

**Forest Service Handbook
National Headquarters - Washington Office
Washington, DC**

**Forest Service Handbook 5509.11 – Title Claims, Sales, and Grants Handbook
Chapter 60 – Encumbrances**

Amendment: 5509.11-1992-4

Effective date: August 03, 1992

Duration: This amendment is effective until superseded or removed.

Superseded Directive: Title Page; 5509.11, Contents; 00--1 thru 52; 5509.11,60 Contents; 5509.11,60; 5509.11-92-3, 2/25/92; 5509.11-92-2, 2/25/92; 5509.11-92-1, 2/25/92; Entire Handbook issued 2/88

Approved by: F. Dale Robertson, Chief

Date approved:

Responsible Staff:

POSTING NOTICE. Amendments are numbered consecutively by Handbook number and calendar year. Post document in numerical order of chapters (1109.12, sec. 4.32, ex. 01). Remove entire national text of the Handbook and replace with this amendment. DO NOT REMOVE SUPPLEMENTS OR INTERIM DIRECTIVES. Retain this transmittal as the first page of this document.

Explanation of changes:

This amendment is a reissuance of FSH 5509.11 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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61 - Outstanding Private Grants and Reservations

[Reserved].

62 - Outstanding Federal Grants and Easements

62.1 - Water Conveyance Facilities

62.11 - Original Authorities

This section contains text of the original laws, as codified in the United States Code, authorizing occupancy of open Federal lands and issuance of easements. Most of these laws are now repealed. Authorizations and grants made under these authorities must continue to be administered according to the provisions contained in the authorizing legislation as summarized in the following table:

Recipient	Act of 1866 Owners of water right	Act of 1891 Companies & "districts"	Act of 1895 Citizens or Assoc. who mine/tmbr	Act of 1901 Citizens, Assoc., or Corp.	Act of 1905 Citizens & Corp.
Uses	General commercial uses	Irrigation & Drainage *	Mining & Timbering *	General water uses	Municipal & mining
Area	Actual occupied or used	Actual +50 marginal	Actual +50" marginal	Actual +50" marginal	Actual +50" marginal
Type of Document	None, A factual question	Filing of Plat Approval ***	Easement	Easement	Easement
Term	Permanent ++	Permenent ++	Regs to be written **	50 years (1912 regs)	Duration of use
Other Provisions	Liable for damages A Grant	Bonding opt. Supplemented Act of 1866 requirements	Permissive by Secy.	Permissive	A Grant

Notes:

- * Act of 1898 supplemented Acts of 1895 and 1891 to add purposes of a public nature, and purposes of water transportation and domestic and power use, as subsidiary to irrigation or drainage.
- ** Act of 1897 required Sec. of Interior to make regulations for the protection of the public forests and forest res.
- *** Approval provided by acknowledgement on plat & providing stips.
- ++ Until abandoned or relinquished.

62.11a - Act of July 26, 1866 (14 Stat. 254) (43 USC 661)

The Act of 1866 was a "general mining law", but Section 9 contained a general grant of rights-of-way to those holding a water right, without restriction on the use made of the water. The Act assigns liability for damages to the holder. Rights-of-ways obtained under this authority were not formally documented, but became operational through construction and use. They must be individually verified through water decrees, permits, water use records, etc.

661. Appropriation of waters on public lands; rights-of-way for canals and ditches:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.

62.11b - Act of March 3, 1891 (32 Stat. 1095) (43 USC 946-949)

The Act of 1891 was primarily to repeal timber-culture laws, but sections 18-21 provided for the granting of rights-of-way to ditch companies for irrigation and drainage purposes. Section 18 provides for the grant, specifies that the area will be that actually occupied plus fifty feet around the margins or either side of a center line, and permitted the use of materials adjacent to the right-of-way. Section 19 provides for the filing of maps and field notes, approval by the Secretary of the Interior, and establishes liability for damages with the holder. Section 20 makes the filing of maps and notes a requirement for all future ditches, and sets a five year time limit for completion. Section 21 says the right-of-way can only be used for a ditch or canal.

946. Right-of-way to canal ditch companies and irrigation or drainage districts for irrigation or drainage purposes and operation and maintenance of reservoirs, canals, and laterals:

The right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any State or Territory, and which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation or, if not a private corporation, a copy of the law under which the same is formed and due proof of its organization under the same, to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the applicant, such additional right of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; also, the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation; and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

947. Map; damages to settlers:

Any canal or ditch company desiring to secure the benefits of sections 946-949 of this title shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

948. Application to existing and future canals:

The provisions of sections 946-949 of this title shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps therein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of

individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the officer, as the Secretary of the Interior may designate, of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats filed before March 3, 1891, shall have the benefits of sections 946-949 of this title, from the date of their filing, as though filed thereunder: Provided, That if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights therein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

949. Use for canal or ditch only:

Nothing in sections 946-949 of this title shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

951. Right-of-way for water transportation, domestic purposes, or development of power:

Rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections 946-949 of this title may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation or drainage.

62.11c - Act of January 21, 1895 (28 Stat. 635) (43 USC 956)

The Act of 1895 provided for the Secretary to give "permission" for rights-of-way, and to regulate them. Originally, the Act of 1895 authorized rights-of-ways only for mining and timbering uses, but the Act of May 8, 1898 (30 Stat. 404) (43 USC 292) added authority for domestic, public, and other beneficial uses.

956. Right-of-way for tramroads, canals, or reservoirs:

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any national forest, park, military or Indian reservation, for tramroads, canals, or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or any association of

citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber or for the purposes of furnishing water for domestic, public, and other beneficial uses.

62.11d - Act of June 4, 1897 (30 Stat. 35) (16 USC 551)

The Act of 1897 directed the Secretary of the Interior to protect the public forests and forest reservations, and provided for the making of rules to regulate occupancy and use.

551. Protection of national forests; rules and regulations:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of sections 473-482 of this title or such rules and regulations shall be punished as is provided for in section 104 of Title 18.

62.11e - Act of May 11, 1898 (30 Stat. 404) (43 USC 951)

The Act of 1898 amended Section 18 of the Act of 1891 (see 62.11b above) to include domestic and power as subsidiary uses of water for irrigation.

951. Right-of-way for water transportation, domestic purposes, or development of power:

Rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections 946-949 of this title may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation or drainage.

62.11f - Act of February 15, 1901 (31 Stat. 790) (43 USC 959)

The Act of 1901 provided for the issuance of permits for all water uses. A determination of compatibility with the public interest was required, and the permits are revokable. The extent of the grant was the area actually occupied plus additional land required for operation and maintenance not to exceed fifty feet on each side of the center line of ditches or the marginal limits of reservoirs.

959. Rights-of-way for electrical plants, etc.:

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, and the General Grant grove section of the Kings Canyon National Park, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: Provided, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: Provided further, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of sections 1-6 and 8 of Title 47, regulating rights of way for telegraph companies over the public domain: And provided further, That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

62.11g - Act of February 1, 1905 (33 Stat. 790) (16 USC 524)

The Act of 1905 is known as the Transfer Act since it transferred the Forest Reserves to the Department of Agriculture. Section 4 also provided a grant of rights-of-way for water uses associated with mining and municipal uses, which grants were to be operated according to regulations of the Secretary of the Interior.

524. Rights-of-way for dams, reservoirs, or water plants for municipal, mining, and milling purposes:

Rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the national forests of the United States, are granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use,

under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said forests are respectively situated.

62.12 - Legislative History - Act of October 27, 1986

The following letter was included in the legislative history for Public Law 99-545. It is included here to provide background information and clarification for the guidance contained in FSM 5520.11 - 5520.13.

Department of Agriculture
Office of the Secretary
Washington, DC 20090-6090
October 1, 1986

Honorable Malcolm Wallop
Chairman, Subcommittee on Public Lands,
Reserved Water, and Resources
Conservation, Committee on Energy
and Natural Resources,
United States Senate
Washington, DC 20510-6025

Dear Senator Wallop:

At the September 23, 1986, hearings on H.R. 2921 before the Senate Subcommittee on Public Lands, the Colorado Water Congress testified to the need for amendments to the bill. You asked for the Department of Agriculture's views on these suggested amendments.

In our view, the concerns expressed relate to three somewhat different issues. The first concern expressed was that the limitation in H.R. 2921 to "solely agricultural or livestock watering purposes" unnecessarily constricted the benefits of the legislation. The legislation has the purpose of recognizing the rights of a certain class of ditch owners who cannot document a right of way issued prior to October 21, 1976. It was pointed out that many ditches on the Federal lands have a multiplicity of owners, any one of whom under State law may change the ultimate use of his share of the water right carried in the ditch to other than agricultural irrigation purposes. Many such changes have occurred over the past 90 years and many are occurring today. Thus it was observed that intended beneficiaries of this bill may lose any entitlement under it from the operation of State sanctioned market systems in water rights by or among co-users of ditches.

The Department understands the desire of the Subcommittee to avoid amendments now, considering the lack of time remaining in the session. We acknowledge that further amendments, carefully drawn and considered, would be appropriate to cure these situations. The end use of water off the Federal lands, as it may change over time, casts no greater burden on the Federal property to carry the water to its place of use. The Department contemplates administrative procedures under H.R. 2921 which obviate much of this concern, particularly a procedure whereby easements allowed by H.R. 2921 may be automatically converted for permits under FLPMA. The Department will work with your committee and other concerned persons to develop and support appropriate administrative action or statutory amendments for the consideration of Congress in a future session. In that way, relief from uncertainty can now be provided for certain irrigators and stockmen without creating unintended implications for other water users. In a succeeding Congress the full, necessary consideration of the scope of the amendments can be achieved. The Department reemphasizes that H.R. 2921 does not create any implication attributable to any pre-existing rights of way, the owners of which may elect not to avail themselves of the benefits of H.R. 2921.

Second, concerns were expressed at the hearing that the Department of Agriculture, under the jurisdictional authority proposed to be transferred to it as part of H.R. 2921, contemplates asserting forfeitures against those holders of rights of way issued pursuant to the Act of March 3, 1891 (26 Stat. 1095) as amended by the Act of May 11, 1898 (30 Stat. 404), whose end use of water off the public lands is no longer for the primary purpose of irrigation.

Third, concerns were expressed that rights of way previously granted by the Act of February 15, 1901 (31 Stat. 790), and the Act of February 1, 1905 (33 Stat. 628), will not be administered by the Department of Agriculture in accordance with the settled procedures and laws that have developed over the past 85 years during which the administration of such rights of way have been subject to the jurisdiction of the Department of the Interior. To resolve these concerns, amendments to H.R. 2921 were suggested which would preclude administrative changes to the detriment of holders of pre-FLPMA rights of way.

For reasons which follow, the Department does not believe that such amendments are now appropriate or required. The construction placed on the Act of 1891, as amended, by the Department for the rights of way it will administer does not prejudice or diminish the rights of grantees thereunder. We do not assert that the end-use of water, which may change from irrigation to municipal or other beneficial uses recognized under State law, in and of itself occasions a forfeiture of such rights of way.

The Department is fully aware of the decision of the United States Court of Appeals in City and County of Denver v. Bergland, 695 F.2d 465 (1982). Concern has been expressed that with its acquisition of administrative jurisdiction, the Department will diminish the entitlements of rights of way holders under existing grants.

The Department disavows any such intention. The Department will be careful to avoid any action that will reduce the rights conferred under pre-FLPMA grants, and will process pending application for amendment and other pending administrative matters in accordance with the applicable regulations, policies, and procedures of the Department of the Interior.

The Department must of course maintain its authority to assure that holders of rights of way on Federal Lands use those lands in sound ways. However, we do not assert that pre-FLPMA rights of way for water conveyance and storage systems must be subjected to a repermitting process. The Department recognizes that long-standing uses ought not be diminished by insignificant defects in survey or description made many years ago, or a change in the end use of the water off the Federal lands.

We hope that this letter has adequately clarified the Department of Agriculture's position on concerns that have been raised related to H.R. 2921.

Sincerely,
/s/Douglas W. MacCleery
Douglas W. MacCleery
Deputy Assistant Secretary for
Natural Resources and Environment