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Forest Service Manual 5409.13 – Land Acquisition Handbook

Chapter 40 - Partial Land Interest

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Approved by: F. Dale Robertson, Chief

Date approved:

Responsible Staff:

Explanation of changes: Following is an explanation of the changes throughout the directive by section.

This amendment is a reissuance of FSH 5409.13 to conform the format and structure of the Handbook to the requirements of electronic directive issuance.

This amendment makes no substantive changes to the text. The only changes made are those necessary to meet new format requirements or to correct spelling, punctuation, or unit names.

This Handbook is now available electronically in the National Information Center in the same format as the paper copy. Henceforth, amendments to this Handbook will be issued to Forest Service units electronically on a document basis.

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Many acquisition processes for partial interests and fee title are similar. This chapter discusses only those items that are different or of particular significance to partial interest acquisition. It does not deal with acquisition of rights-of-way for access or leases.

41 - Acquisition of Partial Interests

41.1 - Preliminary Evaluations

To accomplish management objectives in the acquisition of partial interests, make an analysis of authorities, alternatives, long-term effects, and other factors early in the process. Carefully construct the partial interests proposal from the many property rights that constitute fee title. Acquire the rights needed to accomplish the management objective, but do not acquire unnecessary rights.

41.2 - Guidelines for Regional Forester Approval

Obtain the Regional Forester's concurrence before negotiating the acquisition of partial interests. The Regional Forester shall base the decision regarding approval on the following information:

1. The National Forest objectives being met by the proposed action.
2. Land use trends in the area.
3. Public involvement to date.
4. Analysis of alternatives to the proposed action. Include no-action and fee acquisition alternatives. Consider cost effectiveness.
5. Authority.
6. Source of funds.
7. Results of coordination with other staffs.
8. The proposed easement, mineral deed, or other appropriate conveyance document, including a statement of unusual or special terms or conditions. In project proposals, include an approved copy of the acquisition plan for the project.
9. Map of the project proposal showing relationship of the proposed interest(s) to adjacent National Forest System lands.
10. Documentation of National Environmental Policy Act compliance. Include a copy of appropriate environmental assessments or environmental impact statements (FSM 1950).

To improve coordination and reduce duplication, address the listed considerations in the early stages of resource or land management planning to ensure that the proposed acquisitions reflect management objectives developed through an interdisciplinary planning process.

41.3 - Appraisals

Follow established standard procedures.

41.4 - Funding

When acquiring partial interests use the same requirements, procedures, and guidelines as fee simple purchases. For example, the acquisition of partial interests with Land and Water Conservation Funds must benefit public outdoor recreation. Ensure that funds are available for land purchase in the area of the proposed acquisition.

When the Forest Service acquires mineral or other interests under the Weeks Law, the purchase must meet the requirements of the act and have the approval of the Secretary of Agriculture along with the appropriate congressional oversight.

Once acquired, administer partial interests with National Forest System appropriations.

41.5 - Negotiations and Purchase Procedures

41.51 - Options

Use land purchase options when administratively desirable. Use Form FS-5400-36, Land, Waters, or Interests in Land or Waters-Purchase Option and Contract, to precisely identify the estate the Forest Service is acquiring and use the same wording as in the easement or other deed. Because of the length of these property-right descriptions, attach them as an exhibit to the option.

Always use land purchase options and contracts when acquiring preexisting uses that require a physical change in existing conditions.

41.52 - Acquiring Preexisting Uses

Some preexisting uses or conditions such as mining operations and adverse visual conditions (reflective roofs, junkyards, and so forth) may not be consistent with the management objective of the area.

One can acquire the right to regulate or change these pre-existing uses on a willing-seller basis. However, the statute under which the Government is acquiring the rights, such as the Wild and Scenic Rivers Act, may prohibit condemnation of preexisting uses. Always review the statutory authority and consult with the Regional Attorney when considering condemnation of preexisting uses.

Many preexisting uses can have assigned value in the appraisal, and the estimated compensation can include payment for all preexisting uses, as well as future rights conveyed to the United States. Use this approach whenever easement compliance consists of refraining from certain land uses such as timber harvesting and gravel mining. Do not use this approach when the interest the Forest Service is acquiring requires a physical change in existing conditions, such as painting a reflective roof, planting trees, and moving fences. Make payment for such items upon satisfactory completion of the desired change. Base compensation on project cost or cost to cure.

Use form FS-5400-36, Land, Waters, or Interests in Land or Water-Purchase Option and Contract, when negotiating a physical change in existing conditions. The option separates the necessary changes and associated payments from the balance of the estate the Forest Service is acquiring. Pay for the itemized changes only after satisfactory completion of the job(s). Specify completion dates. When applicable include a hold harmless provision in the option and contract plus right of access to the property and the right to make changes if the grantor does not complete the work on schedule.

The Government cannot condemn to require an action or service by a landowner because this would be a form of involuntary servitude; therefore do not require this action of the landowner.

41.53 - Determine Preexisting Uses

Determine the regular use(s) exercised before acquiring the easement particularly with wild and scenic rivers. Some landowners may claim prior uses where there is little physical evidence of such use, or assert that they acquired the property for the express purpose of exercising a use such as timber harvesting; to establish prior use, ensure that at least one of the following criteria generally has been met:

1. Actual physical evidence of the prior, regular use. For example, timber management could be evidenced by physical signs of past silvicultural activities or recurrent harvesting operations. The Agricultural Stabilization and Conservation Service and Soil Conservation Service may have photographs, maps, and other information that would help to analyze the preexisting use.
2. Management efforts evidenced by organizational objectives and expenditures to protect, maintain, and develop the property for the use in question. An example would be timber-producing land that a timber company acquired.
3. Documented statements by objective third parties that clearly support and document a preexisting use not normally evidenced by items 1 and 2. Examples include annual or seasonal events creating little evidence of occupancy.

New landowners may not rely on the practices of previous owners to establish present existing uses, except where the landowner can provide evidence demonstrating continuance of previous uses.

41.54 - Documentation of Preexisting Uses

Ensure that preexisting uses not being acquired are carefully identified, agreed upon between the landowner and the negotiator, and accurately documented. The District Ranger and Supervisor's offices should retain a permanent file of this documentation. This documentation in the conveyance document would aid in determining legal proof of value if judicial relief is necessary for enforcing the instrument.

Supporting documents may include:

1. Dated photographs.
2. Large-scale color aerial photographs taken shortly after acquisition of the interests.
3. Easement deed that contains a list of the primary preexisting uses (sec. 43).
4. Tract plats that identify classes of use for future reference.

The Regional Attorney must review any proposals to list preexisting uses in the declaration of taking and determine when it is desirable to define the estate taken as subject to certain preexisting uses. The landowner and the United States shall acknowledge these uses before filing the declaration of taking.

41.55 - Limits of Easements

Three considerations limit the rights that the United States can acquire.

1. If acquisition of only part of a property would leave its owner with an uneconomic remnant, section 301(9) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) requires the head of the concerned Federal agency to offer to acquire the entire property. The acquisition of an easement could create uneconomic remnants as readily as fee acquisition of a portion of a larger tract. Therefore, whenever the acquisition of an easement would appear to leave the grantor with an uneconomic remnant, consult with the Regional Attorney before beginning negotiations.

2. Many statutes authorizing scenic easements limit the acquiring agency's fee acquisition. Acquisition of all the useful or valuable property rights through an easement might be misconstrued as approaching a fee taking, which might exceed the acquisition authorities for wild and scenic rivers and some other areas. Consult the Regional Attorney about such questions.

3. Easements are frequently appraised as a significant percentage of the fee value. If not restricted by law or policy, the Regional Forester always should evaluate the feasibility of fee acquisition when the appraised value of the easement is a majority

of the fee. However, do not recommend fee acquisition where it would create future management problems such as small fee parcels surrounded by scenic easements.

Before initiating negotiations, be sure that the proposed estate is consistent with these guidelines. For example, if an easement preventing development is being prepared for a one-fourth acre undeveloped lot, the appraised value may be between 90 and 100 percent of the fee value. If not prevented by law, consider acquiring the lot in fee.

If the authorizing legislation prevents fee acquisition, items 1 and 2 may indicate the acquisition of some lesser estate than originally proposed.

41.56 - Estate To Be Acquired

Several considerations that apply to all partial interest easements are:

1. Only individuals who fully understand the need for and the effect of each provision should draft and review the easement document. Carefully review boilerplate provisions against the specific situation because standard provisions may unnecessarily restrict private rights or may not accomplish the management objectives.

2. The intention of using scenic, conservation, and similar easements is to restrict land use on a specific area. When the Government acquires this right (either by purchase, exchange, or condemnation), base the compensation on the diminution of the property value arising from the acquisition of these rights. These easements are predicated on the premise that it is not necessary to acquire fee title to a property to limit certain land use activities. Therefore, acquiring the rights to limit adverse uses generally leaves the landowner with at least residual interests in the various property elements.

3. Proposed easements frequently prohibit mining or industrial activities in the easement area. The effect of this provision depends on the likelihood of minerals on the property, the type of minerals, and whether the landowner has other property outside the easement area. Carefully consider this question when drafting the easement and during the appraisal process. Under appropriate circumstances, include discretionary language whereby the Secretary of Agriculture could prescribe regulations for mineral operations in the easement area. Be aware that prohibition may unnecessarily lock up valuable mineral resources; on the other hand, discretionary language could subject future administrators to intense pressure if valuable mineral resources are ever discovered in the area of the easement.

4. Remember that the available flexibility depends on the authorizing legislation and subsequent policy guidelines. Policy limitations affecting acquisitions in wild and scenic rivers may not apply to conservation easements in a composite.

5. Research partial interest acquisitions as an alternative to fee acquisition when considering guidelines for new project proposals.

41.57 - Amending Easements

Amend easements by executing a new deed of conveyance. If amending the terms of the easement involves the Government's acquisition of additional rights in the land, treat it as a new acquisition.

If amending the terms constitutes a relinquishment of previously purchased rights, process the disposal under laws covering exchange or sale of surplus Government property.

42 - Title Considerations

Consult chapter 50 for general procedures for obtaining adequate title evidence.

42.1 - Level of Title Perfection

Use the same level of title perfection for partial interests as are used for fee acquisition.

42.2 - Mortgages

Title to easements can be approved subject to outstanding mortgages, deeds of trust, and vendor's lien that meet the Attorney General's guidelines. In all other cases, mortgages against the property on which the partial interest is being acquired must be released before payment of the purchase price can occur.

The United States can pay the escrow fees that title companies charge to process closings involving the simultaneous release of a mortgage.

43 - Partial Interest Conveyance Documents

43.1 - Mineral Rights

Acquisitions of mineral rights under National Forest surfaces and similar partial interest purchases are rare. Define such estates by the rights or interests reserved in previous conveyances. Develop the documents conveying these interests on a case-by-case basis in cooperation with the Regional Attorney.

43.2 - Conservation or Scenic Easements

When the Forest Service acquires conservation or scenic easements, the estate is generally developed in accordance with the guidelines in the authorizing legislation and appropriate management plans.

To prepare an adequate easement document, start with a well-thoughtout plan that analyses the precise qualities of the area that the easement is to protect. Clearly state the objectives. Clearly define the rights and duties of the parties in the present and future to avoid acquisition and valuation or management and enforcement problems. Maintain close and continuous coordination between the staff areas and the Regional

Attorney involved in the acquisition and enforcement of the easement and those that must manage the resources according to its terms.

Sections 43.21 through 43.28 discuss guidelines that the sample easement shown in section 43.3, exhibit 01, illustrates.

43.21 - Preamble

Cite the authorities for the acquisition in a preamble. Also indicate the objectives of the acquisition. To clearly define the Federal significance of the proposed action, link the acquisition to the objectives of the statute.

43.22 - Description of Property

Describe the property encumbered by the easement using the same standard as for fee title acquisition. If different restrictions govern different portions of the property, define the boundaries of these areas.

43.23 - Term

State the term of the easement, if it is to be perpetual, so indicate.

43.24 - Enumeration of Regular Uses

To avoid misunderstandings, list the primary regular uses that the landowner is not relinquishing. This is particularly helpful when the statutory authority allows for retaining preexisting uses. See section 41.54 for additional guidelines.

The listing of these uses does not relieve the administration from the responsibility of maintaining a carefully documented case file for each scenic easement.

43.25 - Use by Grantee

The term "use by grantee" denotes the rights and obligations of the United States. This section of the easement provides those powers necessary to preserve the rights enumerated in the instrument and enabling legislation. Generally, the easement deed must reserve a right of entry to administer the easement, to inspect for violations, and provide the powers for removal of items inconsistent with the purposes of the easement. Enumerate the powers the Government needs in this section to protect and maintain its interests from fires, insect and disease outbreaks, erosion, and other problems. Provide for right of entry to the property to repair or restore damage to its interests.

Have the Regional Attorney review all easements to avoid making the instrument so specific as to risk excluding inferred powers versus making it too general and ambiguous.

43.26 - Retained Rights and Restrictions

Be aware that defining the restrictions on the grantor, or landowner, is the most troublesome area of easement preparation.

Grantors generally insist that statements of prohibitions be as specific as possible. To protect the interest being acquired, carefully review the easement document to ensure the inclusion of all foreseeable prohibitions.

Pay particular attention to provisions covering the construction and maintenance of structures, subdivisions, and alteration of the land surface and vegetation. Carefully analyze ongoing and potential land uses such as timber harvesting, row crop production, and grazing.

Ensure the document makes it clear that the intention is to create a covenant that runs with the land and is binding on the original owner and all successors.

43.27 - Public Access

Instruments to provide the public with access along any portion of the property must define the extent and nature of the access.

Conversely, if public access is not to be allowed, be sure to state that nothing in the easement is to be interpreted as conferring such rights.

43.28 - Termination and Reverter Clauses

Do not use termination and reverter clauses in scenic easements.

43.3 - Wild and Scenic River Easement

Exhibit 01 illustrates the format and general content of wild and scenic river easements. The terms and conditions apply to a specific easement for one wild and scenic river. Because each easement must be consistent with the intent of the appropriate legislation, management plans, objectives, and specific property conditions, the Forest Service has not developed sample easements for the various authorities.

43.3 - Exhibit 01

Tract No.

NATIONAL WILD AND SCENIC RIVERS SYSTEM EASEMENT DEED

THIS EASEMENT, dated this ____ day of ____, 19__, by and between ____ (landowner) ____, of (address) ____ hereinafter called the GRANTOR(S), and the UNITED STATES OF AMERICA, hereinafter called GRANTEE;

WHEREAS, Public Law 90-542 (82 Stat. 906), (or other applicable statutes) as amended, provided for the establishment of a Wild and Scenic Rivers System, and designated portions of the ____ River in (State) as a component of the National Wild and Scenic Rivers System to be administered by the Secretary of Agriculture as part of the National Forest System, and

WHEREAS, the Grantor(s) is(are) the owner(s) of certain land in the established boundaries of the ____ River component of the National Wild and Scenic Rivers System, located in County, State of ____, said land being appurtenant to other lands of the Grantee and affecting the public benefits provided by this Federal land, and

WHEREAS, the Grantee, by the United States Department of Agriculture through the Forest Service, or its successors, desires to administer such land pursuant to the Wild and Scenic Rivers Act and the general statutory authorities relating to the National Forest System and to provide for and protect the natural, scenic, recreational, and other values for which this river area was designated, and to prevent any developments that will tend to mar or detract from these values, and to that end exercise such reasonable controls over the land within the areas described herein as may be necessary to accomplish such objectives.

NOW THEREFORE, the Grantor(s) for and in consideration of the sum of \$_____, the receipt of which is hereby acknowledged, and in further consideration of the covenants herein contained, does hereby grant and convey unto the Grantee and its successors or assigns a perpetual estate and easement in the following described lands:

(Insert description)

The acquiring agency is the Forest Service, United States Department of Agriculture.

Grantor and Grantee do hereby covenant and agree for themselves, their heirs, successors, or assigns, that they shall use and restrict the use of the easement area as set forth hereinafter, it being mutually agreed that such use, or restriction thereof, shall run with the land, and be to the benefit of the entire river area and such other lands of the Grantee which are situated within said area by fostering and enhancing the Grantee's goal of preserving the scenic, recreational, and other natural qualities of the ____ Wild and Scenic River area in accordance with Public Law(s) ____ (authority) ____.

43.3 - Exhibit 01--Continued

Section 15(c) of the Wild and Scenic Rivers Act, Public Law 90-542, defines a scenic easement, the interest being acquired herein, as the right to control the use of land (including the air space above such land) within the authorized boundaries of a component of the Wild and Scenic Rivers System for the purpose of protecting the natural qualities of the river area; but such control shall not affect, without the owner's consent, any regular use exercised before acquisition of the easement; accordingly, the regular use(s) of the above described land exercised before acquisition of this easement and not relinquished is (are):

(List specifically, not generally.
It may be appropriate to use a
plat to illustrate existing uses.)

I. USE BY GRANTEE. The Grantee, its authorized representatives and/or assigns, is hereby granted the right to go upon the land described in this easement for the following purposes:

A. To inspect for violations and to administer this easement, including the establishment and maintenance of corners delineating the easement area.

B. At the expense of the grantee, remove or eliminate any advertising displays, signs and billboards, stored or accumulated junk automobiles, and other salvage materials, junk, or debris, which is not permitted by the terms of this easement, and is placed on the above-described land after the date of this easement.

C. To mark, cut, and remove any trees and shrubs which in the judgment of the Grantee endanger public safety or detract from the aesthetics of the above-described area, and to plant and selectively cut or prune trees and shrubs to restore or maintain the scenic view and to implement disease prevention measures. The property owner shall be consulted before beginning such operations. Merchantable timber cut by the grantee or its assigns shall be disposed of or sold at the discretion of the grantee.

D. To perform such other scenic, aesthetic, historical, fish and wildlife, sanitation, restoration, or other work as, in the opinion of the authorized representative of the Grantee, may be deemed necessary or desirable to protect and promote the natural and recreational qualities of the area. The Grantor shall be consulted before initiation of such projects.

43.3 - Exhibit 01--Continued

E. To post regulatory notices on selected portions of the easement area for purposes of promoting the provisions of this easement and the intent of the Wild and Scenic Rivers Act, and at its discretion to utilize with respect to the public the general statutory authorities relating to the National Forests and Wild and Scenic Rivers in such a manner as it deems appropriate to carry out the purposes of said Act. Nothing in this clause is intended to abrogate the Grantor's right to legally protect his property rights under State law.

43.3 - Exhibit 01--Continued

Except as noted, activities conducted by the Grantee under the above section shall be at no expense to the Grantor. Nothing herein shall be construed as creating any duty on the part of the Grantee to undertake any of the acts described above.

II. USE BY GRANTORS. In return for the stated consideration, the Grantor assumes the following covenants and restrictions. These covenants and restrictions are imposed upon the occupancy and use of the easement area by the Grantor, his successors or assigns, except that none of these covenants and restrictions shall be deemed or construed as controlling or eliminating any regular use of the land exercised before the acquisition of this easement unless such use is acquired by the Grantee. Except as otherwise provided by this easement, the costs of conformance with the terms of part II of this easement shall be borne by the Grantor.

A. The lands within the easement area shall not be used for any professional or commercial activities except such as can be and are in fact conducted from a residential dwelling without exterior alteration of the dwelling.

B. No mining or industrial activity shall be conducted on the lands within the easement area.

C. The Grantors, their heirs and assigns, retain the right to use the easement area for general crop and livestock farming and for limited residential development. Such right shall be subject to the following limitations:

1. Said land shall not be subdivided and sold as smaller tracts.
2. One (1) single-family residence with appropriate accessory structures is the total maximum number authorized for the easement area.
3. No commercial buildings, multifamily residential buildings, or other industrial or commercial structures shall be erected on said land.
4. No trailers, portable structures, or any other non-permanent low quality, unattractive structures shall be constructed or moved into the easement area.
5. No structures allowed herein shall be placed within ____ feet of the river.
6. Adequate provisions for disposal of waste and sewage shall be made to fully comply with applicable State and local regulations for sanitation and water pollution control. In no case shall untreated waste or sewage be discharged into any water or waterway.

43.3 - Exhibit 01--Continued

7. Structures shall not exceed a height of _____ feet measured from the natural grade at the middle of the front of the structure to the highest point of the roof or parapet.

43.3 - Exhibit 01--Continued

8. Roofs, exterior siding, vent pipes, chimneys and other exterior material and fixtures (except windows) shall be constructed of nonreflective material or painted and maintained with earth-tone colors.

E. There is specifically retained by the Grantor, the right to perform ordinary maintenance on all permitted roads and structures, together with the right to replace, rebuild, or substitute any road or structure now existing with similar roads or structures in substantially the same location.

G. No dump of trash, ashes, garbage, sewage, sawdust, or any similar unsightly or offensive material is permitted within the easement area.

H. Except as otherwise provided, no signs, billboards, outdoor advertising structures, or advertisement of any kind or nature shall hereafter be erected or maintained within the easement area. One (1) on-premise sign no larger than 36 inches by 24 inches may be erected and maintained to advertise the sale, hire, or lease of the property, or to advertise the sale or availability of any goods, products, or services on the land. One additional sign of the same size may be erected and maintained to designate the owner or the name of the property.

I. No permanent changes in the general topography of the landscape or land surface are permissible, except for those authorized herein or caused by the forces of nature. The Grantor may drill wells, lay, operate, maintain, repair, or remove water and sewer pipelines, conduits, or drains below the surface of the easement area insofar as such activities do not permanently impair or adversely affect the natural beauty of said easement area and the area is restored to its former natural condition.

J. No trees or shrubs shall be pruned, removed, or destroyed on the land in the easement area except for dead or hazardous trees for reasons of safety. Likewise, seedling trees or seedling shrubbery may be grubbed up or cut down in accordance with good farm practice on lands presently being cultivated or for residential maintenance purposes. Cultivated crops, including orchard fruit and nut trees, may be pruned, sprayed, harvested, and otherwise maintained in accordance with good agricultural practices.

K. Subject to valid existing appropriated water rights, the Grantor may not pump or remove water from the river. Diversion works and ditches are to be constructed and maintained in a manner compatible with the preservation of the scenic values of the river. The Grantor may obtain water from wells and ponds in the easement area, consistent with the other provisions of this easement.

43.3 - Exhibit 01--Continued

L. Archaeological or paleontological explorations may be conducted only by the Grantee or as authorized by a permit from the Secretary of Agriculture or his duly authorized representative. All specimens or materials of archaeological or paleontological interest shall be the property of the United States.

43.3 - Exhibit 01--Continued

III. PUBLIC ENTRY. The granting of this easement is not intended to permit or in any way give the public the right to enter upon said land for any purpose.

TO HAVE AND TO HOLD the herein described scenic easement and rights unto the Grantee, its successors and assigns, forever. The said Grantor hereby covenants that the Grantor, Grantors' heirs, executors, administrators, and assigns, shall warrant and forever defend unto the Grantee, its successors and assigns the quiet and peaceable use and enjoyment of the herein granted easement against the lawful claims and demands of all persons whomsoever. This grant shall be binding upon the Grantor, the Grantor's heirs, administrators, executors, and assigns, and shall run with and constitute a servitude upon the above-described land.

IN WITNESS THEREOF, the Grantors have hereunto set their hands on the day and year first above written.

(signature)
(typewritten name)

(signature)
(typewritten name)

ACKNOWLEDGMENT

44 - Disposal

The Federal Land Policy and Management Act of 1976 (P.L. 94-579; 90 Stat. 2743) amended Forest Service exchange authorities to permit the exchange of partial interests.

See FSM 5430 for policy concerning the exchange of partial interests.