeding \$50,000 in value in any one fiscal year to a tribe.
- Regional foresters may provide material not exceeding \$100,000 in value in any one fiscal year to a tribe.
- USFS Chief may provide material exceeding \$100,000 in value to a tribe.

Opportunities for Flexibility in the Harvest Permitting System: Codified Agreements

Due to the nature of the decentralization in the USFS, there are several mechanisms for enhancing both flexibility and tribal sovereignty over the harvest of forest products on USFS lands per 25 U.S. Code, chapter 32A, sections 3051-3057. As there are no specifications on the form these agreements should take, or the type of agreements covered, *there is considerable flexibility in adapting them to the particular aspirations of the tribe.*

Various national forests across the nation use different means of codifying a harvest agreement. These can include but are not limited to: memorandum of understanding, government-to-government letters, and tribal permit cards. Details of each are outlined below.

Memorandum of Understanding

A Memorandum of Understanding (MOU) is a bilateral agreement based on the principle of government-to-government relations between the United States Government and federally recognized Indian Tribes. It can be a flexible arrangement in which the tribe does not necessarily have to specify species of interest up front and can negotiate or gain access as new needs arise. MOUs are a manifestation of decentralization, balancing flexibility in design with consistency in application.^{1,9,10}

An MOU can also ensure there is monitoring of harvest levels to ensure resource protection. An MOU may also help distinguish harvest limits between tribal and non-tribal members to ensure forest product sustainability.

Government-to-Government Letter

Other harvest agreements between national forests and tribal governments throughout the U.S. use a letter prepared and signed by a USFS authority. To initiate this process, a tribal member or representative approaches the forest's USFS district rangers (line officers) inquiring about a particular forest product and the amount intended to be harvested. The district ranger verifies the individual as a member of a federally recognized tribe, confirms the presence of the requested product, helps identify product locations, and ultimately decides whether harvest aligns with the current USFS forest plan. After this is agreed upon, the letter is drafted and either sent to the USFS Forest Supervisor to sign, or signed by the district ranger.

The letter lays out parameters including the designated individual who is permitted to harvest, what species is allowed to be harvested, and the agreed upon harvest amount. A letter typically covers a period of one year.

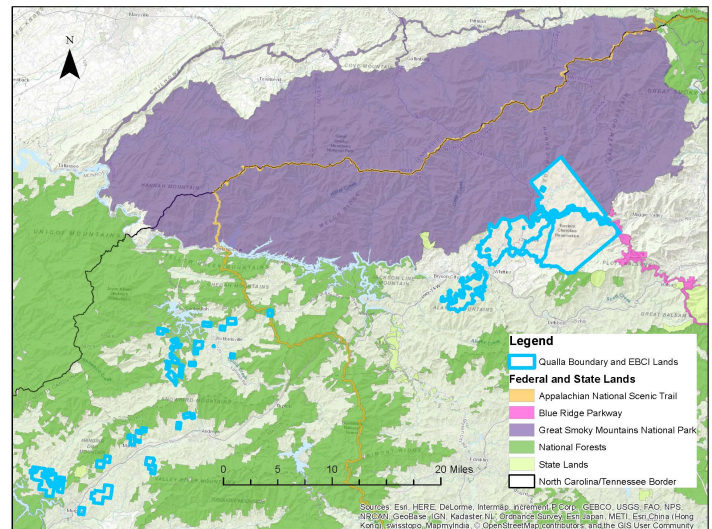


Figure 3. Map of Qualla Boundary. Created by Jonathan Hallemeier.

One benefit of a government-to-government letter over an MOU is that while the MOU must be approved at higher levels through grants and agreements, the letter is agreed upon at the local level among decision-makers for that particular national forest. Additionally, letters are issued on a case by case basis, and so may be more efficient than an MOU when only a few harvest requests are made per year.

Tribal Permit Card*

Another form of agreement can consist of a tribal permit card. This permit card, similar to the letter, would come about through an agreement among a tribal member or representative and a USFS district ranger regarding specific harvest needs.

The permit card lays out a time period, typically one year, during which the specified forest product(s) can be harvested. The card also includes the name of the permittee, and is signed by the appropriate district ranger or Forest Supervisor.

The permit card is usually pocket sized, enabling the permittee to easily carry it when harvesting in the forest. The benefit of this smaller card is to ease interactions with law enforcement, as the permittees can easily present their card if approached while harvesting.

**The tribal permit card is what we have been informed the EBCI use.*

Further detail and references for all the information in this policy brief can be found in our Accompanying Guide.

Figure 4. An example of a tribal permit card.

Box 3: Forest Service Tribal Liaison for North Carolina

EBCI tribal members may contact the Forest Service Tribal Liaison for North Carolina for information and assistance regarding collection of forest products:

Joël Hardison

Forest Archeologist/Tribal Liaison Forest Service
National Forests in North Carolina

p: 828-257-4255 x255

c: 336-301-4608

f: 828-257-4884

joel.hardison@usda.gov

Acknowledgments

This policy brief was developed as part of the ICON 8002 course which employs a case study approach to the practice of integrative conservation. For 2020, the theme of ICON 8002 was a cross-jurisdictional landscape approach to managing for culturally important forest products of the EBCI. This study was done in consultation with the EBCI forestry and natural resource professionals.

Laura German and Seth Wenger, professors of the ICON 8002 Spring 2020 course, and John Schelhas (USFS), contributed substantially to the idea and development of the project.

- 1 February 25, 2020 interview with Alicia Bell-Sheater.
- 2 Forest Service, U.S. Department of Agriculture. (2016). Provision of Trees, Portions of Trees, or Forest Products to Indian Tribes for Traditional and Cultural Purposes. (Code of Federal Regulations, Title 36, Chapter II, Part 223, Subpart A, §223.15). Retrieved from [here](#).
- 3 (2008). Food, Conservation, and Energy Act. (Public Law 110-234; Title VIII, Subtitle B, Sections 8101-8107). Retrieved from [here](#).
- 4 Forest Service, U.S. Department of Agriculture. (2012). U.S. Code, Title 25 - Indians, Cultural and Heritage Cooperation Authority. (Chapter 32A, sections 3051- 3057). Retrieved from [here](#).
- 5 Forest Service, U.S. Department of Agriculture. (2019). Tribal Cultural and Heritage Cooperation Authority Technical Guide: A Companion to the Forest Service Directives. (FS-1137). Retrieved from [here](#).
- 6 Forest Service, U.S. Department of Agriculture. (2016). Forest Service Handbook. (Chapter 80, pg. 6). Retrieved from [here](#); Forest Service, U.S. Department of Agriculture. (2016). Forest Service Manual. (Chapter 1563). Retrieved from [here](#).
- 7 April 20, 2020 interview with Lexie Rue-Harris.
- 8 Forest Service, U.S. Department of Agriculture. (2016). Sale and Disposal of National Forest System Timber; Forest Products for Traditional and Cultural Purposes. (Federal Register Vol. 81, No. 186). Retrieved from [here](#).
- 9 Forest Service, U.S. Department of Agriculture. (2012). Memorandum of Understanding Regarding Tribal-USDA-Forest Service Relations on National Forest Lands Within the Territories Ceded in Treaties of 1836, 1837, 1842. Retrieved from [here](#).
- 10 Forest Service, U.S. Department of Agriculture. (2019). Tribal Cultural and Heritage Cooperation Authority Technical Guide: A Companion to the Forest Service Directives. (FS-1137, pgs. 47-48). Retrieved from [here](#).



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