

**Forest Service Handbook
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Forest Service Handbook 5409.17 – Rights-of-Way Acquisition Handbook

Chapter 20 – Title Clearance and Approval

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by: Calvin N. Joyner, Assistant Deputy Chief, NFS

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Responsible Staff:

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

Posting Instructions: Amendments are numbered consecutively by handbook number and calendar year. Post by document; remove the entire document and replace it with this amendment. Retain this transmittal as the first page(s) of this document. The last amendment to this handbook was 5409.17-2013-1 to 5409.17_40.

20: Revises, updates, and sets forth new direction throughout entire chapter.

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20.1 - Authority

Department of Justice, Title Standards 2001: A Guide for the Preparation of Title Evidence in Land Acquisitions by the United States (“Title Standards 2001”) which superseded Standards for the Preparation of Title Evidence in Land Acquisitions by the United States on December 29, 2000. The Title Standards serve as a guide for the preparation of evidence of title of all acquisitions by the United States of land or interests in land, including acquisitions by direct purchase, exchange, donation, and condemnation.

20.2 - Objective

To describe requirements for the preparation of evidence of title for all rights-of-way acquired for the management of National Forest System lands whether by direct purchase, exchange, donation, or condemnation.

21 - Title Evidence

It is the duty of the Forest Service to obtain all necessary evidence of title to land to be acquired by direct purchase, exchange, donation, or condemnation for National Forest System purposes. The expense for procuring evidence of title is to be paid from Forest Service appropriations (40 U.S.C. §3111), typically from the same source as that used for acquisition of the rights-of-way.

21.1 - Types of Acceptable Title Evidence

Acceptable forms of title evidence include title insurance policies, certificates of title, and abstracts of title prepared in accordance with the requirements of Title Standards 2001 by approved abstracters, attorneys or title companies or, in certain special circumstances detailed in section 21.13, searches by Forest Service employees.

Except as indicated in section 21.13 or as approved by the Office of the General Counsel, obtain title evidence from experienced, financially responsible, and reputable title companies, abstractors, or attorneys qualified and authorized by law to prepare such evidence in the jurisdiction in which the lands are situated. Ensure that the form and contents of title evidence meet the requirements set forth in Title Standards 2001.

Obtain preliminary title information for tracts the easement is expected to cross once the general location of the easement is determined. The Forest Supervisor shall send the information for the tracts actually crossed with the draft easement and supplemental title evidence (sec. 21.2) to the Regional Forester’s Lands staff to insure that it is complete and ready for preliminary review by the Office of the General Counsel, when required. After approval by the Regional Forester, have

the easement signed and notarized. As soon as possible thereafter record the deed, obtain final title evidence (title insurance policies and title certificates) ensuring or guaranteeing or showing the history and condition of (abstracts) the United States' title to the easement. Price arrangements with title companies and abstractors should cover both preliminary and final title evidence as a package but may be paid for separately.

The principal forms of title evidence discussed in this chapter are in the order of their typical desirability. In general, do not settle for a less desirable form of title evidence when a more desirable form is available.

21.11 - Title Insurance

A title insurance policy insures the United States against pecuniary loss attributable to defects in the title or liens and encumbrances affecting title, subject to conditions and exceptions set forth in the policy. The required form of title insurance policy is commonly identified as the American Land Title Association (ALTA) U.S. Policy. Special exceptions peculiar to the locality and those relating solely to the property covered by the policy are inserted in schedule B. Except in Texas, no other form of title insurance policy is acceptable. For acquisitions in Texas, refer to section 9 of the Title Standards 2001 and consult the Office of the General Counsel.

At a minimum, obtain title insurance equivalent to 50 percent of the first \$100,000 of value, plus 25 percent of that portion of value in excess of \$100,000.

When the final evidence is to be a policy of title insurance, have the preliminary title evidence prepared in the form of a preliminary title report or binder that commits the title company to issue a title insurance policy in the approved form.

21.12 - Certificate of Title

A certificate of title is a document issued by a title company or other qualified source, indicating that it has conducted a diligent examination of the title and that, except for the encumbrances noted in the certificate, the grantor has good title to the land. For purposes of this chapter, a certificate of title is less desirable than title insurance because it is not a guarantee or insurance of good title, nor does it insure the Government against risk that the grantor does not have legal capacity to convey the rights-of-way.

When the grantor is a public body, corporation, trustee, or other personal representative, supplement the title certificate assembly with the information necessary to establish the signatory's authority to sign for the principal.

21.13 - Abstract of Title

An abstract of title is a condensed history, taken from public records or documents, of the ownership of a tract of land. An abstract of title is considered more prone to error or omission than a certificate of title. Use an abstract of title only when title insurance or a certificate of title is not available. Refer to section 3 of the Title Standards 2001 and obtain guidance from the Office of the General Counsel when considering an abstract of title.

21.14 - Search by Forest Service Employee

An abstract of title prepared by a Forest Service employee trained and experienced in record search may be accepted by the Office of the General Counsel when the consideration is less than \$5,000 if there is not an approved title company, title attorney or abstractor operating in the area, or their services are deemed too slow, too costly, or otherwise unsatisfactory. However, the use of a Forest Service employee prepared abstract of title is not appropriate to avoid minor delays or reasonable costs.

The Regional Forester shall consult with the Office of the General Counsel to develop more specific guidance for the use of record searches by Forest Service employees.

21.15 - Other

On a case by case basis, the Office of the General Counsel may approve other forms of title evidence consistent with Title Standards 2001 adequate to protect the interests of the United States.

21.16 - Period of Search

Obtain title insurance or a certificate of title based on a search of all records affecting the title and extending back to the original patent or grant by the Sovereign, whenever possible.

The Department of Justice has authorized the use of last-owner searches for easements where the consideration is \$5,000 or less, provided such easements will not be the exclusive access to a property, and provided such easements are not being acquired with the intention of building or installing permanent improvements thereon.

21.2 - Supplemental Title Evidence

For Forest Service acquisitions of rights-of-way, supplemental title evidence is limited to the certificate of use and consent, certificate of inspection and possession, and when needed, a certificate of title (see section 21.12), and proof of authority to execute the conveyance. The term supplemental title evidence does not include instruments curing title defects revealed by the primary title evidence or certificate of possession. Section 21.3 addresses the means for curing title defects and the forms of instruments required.

21.21 - Certificate of Use and Consent

Use form [FS-5400-27 \(10/86\)](#) to prepare certificates of use and consent.

Prepare first a certificate of use and consent on the basis of preliminary title evidence showing condition of fee owner's title. Submit it as part of the title assembly for preliminary title review before the easement is signed. Submit a second certificate executed after the date of recordings and based on final title evidence as part of the title assembly for final title approval (section 22.31).

This certificate serves two purposes:

1. Certification that specified outstanding rights and encumbrances disclosed by the title evidence do not interfere with the intended use of the easement. In paragraph A of form FS-5400-27, separately list any outstanding rights and encumbrances revealed by the title evidence that can be waived because they will not interfere with use of the easement. Provide reasoning for why the outstanding right or encumbrance can be waived. If the title evidence is something other than title insurance, greater care and detail is required. Only those outstanding rights or encumbrances that will not affect the planned use can be administratively waived. Clear all other exceptions by a suitable document (section 21.3), or request a waiver from the title approving authority (section 21.4). Examples of typical waivers follow:

- a. Exception No. (insert number for exception such as 1,2, and so forth) in schedule B of the preliminary title certificate is a power line easement that does not encroach on subject rights-of-way. Request waiver.
 - b. Special Exception No. (insert number for exception such as 1,2, and so forth) in schedule B of the title insurance policy is for mineral rights outstanding to third parties. There is little probability that the parties will exercise the rights. Request waiver.
 - c. Exception No. (insert number for exception such as 1,2, and so forth) is a deed of trust that has been subordinated. See attached Subordination Agreement. Request waiver.
2. Certification that the conditions set forth in the easement conveyance have been considered and acquisition subject to them is acceptable to the Forest Service and is recommended.

21.22 - Certificate of Inspection and Possession

Use form [FS-5400-28 \(09/2008\)](#) to prepare certificates of inspection and possession.

List in the certificate of inspection and possession only those occupancies that are not of record. Deal with those occupancies that are of record and revealed by the primary title evidence in the certificate of use and consent (section 21.21).

The inspection is for the purpose of identifying possible rights of possession or other interest in the land within the easement that are unrecorded.

Under section B of the form FS 5400-28, there are five statements based on personal inspection and inquiry that must be certified as accurate, or, if one or more statements are not accurate, must be recorded as such. When recording findings, which vary from the statement, include sufficient detail to allow the title approving authority to determine whether a waiver may be granted or curative action is required.

Make the initial inspection and prepare the certificate after obtaining permission to enter the property. Include the initial certificate in the preliminary title assembly (section 22.11).

Make a second inspection and prepare a certificate immediately after the recording of the easement deed. If findings which varied from the statement were attached to the initial inspection, indicate whether the defect was waived or cured with specific reference to the appropriate document in the final title assembly. Include the second certificate in the final title assembly when you submit the case for title approval (section 22.31).

If applicable, follow the second, third and fourth certifications with a reference to the curative document in the final title assembly. Waive those it is possible to waive administratively by a statement following its identification. The rules for administrative waiver are given in section 21.4.

The certificate prepared for the preliminary title assembly need identify only the possessory rights or interests discovered. The administrative waiver statement, reference to curative documents, and other information must be complete in the second certificate, which is a part of the final title assembly.

21.23 - Proof of Corporate Authority

In acquisitions from public bodies, corporations, limited liability corporations (LLCs), trusts, or other legal entities granting title through an agent, when the primary title evidence consists of a title certificate or abstract, supplement the title assembly with the following:

1. State Law. Sufficient portions of statute, code, or other records to determine the power of the grantor to hold and convey real property and the validity of such conveyances under applicable state and local law.

2. Grantor's Authority to Convey. Articles of incorporation or organization or other instruments recognized under applicable state law confirming the authority of the grantor to hold and convey real property.
3. Agent's Authority to Convey. A certified copy of the properly drafted instrument authorizing the grantor's agent to execute the conveyance to the United States.
4. Tax Compliance. A certificate or statement from the proper State officer showing payment of any required taxes and stating that the grantor is in good standing.

In consultation with the Office of the General Counsel, the Regional Forester may supplement these instructions as needed to address specific requirements particular to the State or circumstance. The Office of the General Counsel may also modify these requirements on a case-by-case basis.

To eliminate the need for the additional information required when acquiring easements from legal entities granting title through an agent, seek title insurance as the primary title evidence whenever feasible (section 21.11).

21.3 - Curing Title Defects

In these instructions, the term title defect means any matter revealed by title evidence that adversely affects title to the easement to be acquired by the United States. These may be matters of record revealed by the primary title evidence or matters not of record discovered by inspection of the rights-of-way or inquiry as noted in the certificate of possession. Those matters of record it is possible to waive administratively are not included within the meaning of the term.

The Office of the General Counsel advises as to the general rules to follow and decides if it is possible to waive specific defects and, if not, the curative action required.

The Forest Service is responsible for taking the necessary action to cure title defects, including obtaining curative instruments, paying costs associated with obtaining curative action and instruments when lawful and fiscally prudent to do so, and recording any required curative instruments.

In collaboration with the Office of the General Counsel, the Regional Forester is responsible for developing procedures for addressing title defects and instructing Forest Service employees as to these procedures through manual supplements, correspondence, and training.

Observe the following principles in developing Regional procedures so that title defects may be disposed of efficiently and economically:

1. Preference waiving defects over curative action. Maximize utilization of waiver requests and minimize the need for curative action.
2. Assign Responsibility. Regional procedures may distinguish simple from complex defects. Under this arrangement, curative action for simple defects may be taken by the Regional Forester's Staff without formal review by the Office of the General Counsel,

while complex defects would require the involvement of the Office of the General Counsel.

3. Assess need. Except when readily apparent that a curative action would require little or no more time than the preparation of a request for waiver, no curative action should be undertaken without first determining that a request for waiver would be insufficient.
4. Prevent delay. When the situation indicates the need for curative action, begin as soon as the executed easement is obtained. The submission of a case for preliminary review should not be delayed waiting for the completion of curative action. It is only necessary that curative action be complete before final review and title approval.

21.31 - Taxes

1. Current-Year Property Taxes. Under Order No. 440-70 of the Attorney General (A.G. Order 440-70), dated October 2, 1970, titles may be approved subject to the lien of the current-year taxes if they are not due and payable without any provision for the payment of such taxes if the purchase price of the easement is not in excess of 50 percent of the reasonable value of the entire property. If the consideration to be paid for an easement is more than 50 percent of the appraised value of the tract and the current taxes are not payable, funds must be withheld from the purchase price to pay the current taxes when they are due. The Regional Forester shall draft a suitable form of withholding authorization and publish it in a Regional supplement with instructions for its use.
2. Delinquent Property Taxes. Ordinarily, it is necessary to clear delinquent taxes. If it is possible to persuade the grantor to pay the delinquent taxes, the title evidence may be amended to remove this objection; or evidence that taxes have been paid may be included in the title assembly. Alternatively, withholding a sufficient amount from the purchase price to pay the delinquent taxes is another solution. This requires a withholding authorization from the grantor.
3. Delinquent Income Taxes. Handle Federal or State income tax liens as directed by the Office of the General Counsel.

In some cases, the taxing authority has been willing to take official action to ensure that any subsequent conveyance of the lands the taxing authority may acquire through tax delinquency shall be subject to Forest Service easements crossing said lands. The taxing authority can take this action with respect to an individual case or to all easement acquisitions by the Forest Service within that taxing authority's jurisdiction. The latter method is greatly preferable. Try to obtain a general consent from the local taxing authority or blanket insurance in any jurisdiction where it is common to encounter tax delinquency.

It is necessary to know the tax situation relative to the land crossed by the easement at the time negotiations begin for the easement. If a withholding authorization is necessary, obtain it before execution of the easement. Discovering if the grantor is willing to pay delinquent taxes should be a part of the negotiations.

In some cases, the defect resulting from unpaid taxes is not eligible for waiver under the regulations of the Attorney General; nor is curative action possible due to unwillingness of the grantor or for other reasons. Rather than prepare the case for condemnation, request a waiver. Include with the waiver a statement of the facts regarding the tax situation and a statement of the attempts at curative action and their results. The Office of the General Counsel then decides whether to waive the defect or recommend condemnation.

21.32 - Mortgage Liens

Pursuant to A.G. Order 440-70, title to easements may be approved subject to outstanding encumbrances such as mortgages, deeds of trust, and vendor's liens, where the properties are not encumbered in excess of 50 percent of their reasonable value and the consideration being paid for the easement is not more than 10 percent of the value of the tract. Always request a waiver when the case qualifies under these rules. Where the conditions of the lien do not qualify it for waiver, the mortgage holder must release the easement area from the lien or must subordinate the lien to the easement.

Mortgage holders usually prefer a subordination agreement to a partial release because if the easement is terminated, the mortgage lien is automatically reinstated over the area covered by the easement. If a partial release is used, the mortgage lien is permanently removed and cannot be reinstated, except by the execution of another instrument.

The larger lending agencies such as banks, insurance companies and Government lending agencies usually have their own forms and procedures for granting such releases or subordinations. They usually execute them when the request includes a copy of the easement conveyance and a plat of the rights-of-way across the mortgaged property.

Sometimes there is a fee for execution of a partial release or subordination. The Government may pay a reasonable fee for the release directly or the landowner may be reimbursed for such cost as a relocation expense.

21.33 - Other Liens

When liens other than those specified in sections 21.31 and 21.32 are encountered, consult the Office of the General Counsel for a recommended course of action.

21.34 - Outstanding Rights

This group of title defects includes a wide variety of interests in the property crossed by the easement that are owned or held by parties other than the grantor. When these interests are administratively acceptable, they are not title defects and may be recommended for waiver.

Some of the more common outstanding interests requiring curative action and their treatment are:

1. Possessory Interests of Tenants, Lessees, and Squatters. Leases and tenancy agreements may or may not be recorded. Unrecorded agreements may even be unwritten. Inquiry or inspection of the property is intended to reveal those that are not in writing or

not recorded. Inspections may also reveal squatters or others holding possession adverse to the Forest Service grantor.

Whenever feasible, obtain a disclaimer or waiver of interest from the party in possession. Develop forms for this purpose in consultation with the Office of the General Counsel; furnish the forests with such forms if the volume of work warrants. Otherwise, prepare a case specific instrument with the help of the Office of the General Counsel at the time of preliminary review.

If it is not feasible to obtain a disclaimer or waiver of interest, request a waiver of the title defect. The request is to include a statement of relevant facts concerning the possessory interest in relation to the easement and the attempted curative action. If possible, obtain a copy of the lease or other document under which the interest is held.

2. Easements. Occasionally, the rights-of-way sought by the Forest Service would cross a pre-existing senior easement owned by a third party. If the senior easement is for a facility such as a power line, telephone line, or pipeline, it may be possible to locate and construct the road in such a way as not to interfere with the facility. However, if it is not possible to avoid the senior easement, it is necessary to secure legally-sufficient written consent of the owner of the senior easement.

The consent must also be in recordable form, unless the evidence of third-party easement interest is not a recorded easement deed as is often the case, for example, with rural electric association power lines. In such cases, a letter of consent or agreement that is not in recordable form is sufficient when it is included in the preliminary or final title assembly.

The Regional Forester shall develop consent form templates with the help of the Office of the General Counsel and shall furnish these templates to the forests. A continuing need for consents from the same party, for example a regional utility, may require agreement on a standard form of consent with that party.

Frequently, the senior easement owner includes requirements for the design of the road, such as minimum depth of fill across a pipeline as a consent condition. Construction and use of a road across a pre-existing easement may require some changes to the pre-existing facility, for example new poles to provide added clearance for a power line or telephone line over the road. The senior easement owner may condition the consent on the Forest Service agreeing to bear the cost of the alteration. Draft the language concerning the arrangements for paying such costs so as not to violate fiscal or contracting limitations. Whenever possible, determine the cost of doing such work prior to executing the easement. The consent agreement should specify that this amount be paid to the senior easement owner when the described alteration is satisfactorily completed.

Consult with the Office of the General Counsel when the exact location and dimensions of the senior easement are not definitely described (floating easement). Typically, a definitely described easement acquired by the Government is superior to a floating easement whose location has not been fixed by construction or by use for the purpose

granted within a reasonable time period. This is not always true, however, because of the lack of opportunity to locate the floating easement on a reasonable route, variation in State laws, and the language of the prior floating easement itself.

See FSH 5409.17, chapter 10, section 11.4 for railroad crossings.

3. Outstanding Timber Rights. Standing timber or the right to cut such timber may be owned by a party other than the owner of the fee who is granting the rights-of-way to the United States.

In the absence of a specific conveyance of timber on the rights-of-way, the United States does not obtain ownership of such timber, but it does obtain the right to cut the timber in construction of the road. When timber rights are outstanding, obtain a release from the owner of the timber rights if there is any timber on the rights-of-way that must be cut to construct the road.

Obtain the release in recordable form and include it in the preliminary title assembly. The release should specifically authorize the cutting of the timber on the rights-of-way and should specify the method of disposal.

If the timber on the rights-of-way has already been cut or there is no timber on the rights-of-way, a release is not necessary. If the outstanding right is of record, note the facts in the certificate of use and consent. If it is not of record, cover it in a separate statement, included in the preliminary title assembly.

If the Government is to acquire timber on the rights-of-way, the owner of the timber rights may join in the conveyance with the fee owner. Alternatively, the fee owner may reacquire the timber on the rights-of-way and convey the easement and timber to the United States.

4. Outstanding Mineral Rights. Generally, it is possible to waive outstanding mineral rights administratively (section 21.21). However, if the nature of the rights, the probability of their exercise, and the probable mining methods are such as to impose a significant risk to the road, it is necessary to take some action to eliminate or minimize the risk. The nature of the curative action needed depends on so many variables that it is best to rely on Office of the General Counsel instructions for each case.

21.35 - Heirship and Probate Problems

Imperfections in title to the land crossed often result when title has passed by will or by descent. There may be a significant range of title issues resulting from heir and probate problems as well as variations of State laws and procedures. For example, it may not be clear who can legally execute the easement.

Generally, the Office of the General Counsel indicates the action required in the individual case after reviewing the preliminary title evidence and facts furnished by the forest. The Regional Forester should include instruction in the basics of applicable State law and procedures in

training sessions so the staff experts can understand the problems revealed by the preliminary title evidence and can follow the instructions of the Office of the General Counsel.

Often it is necessary to seek documentation or action from the landowner to resolve some problems before execution of the rights-of-way. For example, the executor of an estate may need court authorization to convey the rights-of-way.

21.4 - Waiver of Title Defects

Attorney General Order 440-70 contains instructions for waiving defects resulting from tax and mortgage liens in easement acquisitions. The Office of the General Counsel follows these instructions in title approval of rights-of-way acquisitions. See sections 21.41 and 21.42 for specific instruction regarding tax and mortgage liens.

There are no specific rules governing the administrative waiver of the large remaining body of title defects encountered in easement acquisition. Requests for waiver may be granted in many cases when the nature of the defect and the facts are such that the risks of future problems or loss are minimal in relation to the Government's investment and the costs of clearing the defect.

Some of the factors the Office of the General Counsel shall take into account when considering requests for waiver of title defects are:

1. Acquisition cost of the rights-of-way.
2. Cost in money and time to clear the title defect.
3. The extent of the action taken by the field to eliminate the title defects.
4. The nature and extent of the title defect and its effect on the validity of the title to the rights-of-way.
5. The possible consequences of failure to clear the defect and the probability of these consequences developing.

Choosing among further efforts to eliminate the defect, request for waiver, or recommendation for condemnation requires coordination between the Forest Service and the Office of the General Counsel. The Office of the General Counsel has ultimate responsibility for decisions on these matters. However, the Forest Service is responsible for supplying the title evidence and supporting data that enable the Office of the General Counsel to identify the nature of the defect; for taking or obtaining curative action where feasible; for supplying facts and, in some cases, judgments needed to back up a request for waiver; and for recommending a solution to title problems.

Condemnation is rarely needed to clear title for a rights-of-way acquisition. Submit doubtful cases for title approval accompanied by a request for waiver of the title defect rather than prepare the case for condemnation. The Office of the General Counsel approves title subject to the title defects, returns the case for further information or specified curative action, suggests the case for condemnation.

When submitting a direct purchase case that includes unresolved title defects for title approval, the title assembly must include the following in addition to the usual material:

1. A request for waiver of the defects.
2. A statement regarding the curative data obtained and action taken or attempted to eliminate the title defect. This statement must explain the reasons why further curative action is not possible or practicable.
3. When the title evidence consists of a preliminary title certificate or a preliminary title report, provide information from the title company as to what curative action or material the title company considers necessary in order to issue a certificate or policy finding valid title in the United States.

21.41 - Waiver of Tax Liens

Attorney General Order 440-70 provides instruction under which payment of current-year property taxes that are a lien and that are not due and payable may be waived. The instructions applicable to easement acquisitions state that there is no need to make provision for payment of current taxes when the consideration to be paid for the easement is less than 50 percent of the reasonable value of the entire tract of land subject to the easement.

This applies only to current-year property taxes, not delinquent taxes which typically cannot be waived. Regional Foresters shall supplement the Forest Service Manual to clarify the term delinquent as it applies to the various States in the Region.

Submit requests for waiver of current-year taxes in substantially the form of exhibit 01 at the end of this section. Part B of the form is for tax liens.

Do not request a waiver in a condemnation case.

21.41 - Exhibit 01

**REQUEST FOR WAIVER OF LIEN IN ACQUISITION
OF EASEMENT BY DIRECT PURCHASE**

It is requested that the following lien(s) be waived per Attorney General Order No. 440-70, dated October 2, 1970.

A. Lien of (mortgage) (deed of trust) (vendor's lien) shown at (page of the abstract) (item___ of the certificate of policy).

Title to easements may be approved subject to outstanding encumbrances, such as mortgages, deeds of trust, and vendor's liens, where the properties are not encumbered in excess of 50 percent of their reasonable value and the considerations being paid for the easement do not represent sum in excess of 10 percent of the value of the tract.

1. The present amount of the lien is \$_____.
2. The reasonable value of the fee is \$_____.
3. The purchase price of the easement is \$_____.

B. Lien of taxes for the current year 20_____.

Title may be approved subject to the lien of the current-year taxes, if they are not due and payable, without any provision for the payment of such taxes if the purchase price of the easement is not in excess of 50 percent of the reasonable value of the entire property. The purchase price is not in excess of 50 percent of the reasonable value of the entire contiguous estate.

1. The reasonable value of the fee is \$_____.
2. The purchase price of the easement is \$_____.

21.42 - Waiver of Mortgage Liens

The Attorney General has authorized approval of title to easements subject to outstanding mortgages, deeds of trust, and vendor's liens when the following conditions exist:

1. The unpaid balance of the lien does not exceed 50 percent of the reasonable value of the mortgaged property.
2. The consideration the Government is to pay for the easement does not exceed 10 percent of the reasonable value of the mortgaged property.

The request for waiver and supporting information should be in the form of exhibit 01 in section 21.41. Part A of the form is for mortgaged liens.

Do not request a waiver in a condemnation case.

22 - Title Approval

Preliminary title review is not required if the approved form of deed and curative documents are to be used and there are no questions concerning the title exceptions. However, easement deeds and curative documents that vary from previously approved formats require approval from the Office of the General Counsel.

Final approval of title to easements can only occur after the executed conveyance is recorded and the title evidence shows title to the easement vested in the United States subject to specified exceptions.

22.1 - Preliminary Review

The purposes of preliminary review of the draft easement, curative documents and preliminary title evidence are to:

1. Approve the contents of the conveyance.
2. Determine any title defects to resolve before submitting the case for title approval.
3. Approve format and content of curative documents or request additional information needed for waiver requests.
4. Authorize execution of the easement.

Preliminary review involves both the Regional Office Easement Acquisition staff and, when necessary, the Office of the General Counsel. The Forest Supervisor submits the draft easement and preliminary title evidence to the Regional Forester. As a minimum, the Regional Forester's staff checks the easement for accuracy of the description and administrative suitability of the covenants, provisions, reservations, and interests conveyed. The remaining elements of the review are legal in nature; depending upon the complexity of the case, the Office of the General Counsel or Forest Service personnel experienced in this work in consultation with the Office of the General Counsel may review these elements.

Regional Foresters shall develop procedures with the Office of the General Counsel to promptly perform the preliminary review and issue instructions for completing the acquisition. Forest Service work, in addition to the administrative review, depends on the:

1. Experience and training of the Regional Office staff,
2. Complexity of individual cases, and
3. Kind of preliminary title evidence obtained.

When the evidence obtained consists of preliminary title certificates, preliminary title reports, or insurance binders rather than abstracts, the review is much simpler and generally Forest Service personnel can readily perform such reviews.

22.11 - Preliminary Title Assembly

Include the following items in all submissions for preliminary review:

1. Draft Easement or Option.
2. Plat of Rights-of-Way If Plat Is Not Part of Conveyance. Any separate plat should use the stationing, courses, distances, curve data, ties, and other information that appear in the written description so that it is possible to check the written description properly.
3. Preliminary Title Evidence.
 - a. Primary. Preliminary title certificate, preliminary title report or binder, abstract or record search information showing condition of title to lands crossed by the easement to be acquired (section 21.1).
 - b. Supplemental.
 - (1) Draft certificate of use and consent prepared prior to the date of execution of the easement (section 21.21).
 - (2) Certificate of inspection and possession prepared prior to execution of the easement (section 21.22).

(3) If needed, documents showing proof of corporate authority (section 21.23). If not yet available, this item may be omitted to avoid delaying the preliminary review, but must then be submitted with the final title assembly.

4. Curative Documents. Include curative documents already obtained. Specify curative action already started or planned concerning other title defects. Indicate the tax and mortgage liens that are to be waived under A.G. Order 440-70 (section 21.4). Do not make the actual waiver request until after recordation of the easement and preparation of the final title assembly.

5. Other Information. Include any other information that would help the reviewer to determine the nature, extent, and seriousness of those title defects not easily eliminated by curative action or waived under A.G. Order 440-70.

22.12 - Instructions for Recording and Curative Action

Upon completion of preliminary review, when required, return the title assembly to the Forest Supervisor along with instructions for completing the acquisition. The instructions should include specific direction to have the easement signed and recorded, and instructions for curative action or preparation of requests for waiver of title defects. Include answers to questions in the submission from the forest.

When there is a formal review of the preliminary title assembly, the Office of the General Counsel usually prepares a preliminary title opinion for the Regional Forester. Send the preliminary title opinion to the Forest Supervisor. Include any further instructions or interpretation of the opinion in the letter transmitting the opinion to the forest.

When the preliminary review is by the Forest Service, the letter of instructions to the Forest Supervisor shall contain the information and direction that a preliminary title opinion would provide.

22.2 - Action by Forest Supervisor

Promptly upon return of the case after preliminary review, the Forest Supervisor shall carry out the instructions for completing the acquisition.

22.21 - Execution and Recording

If corrections to the easement deed are needed, make the necessary changes and have the deed executed and notarized promptly. Record the easement immediately thereafter. Delay may allow additional taxes to become a lien or allow other actions to cloud or encumber title to the easement. An easement across land lying in more than one county must be recorded in every county involved.

The Forest Service pays recording fees.

22.22 - Obtaining Final Title Evidence

Order final title evidence concurrently with recording the easement. In most cases, have the title company record the easement with simultaneous issuance of the Final Title Evidence.

22.23 - Waiver Request

Prepare requests for waiver of tax and mortgage liens under A.G. Order 440-70 (section 21.4) as soon as the easement is recorded.

Follow the instructions received from the Office of the General Counsel and Regional Forester when preparing requests for waiver of other title defects and when obtaining the facts to substantiate the request. Ask advice promptly at any stage in the preparation of the final title assembly when there is doubt as to the next step or when the instructions received do not apply to the facts as they develop.

22.24 - Curative Action

Begin curative action on title defects immediately upon execution of the easement. Examples of defects for which curative action may be needed include permission to cross other easements, disclaimers from tenants or lessees, and mortgage subordinations when the facts do not support automatic waiver.

When possible, record curative instruments that are in recordable form prior to requesting final title evidence from the title company. This may prevent the defects from appearing in schedule B of the final title certificates and insurance policies.

Curative documents may be recorded after the issuance of the final title evidence. This way, defects (exceptions in schedule B of the final title certificates or insurance policies) can be waived.

22.3 - Final Review and Title Approval

The Regional Forester's staff shall review the final title assembly when it is received from the Forest Supervisor to ensure that it is complete and ready for review by the Office of the General Counsel. A checklist and systematic procedure for conducting this review is essential. The Regional Forester shall then submit the case to the Office of the General Counsel for final title approval.

22.31 - Final Title Assembly

The final assembly consists of the following items:

1. Executed and recorded easement conveyance.
2. Final title evidence.

a. Primary. Title insurance policy, title certificate, title abstract or record search showing title to the easement vested in the United States.

b. Supplemental.

(1) Certificate of use and consent prepared after recording of the easement conveyance and reflecting the condition of the title revealed by the final title evidence (primary).

(2) Certificate of inspection and possession prepared after recording of the easement conveyance.

(3) Proof of corporate authority, if needed (section 21.23). The same material included in the preliminary title assembly, if available at that time, may be used in the final.

3. Curative Documents. Include all documents and instruments that cure or partially cure title defects revealed by the final title evidence. Also, include other information in the form of signed statements or as part of the transmittal letter that would help the attorneys to understand the nature of defects and the action taken to cure them.

It is not necessary to include material on defects that appeared as exceptions in the preliminary title evidence but that have been remedied and that do not appear as exceptions in the final title certificate or insurance policy.

4. Waiver Requests. Include in the final title assembly formal waiver requests for tax and mortgage liens shown in the final title evidence that are to be waived under A.G. Order 440-70. See section 21.4 for these rules and the form for waiver requests.

Also, include requests for waiver of title defects not under A.G. Order 440-70 and not removed by curative action or otherwise. Include the information suggested in the preliminary review or in later instructions from the Office of the General Counsel.

22.32 - Office of the General Counsel Approval

For purposes of this chapter, the Office of the General Counsel has authority to approve title to all rights-of-way.

The Office of the General Counsel may do one of the following:

1. Approve title.
2. Approve title conditionally.
3. Request further information.
4. Return the case to the Regional Forester with a recommendation to prepare it for condemnation.

The Regional Forester shall return the case file to the Forest Supervisor for either closing the case, or further action recommended by the Office of the General Counsel.