

CEMP-CR

Regulation  
No. 405-1-11

28 November 2014

Real Estate  
ACQUISITION

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## CHAPTER 1

### Overview

1-1. General. This regulation describes USACE procedures for the acquisition of real property and interests in real property for USACE Civil Works and military projects as well as for other agencies. The U.S. Army Corps of Engineers may deviate from any policy in this regulation as necessary unless required by law or another binding regulation.

1-2. Organizational Responsibility for Military Real Property. Responsibilities and policy for real estate acquisitions are found in AR 405-10, Acquisition of Real Property and Interests Therein, or its replacement regulation, and in supporting manuals. District Real Estate works primarily with the Garrison Commander or equivalent DA representative accountable for the real property, or their real property staff, and either the Regional Offices of the Installation Management Command (IMCOM), the Medical Command (MEDCOM), or the Army Materiel Command (AMC), depending on which command is accountable for the real property. Creation of teams is encouraged. The procedures of this regulation are to be used for acquisition of land and interests in land (except leases).

1-3. Organizational Responsibility for Civil Works Real Property.

a. Secretariat responsibilities and policy for real estate acquisition are found in AR 405-10, Acquisition of Real Property and Interests Therein, or its replacement regulation, and in supporting manuals or regulations. Within USACE, acquisition of real property for civil works purposes will involve consultation and coordination among several field elements. Any references to Operations are intended to include both the District and project elements. The references to official or Chief of Real Estate refer to the District or Division individual who is the Real Estate Contracting Officer with the delegated real estate authority at the appropriate warrant level in a written Certificate of Appointment or other delegation.

b. The Chief of Real Estate manages all lands during the acquisition phase of a project for the purpose of phasing out interests of former owners or tenants, to provide for any interim use of the property before the project is completed, and to phase-in the completed project uses.

1-4. Closing Agent and Reviewing Attorney.

a. Closing Agent. Staff qualified to do closings for acquisitions and USACE-Qualified Reviewing Attorneys qualified to review final title, deeds and other legal documents are not the same. In some jurisdictions, an attorney must do closings of land sales. In some, a qualified real estate specialist may do the closings. A USACE attorney, if required by state law, will handle closings. Otherwise, the qualified Closing Agent may be either an attorney or a realty specialist.

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This Regulation Supersedes ER 405-1-12, Chapter 5, dated 20 November 1985

A qualified Closing Agent must have a minimum of three years experience in real estate acquisitions. If a Closing Agent with less experience is asked to handle closings, his/her work product must be reviewed and countersigned by a fully qualified closing agent in his/her own or another office of the agency. A Closing Agent may be a contractor, with appropriate oversight performed by qualified USACE employees with inherently governmental decisions on price, terms, and conditions executed by an appropriate USACE official.

b. **Reviewing Attorney.** Reviewing Attorneys are those attorneys assigned to a USACE legal office and whose credentials are qualified by the Chief Counsel pursuant to AR 690-200. These attorneys review, issue, approve or disapprove preliminary and final title, deeds, and other legal documents. In addition, the Department of Justice requires the government Reviewing Attorneys to have a minimum, from the date of admission to a State bar, of three years experience in the practice of real estate law and reviewing titles. If an attorney with less experience is asked to review titles, his/her work product must be reviewed and countersigned by a fully qualified reviewing attorney in his/her own or another USACE legal office. The role performed by the Reviewing Attorney is an inherently governmental function and must be performed by a government attorney.

#### 1-5. Applicability.

a. The procedures outlined herein will apply to all acquisitions by USACE (military and civil). When doing acquisition for other agencies, such as Air Force, Department of Energy (DOE), Environmental Protection Agency (EPA), and other Federal agencies which utilize the services of USACE for acquisition of real estate, the other agency's authorities, policy, regulations, and procedures apply.

b. All Federal agencies must follow:

(1) The Department of Justice (DOJ) Title Standards, currently the Title Standards 2001, A guide for the preparation of title evidence in land acquisitions by the United States of America (DOJ Title Standards). The DOJ Title Standards include approved forms. DA must also follow special DOJ regulations.

(2) The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. § 4601 et seq.) (Uniform Act). Title 49 CFR part 24 implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. § 4601 et seq. The Uniform Act was referred to as Public Law 91-646 in earlier versions of our regulations.

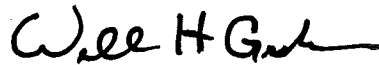
c. DA must follow the DOJ delegation to DA. "Delegation to the Department Of The Army for the Approval of the Title to Lands Being Acquired for Federal Public Purposes".

d. When USACE is acting as the agent and doing work for the local sponsor (acquiring on behalf of the local sponsor), title will be in the name of the local sponsor. See ER 405-1-19,

e. This regulation assumes that all planning (see ER 405-3-10, Military Planning or ER 405-2-12, Roles & Responsibilities: Civil Works) has been done and authorization by Congress has been obtained. This regulation also assumes that mapping (ER 405-1-03, Mapping) and appraisal (ER 405-1-04, Appraisal) will be completed in accordance those regulations. This regulation describes the process for acquisition of the land or interests in land by purchase, by gift, by exchange of real property owned by the United States, or by otherwise generally accepted methods. However, acquisition of an inlease is covered separately by ER 405-1-15, Inleasing. If agreement cannot be reached, condemnation may be required per ER 405-1-19, Condemnation. Relocation assistance required by the Uniform Act is set out separately in ER 405-1-16, Relocation Assistance, and relocation of utilities and facilities is set out separately in ER 405-1-17, Relocation of Utilities and Facilities.

f. The U.S. Army Corps of Engineers may deviate from any policy in this regulation as necessary unless required by law or another binding regulation. Policy deviations must be submitted to CEMP-CR for review and approval.

FOR THE COMMANDER:



WILLIAM H. GRAHAM  
COL, EN  
Chief of Staff

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## CHAPTER 2

### Title Evidence, Title Curative Measures, And Closings

#### 2-1. General.

a. Purpose. This Chapter describes the procedures relating to title evidence, title curative measures, and closings for the acquisition of real estate and interests therein for all Army military and civil works projects. Exceptions in connection with the acquisition of properties under the Homeowners Assistance Program are set forth in a separate regulation (See DODD 4165.50, Homeowners Assistance Program (HAP)).

#### b. Procedures.

(1) State law may limit what type of person or entity may do title work, so local practice must be reviewed by District Counsel. Title evidence should be obtained promptly to ensure that the United States of America obtains acceptable title. To effect these objectives, careful planning is essential, including a determination of the most acceptable and available type of title evidence and the source from which such title evidence may be obtained, by agreement with the District Chief of Real Estate and the District Counsel. When acquiring property, it is the duty of USACE to obtain the necessary evidence of title to land or interests in land, whether acquired by direct purchase, exchange, donation, or condemnation. Any method for obtaining title evidence and the title evidence itself shall comply with all aspects of DOJ Title Standards. In the event of any conflict between these regulations and the DOJ Title Standards, the DOJ Title Standards shall govern. The early examination of the title evidence and title clearance will expedite payment to landowners from whom offers are obtained or when condemnation proceedings are filed. Acceptable types of title evidence are described in paragraph 2-2.

(2) All title evidence must be obtained from attorneys, commercial abstracters, title companies, or a federal real estate attorney designated by their agency for the preparation of such evidence in the jurisdiction in which the lands are situated. Preparers of title evidence should have no interest in the land to be acquired; and not be related to the landowners. Abstracters must be attorneys at law or professional or official abstracters qualified to prepare and certify to abstracts in the state where the land lies. Title companies and their issuing agents must be qualified and authorized to furnish abstracts, Certificates of Title, or Title Insurance policies in the state where the land is titled. Attorneys, abstracters or title companies selected to prepare title evidence shall be experienced, financially responsible and reputable.

(3) Certificates of Title or Title Insurance Commitments that anticipate the issuance of a title insurance policy are the preferred type of title evidence and shall be obtained wherever possible. In the majority of the States either Certificates of Title or Title Insurance Commitments are obtainable. Most State Insurance Commissions have recognized and approved the forms of certificates of title and title insurance policies prescribed by the Attorney General found in the DOJ

Title Standards and have authorized their use in lieu of owners' policies. Districts should familiarize themselves with the State title insurance laws and regulations.

2-2. Acceptable Types of Title Evidence.

a. USACE should select the type of title evidence to be used, keeping in mind the differing and unique requirements of each transaction, local practice, reliability, security, economy, efficiency and speed. In general, the character and scope of the evidence of title shall:

- (1) consist of a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired
- (2) disclose the name of each person in whom title to any interest is vested of record and all additional persons or entities who might have, or who claim to have an interest in the property; and
- (3) contain a sufficient summary of the material facts for the purpose of determining the validity of title when exceptions or objections to the title are noted.

b. Acceptable forms of title evidence include any of the following types of evidence prepared in accordance with the requirements and forms in the DOJ Title Standards by approved abstracters, attorneys or title companies:

- (1) Certificates of Title;
- (2) Title insurance commitments (binders, preliminary reports on title, etc.) which anticipate the issuance of a title insurance policy;
- (3) Abstracts of title.

c. In the event that the District cannot obtain title evidence that meets the DOJ Title Standards, all pertinent facts will be referred to HQUSACE, CECC-R, who will coordinate with CEMP-CR, for possible submittal to the Department of Justice.

d. Certificates of title shall not limit the liability of the title company to a sum less than 50 percent of the reasonable value of the property. However, as to acquisitions valued at more than \$100,000, the liability of the title company may be limited to 50 percent of the first \$100,000 and 25 percent of that portion of the value in excess of that amount. This limitation on the general rule has been approved by the Department of Justice. The appropriate formats for specifications for supplying title evidence may be amended, if that limited liability can be obtained.

e. In the case of a donation, exchange or any other acquisition, the liability amount should be equal to the estimated value of the land or interest in land being acquired as determined by USACE appraisers who may use, for example, tax records estimates.



f. The title evidence contract specifications may be supplemented to address the individual needs of a project. For example, it may be desirable to require the title company to have a local representative stationed convenient to the project office, when, because of the nature of the project (anticipated complexities of title, high purchase prices, or other reasons), it is considered advisable that a local representative be available to perform preclosing interim title searches on request of the contracting officer.

g. Where the estimated consideration to be paid by the Government is \$100,000 or less for acquisition, the acquisition may be based upon a title search by an attorney assigned to a USACE legal office when it is deemed to be in the best interest of the Government. In such cases, the requirement to obtain title insurance is waived.

h. Last owner searches showing the owner under the last deed of record and encumbrances against the title under which the abstracters or title companies assume no liability and without regard to the period of search may be accepted as satisfactory title evidence as to the estates identified below. An attorney assigned to a USACE legal office may conduct any search authorized by this paragraph.

(1) Easements to be acquired for consideration of \$100,000 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 on them. Examples of permanent improvements include paved roads, pipelines, levees, canals and major power lines.

(2) Temporary use or term takings in condemnation proceedings involving the payment of an estimated rental of less than the statutory limit per annum.

(3) Acquisition of a leasehold where the term exceeds 30 years regardless of rental amount. If the value of the improvements to be made during the term by the United States is significant, then the District can obtain the same title evidence as for a fee estate.

i. Certificates of Title. A Certificate of Title is a contract whereby a title company certifies that title to a specific parcel of land is good and unencumbered of record in a named person excepting only such defects and encumbrances as are shown therein. The liability of the company is limited to an amount specified in the certificate. The form for the Certificate of Title is in the DOJ Title Standards. Attorney's preliminary and final certificate of title for fee and for easement is obtained from District Counsel's Reviewing Attorney.

j. Title Insurance Commitments or Title Insurance Policies.

(1) A Title Insurance Policy is a contract which ensures that the owner or mortgagee will not suffer any loss or damage by reason of defects in the title to the property, or liens or encumbrances thereon existing at the date of the policy, except those defects, liens, or encumbrances which the policy specifically accepts.

(2) The required form of title insurance, commonly identified as the American Land Title Association (ALTA) U.S. Policy – 9/28/91, is in the DOJ Title Standards. There is no required

federal endorsement form. The revised form, ALTA U.S. 9/28/91 (Revised 12/3/12) will be required after January 31, 2015. No other form of Title Insurance Policy is acceptable except in Texas. Texas has not adopted this title Policy form and the Texas form is T-11 U.S. Policy. An associated endorsement is referred to as the T-12 U.S. Endorsement.

(3) Companies contracting to issue such interim binders or preliminary reports and title guarantee or title insurance policies must have authority under the laws of the state of their incorporation and their charter to issue the same. They must also be financially sound and be willing and able to issue such binders and policies for all tracts for the amount of liability as set forth above.

(4) In contracting for Title Guarantee or Title Insurance Policies, Delivery/ Specifications For Delivery of Title Evidence, will be used.

k. Abstracts of Title.

(1) An abstract of title is a synopsis or digest of all instruments of record affecting the title to a specific parcel of land. It neither guarantees nor insures the title. These may be obtained for any tract \$100,000 or less.

(2) Abstracts of title must comply with the provisions, including form, content, and period of search, set forth in the DOJ Title Standards. USACE personnel generally will not prepare abstracts of title. However, where there is a comparatively small amount of abstract work to be performed, it may be desirable to have the abstracts prepared by appropriate USACE personnel. The District should consult with the Division when requesting an abstract of title. The file should document the justification for the preparation of abstracts by USACE personnel.

(3) In contracting for abstracts of title, Specifications for Furnishing and Delivering Abstracts of Title will be used. This format provides for an unlimited period of search. For the purpose of conserving Government funds and in applicable easement acquisitions, District Chiefs are authorized to modify the format to provide for the minimum period of search allowable under the regulations of the DOJ, when deemed to be to the best interest of the Government.

2-3. Contracting for Title Evidence.

a. Survey of Area and Source of Title Evidence. Contemporaneously with the preparation of the real estate planning document, the District will:

(1) Give careful consideration to the problems involved to determine the most acceptable type of title evidence; its source, availability of title plants, costs, and delivery time, so that the most advantageous proposals may be received and accepted and the acquisition schedule maintained.

(2) Determine the total number of tracts in the project area. In major projects, it may be desirable to invite bids for title evidence for each county or other specified areas, in addition to the entire project, in order to maintain the acquisition schedule.

(3) Determine the names and addresses of title companies and abstractors available to furnish title evidence. This information should be supplied to the District Contracting Office to ensure widest possible competition.

b. Selection Procedure.

(1) Selection of persons or firms to perform title evidence services will be based upon applicable Federal procurement regulations. In some states, attorneys cannot "bid" on title work, so requests for proposals (RFP) must be used.

(2) Real Estate will coordinate with the District Contracting Office to evaluate bids or proposals to supply title evidence.

(3) In addition to normal procurement practices, attorneys and law firms who have submitted a request that they be considered for future procurements will in all cases be supplied with the Government's RFP.

(4) In cases where bids/proposals are solicited, a selection board including attorneys assigned to the appropriate USACE legal office, shall review the qualifications of each of the attorneys or law firms on the selection list.

c. Forms to be Used. The procurement documents used for the solicitation, offer and award will be used with copies of the delivery/specifications for delivery of Title Evidence, depending upon the type of title evidence to be obtained. The procurement documents will state that time is of the essence; that ability to comply with delivery requirements is mandatory; that the attached specifications constitute a part of the proposed contract; the quantity and description of the supplies by item to be furnished; the time, place, and method of delivery; and the primary period of contract and extensions. Bids or proposals must be submitted in the form required by the invitations, so that the successful firm or attorney can be accepted and a formal contract awarded.

d. Specifications. The specifications for title service will follow the appropriate specification for abstracts, for certificates of title and the appropriate ALTA U.S. Policy for Policies of Title Insurance. Additional provisions may be added as circumstances require, but basic requirements will not be changed.

e. Several Contracts for Title Evidence. To meet the acquisition schedule, it may be necessary to enter into several contracts for title evidence to lands within a designated project area.

f. Credit Card Authority for Title Evidence Contracts. District Contracting Authority may permit acquiring specified dollar amounts of title evidence by use of a Government purchasing

credit card. The specifications for title services and any local requirements will be included as part of any order for title evidence using the credit card. Title evidence will not be ordered without using the specifications, which may be faxed, electronically transmitted or otherwise sent to the landowners. The landowner's delivery of the title evidence subsequent to such an order shall constitute acceptance of the specifications and agreement to deliver product in accordance with the specifications.

2-4. Award of Contracts.

a. Contract Awards. Only duly qualified Contracting Officers in accordance with applicable procurement regulations will make contract awards.

b. Review of Title Evidence Contracts. The District Contracting office, with the advice of Real Estate and the District Counsel, will issue contracts for title evidence. The Real Estate representative, who is the technical advisor to the contracting office, will be familiar with the evidence to be procured and ensure that it will adhere to the DOJ Title Standards.

2-5. Ordering Title Evidence.

a. Placing Orders. Where the contract does not specify the order in which title evidence for particular tracts will be furnished, orders may be submitted to the abstractor or title company on the Order for Title Evidence format, with a legal description and map.

b. Orders Based on Contiguous Areas. If the contract does not contain a list of tracts for which title evidence is to be furnished, orders will be based on contiguous areas of land in identical ownership and will be deemed to be contiguous even though crossed by roads, railroads, rights-of-way, or streams. If there has been a severance of surface and subsurface estates, determination of what constitutes a tract will be based on ownership of the surface. However, in unusual cases where such a contiguous area is composed of several parcels derived through separate chains of title and requiring separate searches of each chain of title down to a comparatively recent date or where such contiguous area lies in more than one section, the Contracting Officer may contract to pay a specified reasonable additional charge for each such additional chain or section if such additional charge is customary in the locality where the land lies.

2-6. Payment for Title Services.

a. Approval. The Contracting Officer will approve payment for all title evidence obtained in connection with the acquisition of land from funds available to the District Chief of Real Estates for that purpose, whether the land is acquired by purchase or condemnation.

b. Review. An attorney assigned to a USACE legal office or real estate staff (the Contracting Officers Representative) will examine all title evidence prior to payment to determine that there has been full compliance with the specifications.

c. Payment for Title Evidence. Payments for title evidence will be made from available funds for the project to which the title evidence pertains, upon receipt of certified and approved vouchers.

d. Preparation of Invoices for Title Services. The abstractor or title company will submit an invoice for services rendered, in accordance with the terms of the contract. The invoice must specify the particular type of title evidence furnished the tract number, name of owner, name of project, and contract number.

## 2-7. Approval of Title by the Attorney General.

a. Delegation of Approval of Title Prior to Payment of the Purchase Price. Pursuant to the provisions of 40 U.S.C. § 3111, authority to approve title to lands being acquired for the use of the Department of the Army, or of any other department or agency for which the Department of the Army is authorized to acquire land, has been delegated to the Department of the Army, subject to the supervision and review of the Attorney General.

b. Issuance of Title Opinions. District Counsel must designate a Reviewing Attorney that has the qualifications and experience to issue title opinions.

(1) The Reviewing Attorney will give written approval of the sufficiency of title to land for the purposes for which the property is being acquired. Approval includes, but is not limited to, authority to issue administrative waivers, preliminary and/or final title opinions; attorney's analysis of title required for submission of a condemnation assembly; and attorney's final opinions required for submittal of final title assembly.

(2) Where the closing of the tract is based upon a Certificate of Title or Title Insurance issued by an acceptable and approved title company, in either fee or easement acquisitions, a Preliminary Opinion of Title is not required.

(3) A Preliminary and a Final Opinion of Title shall be issued in all fee and easement acquisitions involving abstracts of title, if applicable.

(4) A Final Opinion of Title shall be issued for all acquisitions, in accordance with guidance for DOJ.

(5) Any final title opinion issued pursuant to the delegated authority shall substantially follow the format of the DOJ Title Standards, and shall be obtained from the Reviewing Attorney.

(6) An opinion of title prepared by a private attorney could be deemed to be sufficient evidence of title if, in the opinion of the Reviewing Attorney, it provides full disclosure of all matters affecting the title along with the attorney's comments and recommendations relating thereto. If such a private attorney's opinion is deemed to be acceptable, then the reviewing attorney would issue his/her own opinion based on the information contained in the private opinion.

c. Opinion of Attorney General. Whenever the District determines that a title defect is of such character that a possibility exists that it may be waived and cannot be waived under the District's delegated authority, the case shall be submitted by District Counsel through the Division Counsel to HQUSACE (CECC-R) WASHINGTON, DC 20314-1000 for coordination with DoJ.

d. Rejection Opinion. If it is obvious that no possibility of waiver of a title defect exists, a title opinion shall be issued according to the procedure set forth above in this paragraph. Copies of such opinion shall be submitted with the condemnation assembly. See ER 405-1-19, Condemnation.

#### 2-8. Title Clearance.

Certificate of Title and Title Insurance. Curative Action. Upon receipt of an acceptable Certificate of Title, or Policy of Title Insurance, a Reviewing attorney will review the title evidence. Curative action may be conducted as part of the Offer to Sell or may be conducted before Closing. Curative material will be processed as necessary to obtain a final title opinion from the Reviewing Attorney. District Real Estate and District Counsel should work closely together on curative work.

#### 2-9. Title Clearance - Easements.

a. Curative action and clearance of title to easements will be the same as in fee acquisitions, as outlined above, except as follows:

(1) Under the DOJ Standards, title to easements may be approved subject to outstanding encumbrances, such as mortgages, deeds of trust, judgments, and landowners' liens, where the tract is not encumbered in excess of 50 percent of the reasonable value of the remaining property, and the consideration being paid for the easement does not represent a sum in excess of ten percent of the value of the remaining property. (As to taxes, see paragraph 2-10k(6)).

(2) For the purpose of making the determinations necessary to apply the formula set forth in (1) above, the tract appraisal may be used, provided it is based on a "before and after" approach, in which case the amount of the "after" appraisal will be considered to be the reasonable value of the remaining property. In the event no such appraisal has been made, a memorandum estimate by a qualified appraiser (staff or contract) will be obtained. Determination of the total encumbrances may be made on the basis of the face of the encumbering instruments. However, if it is necessary to determine that the total amount of the outstanding liens as of the date of closing has been reduced to an amount less than 50 percent of the reasonable value of the remaining property, such reduction must be evidenced by signed statements from the lienholder or their authorized representatives. The appraisal or memorandum estimate and the lienholder statements will be placed in the tract file.

(3) On the basis of the determinations described in (2) above, the appropriate information will be inserted on the Statement Concerning Outstanding Encumbrances, which will be signed by the Closing Agent. The original will be retained as a separate document in the final title assembly.

(4) The easement deed contains a general warranty covenant by the grantor to continue to pay taxes and other liens and to warrant the title generally.

b. These requirements for title clearance need not be applied if the purchase price of the easement is insufficient to satisfy the liens and interest, or the amount of such liens or interest is small in comparison with the value of the land in which the easement is being acquired, and in comparison with the cost of condemnation proceedings to clear the title. In such cases, the Reviewing Attorney may waive such title infirmities as are determined not to interfere with the use of the easement by the Government or jeopardize the interests of the United States, provided the Reviewing Attorney has determined that such outstanding liens, encumbrances, or interest, if left outstanding, will not interfere with the Government's use of the easement, or will not jeopardize the interests of the United States, and the title is sufficient. A certificate to this effect should be attached to the Attorney's Final Title Opinion.

c. Curative Action.

(1) Curative action will be initiated promptly to eliminate all title defects or encumbrances, except those which may be administratively waived by the Reviewing Attorney, those which may be eliminated by the payment of money and cleared at the time of closing, and those which may be waived as hereinafter provided. Curative material need not be recorded, however, until the closing of the transaction.

(2) All encumbrances, defects, outstanding interests, and other matters shown in the preliminary certificates of title or interim binders, must be cured and eliminated before or at delivery of the purchase check, except those of a nature which have been waived as not interfering with the Government's use of the easement or as not jeopardizing the interest of the United States.

(3) Reasonable curative efforts will be made before initiating condemnation proceedings due to title defects. Costs of the curative efforts and project schedule should be considered in determining the amount of curative work to perform prior to condemnation. Curative efforts should continue after condemnation proceedings are initiated.

## 2-10. Closing of Cases.

a. Closing Agent. Closing of cases will be performed by a qualified Closing Agent, who must have a minimum of three-years experience in real estate acquisition. The Closing Agent and Reviewing Attorney can be the same person. If a closing agent with less experience is asked to handle closings, his/her work product must be reviewed and countersigned by a fully qualified closing agent in his/her own or another office of the agency. Payment and closing of cases will be initiated immediately upon completion of curative action. The Closing Agent

must follow the DOJ Federal procedure and requirements for closing land acquisition transactions. The District Chief of Real Estate may authorize qualified real estate staff to act as closing agent with authority to execute real estate instruments by which land or interests in land are acquired by agreement with landowners, provided it is countersigned by a fully qualified closing agent (See paragraph 1-3 of this regulation) and the documents have been prepared by qualified staff in accordance with this regulation.

b. Conditions, Covenants, and Restrictions (CCRs). The United States does not take title to a property encumbered by various CCRs, such as subdivision CCRs. If these cannot be cured or eliminated then condemnation may be needed, or another property acquired, if there is a choice.

c. Payment. Payment for land or interests therein, will be made from funds available. Expenses incidental to conveying real property to the United States such as recording fees, transfer taxes; penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such real property; and the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective date of possession of such real property by the United States, whichever is the earlier, shall be paid by the Government pursuant to authority of Section 303, Uniform Act.

d. General. The details of the closing necessarily differ according to number of landowners and the outstanding interests, the number and variety of the encumbrances and title objections to be met, state and local laws and miscellaneous other details resulting from complications in the particular title. Upon receipt of the check and title papers, the Closing Agent will meet with the Reviewing Attorney. They will review the entire file relating to the acquisition, will be fully acquainted with the terms and conditions of the sale, and with the condition of the title, and together will ascertain whether there are any special conditions to be performed, or requirements to be met, on the part of the landowner or the Government and what objections to the title are to be eliminated before valid title may vest in the United States. Internal Revenue Service reporting requirements for real estate closings must be satisfied. The Closing Agent will ensure that information is obtained for Internal Revenue Service reporting requirements for real estate closings and made available for proper reporting in accordance with current procedures.

e. Curative Data. The Reviewing Attorney will determine the character and amount of all outstanding interests in, liens on, or claims against the land, which are to be satisfied out of the purchase price, and see that necessary curative action has been taken and curative data obtained to cure all defects in and meet all objections to the title. If the title evidence consists of a certificate of title of a title company, or a title policy, approval of the curative material, obtained to eliminate the title objections, must be obtained from the title company.

f. Continuation of Title Search. The Reviewing Attorney will ensure that no change has occurred in the title since the date of the prior certification which will adversely affect the real estate interest being acquired by the United States. Where deemed appropriate by the closing agent, in consultation with the Reviewing Attorney, the local representative of the title



company or the abstractor will be requested to examine the title records and a continuation of the title evidence should be obtained. Otherwise, the title search prior to closing may be made by the Reviewing Attorney.

g. Payment and Closing Sheet. Payment and Closing Sheet and Receipt for Land Payment Check, will show, in detail, all disbursements of the purchase money, including all disbursements and receipts for the following:

- (1) Taxes and assessments.
- (2) Outstanding judgments--State and Federal.
- (3) Mortgages, deeds of trust, and other liens.
- (4) Amounts collected by the Government.
- (5) Landowner's balance after all charges are deducted from the purchase price.

h. District Inspection of Premises.

(1) Immediately prior to closing, the Closing Agent or other authorized District employee will personally make an inspection of the premises and make an owner inquiry to ascertain whether any person is occupying any part of the property or whether any other evidence of possible claims of use or ownership exist.

(2) A Certificate of Inspection and Possession (CIP) will be completed by the person(s) conducting the inspection and inquiry. CIP forms are in the DOJ Title Standards. CIP 1, which is the preferred form, shall be completed when one person inspects and makes the inquiry. CIP 2 shall be completed when the same person inspects and another person makes the inquiry. Other forms of CIP are not acceptable. No portion of the CIP forms may be amended, deleted or scratched out. All blanks must be filled in. If a particular blank is not applicable to an acquisition, it should be filled in with "N/A." The CIP will be placed with the title papers.

(3) If any person other than the landowner is found in possession, the Closing Agent will secure a disclaimer using the form in the DOJ Title Standards. The disclaimer will be modified to make allowance of any provision in the offer to sell permitting possession after closing.

(4) The Closing Agent or an authorized District employee will check to determine that any buildings, improvements, and crops listed on the appraisal report are still on the land being conveyed. Where buildings, improvements, and crops have been reserved by the landowner, it will be determined that only the items reserved have been removed. Whenever possession of land is surrendered to the Government before the time of payment and closing, an immediate inspection and report (i.e., Report on Vacation of Property) must be completed. The Closing Agent may rely upon this report for the inspection required in the first part of this subparagraph unless there are circumstances which would make a supplemental inspection and report proper.

If no such inspection and report have been made and possession has been surrendered to the Government, the inspection and report must be made at this time. A format for Report on Vacation of Property will be issued by HQUSACE (CEMP-CR). Conditions may only be deleted or modified if so indicated in the format. Standard conditions may not be altered or revised unless the proposed deviations are fully justified by the District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review from CECC-R.

(5) The Closing Agent or an authorized District employee will determine whether there have been repairs or improvements to or construction on the premises which might give rise to mechanics' liens.

(6) The CIP will be executed and placed with the title papers. If executed by an employee other than the Closing Agent, it must be approved by the Closing Agent, to indicate that the Closing Agent has authorized the employee signing the certificate to make the inspection and is satisfied it has been properly done.

i. Deed to the United States.

(1) The deed to the United States will conform to the DOJ Title Standards and local statutory requirements. All legal documents which will be recorded, including deeds, must either be prepared and/or reviewed by an attorney assigned to a USACE legal office.

(a) Quitclaim deeds or deeds with less than general warranties may be accepted only to clear defects or clouds on title or when a Reviewing Attorney has made determinations in accordance with the DOJ Title Standards or when a waiver is obtained from DoJ.

(b) Quitclaim, limited or special warranty deeds may be accepted from State or municipal governments lacking the statutory authority to convey by General Warranty. In some instances, a quitclaim, limited or special warranty deed may be accepted from corporations or public utilities lacking the authority to convey by a Warranty Deed, when a Reviewing Attorney has made determinations in accordance with the DOJ Title Standards, and the lack of authority has been verified. In both situations, attempts should be made to obtain whatever warranty can be given or a waiver is obtained from DoJ.

(c) Deeds containing a fee simple estate shall contain a quitclaim clause by which the grantor quitclaims to the United States all right, title, and interest which the grantor may have in the banks, beds, and waters of any streams bordering the said land to be conveyed, and also all interest in alleys, roads, streets, ways, strips, gores, or railroad rights-of-way abutting or adjoining said land and in any means of ingress or egress appurtenant thereto.

(d) Deeds containing an easement estate shall contain a covenant that the Grantor will pay all taxes and assessments when due and payable.

(e) USACE is not authorized to accept deeds with reverter provisions except when a donation requires construction of improvements or facilities be commenced on or before a specified date. All other requests for reverter provisions must be forwarded by the District Counsel through the Division Counsel to HQUSACE (CECC-R), for review and coordination with DoJ.

j. Satisfaction of Liens and Encumbrances. All mortgages, deeds of trust, judgments, mechanics liens, and similar encumbrances will be satisfied and released or discharged of record. In the acquisition of easements, liens and encumbrances will be satisfied, released or subordinated to the Government's easement, except as administratively waived by the Reviewing Attorney.

k. Payments to Tenants and Lessees. Amounts due lessees, or other tenants, under a Consent to Offer to Sell Real Property, will be paid from the purchase price or by the landowner directly.

l. Satisfaction and Release of Liens of Taxes and Assessments.

(1) With few exceptions, all taxes and assessments which, under the law of the State where the land is located, are a lien on the property as of the date of the delivery and recordation of the deed to the United States must be paid at or before closing, unless provision for payment is made.

(a) Where closing takes place before the determination of the amount of the taxes, a sufficient sum will be withheld from the purchase price to satisfy the landowner's pro rata share of such taxes. The pro rata share withheld should be based upon an estimate made after consultation with the tax assessor and consideration of the amount of taxes paid on the land for the preceding year.

(b) If the taxes are not due and payable under state law, though the amount has been determined at the time of closing, the landowner's pro-rata share of such taxes will be withheld from the purchase price.

(2) Funds withheld for the payment of taxes will be held in an account in accordance with the current financial management procedures and will be linked with the name of the landowner, identify the land for which the taxes were withheld by tract number in the project, identify the taxes for payment of which the money has been withheld by specifying the type of taxes, such as county, city, or school, and set forth the date that each will become due and payable in order that proper payment will be made to the tax office. An estimated amount for the remaining portion of taxes which are allocable to the period after the United States obtains title or takes possession of the property, whichever is earlier, will be committed from project funds for payments under Uniform Act.

(3) The Closing Agent will immediately notify the local tax official that title to the particular tract has been conveyed to the United States. A Notice to Tax Official on a format issued by HQUSACE, or the locally required form will be used. Conditions may only be deleted or modified if so indicated in the format. Standard conditions may not be altered or revised unless the proposed deviations are fully justified by the District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review from CECC-R.

(4) When the taxes become due and payable, the District will pay such taxes from the funds withheld from the purchase price and project funds committed as provided for in paragraph 2-10(k)(2). The tax receipt should be filed with the original title papers.

(5) Where the evidence of title consists of certificates of title or title insurance, and funds are withheld for payment of taxes, the amount withheld may be turned over to the title company, provided that the title company is financially responsible and will agree to issue a final certificate of title or title policy in which no tax liens or unpaid taxes will be noted or, if noted, will be followed by the statement: "For the payment of which provision has been made by deposit of a sufficient sum with this company".

(6) In accordance with the DOJ regulations, in the acquisition of easements adequate provision must be made to assure payment of taxes which are a lien but not payable. A tax deposit should be collected unless:

(a) No provision need be made for the payment of taxes that are a lien but are not due and payable, provided that the purchase price of the easement, including severance damage, is not in excess of 50 percent of the reasonable value of the entire contiguous property of the landowner. In the event the value of the easement has been determined by a "before and after" appraisal, the amount of the "after" appraisal will be utilized in making the necessary determination. In the event no such appraisal has been made, it will not be necessary to prepare a complete appraisal of the value of the contiguous property. In lieu thereof, a memorandum estimate by a qualified appraiser (staff or contract) will be obtained and placed in the tract file. In either case, the appropriate information will be inserted on the Statement Concerning Outstanding Encumbrances format issued by HQUSACE (CEMP-CR). Conditions may only be deleted or modified if so indicated in the format. Standard conditions may not be altered or revised unless the proposed deviations are fully justified by the District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review from CECC-R.

(b) It will not be necessary to withhold funds for payment of current taxes which are due and payable, if the purchase price of the easement is insufficient to pay such taxes. In such case, appropriate items in the format "Statement Concerning Outstanding Encumbrances" will be completed.

(c) A Statement Concerning Outstanding Encumbrances will be signed by the Closing Agent and the original will appear as a separate document in the Final Title Assembly.

m. Payment and Recordation of Deed.

(1) No disbursement of the purchase price shall be made until:

(a) A duly executed deed has been accepted;

(b) All outstanding charges, liens, or encumbrances on the land have been satisfied and discharged, or a sufficient sum has been withheld from the purchase price to satisfy and discharge such charges, liens and encumbrances; and

(c) The title is sufficient for the purpose for which it is being acquired, and all objections thereto have been eliminated or administratively waived in writing.

(2) When the requirements of subparagraph (1) above have been satisfied, the balance of the purchase price shall be delivered to the landowners.

(3) The deed and all instruments which release liens or encumbrances on the property shall be promptly recorded.

n. Closing of Easement Acquisitions. Closing requirements and procedures with respect to easements are the same as in fee acquisitions, except as to mortgages, deeds of trust, judgments, landowners' liens, and similar title infirmities and as to taxes which are liens but which are not due and payable. Certain low value easements (usually less than \$10,000) are the same as a fee acquisition except that title infirmities may be waived by the Reviewing Attorney.

o. Procurement of Check. After acceptance of the offer assembly the current financial management procedures will be followed for the issuance of checks.

#### 2-11. Final Title Assembly.

a. Contents of Final Title Assembly. The final title assembly must include the following:

(1) The original of the Reviewing Attorney's Final Title Opinion. The final title evidence must be effective subsequent to the recordation of the deed to the United States. It must show valid title vested in the United States subject only to title defects which have been administratively waived or to liens and encumbrances for which sufficient funds were withheld from the purchase price.

(2) Copies of abstract of title, properly continued through time of closing; or the original final, intermediate and preliminary certificate of title; or interim binder and original of the Title Guarantee (Insurance) policy.

(3) Copies of curative instruments and material pertaining to title defects which still appear in the abstract, the final certificate of title, or the title guarantee or insurance policy.

(4) A copy of the properly recorded deed to the United States.

(5) A copy of the accepted offer to sell.

(6) A copy of the completed CIP.

(7) A copy of the completed Payment and Closing Sheet, a format issued by HQUSACE (CEMP-CR). Conditions may only be deleted or modified if so indicated in the format. Standard conditions may not be altered or revised unless the proposed deviations are fully justified by the District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review from CECC-R.

(8) Where required, completed Disclaimer.

(9) Any other papers relating to the title or closing of the case.

b. Disposition of Final Title Assemblies. The final title assembly and final title opinion will be coordinated with the Division for quality assurance review, prior to forwarding by the District to the Chief, Title Unit, Land Acquisition Section, Environment and Natural Resources Division, United States Department of Justice, Washington, DC 20044

c. District Files. The original executed and recorded deed and closing documents will be retained in the District files.

2-12. Transfer to Condemnation. If at any time in the course of acquisition by purchase, it becomes apparent that title clearance and/or closing cannot be completed within 60 days of acceptance of the offer to sell, action will be taken to acquire the land by condemnation in order to make funds more immediately available to the landowner.

## CHAPTER 3

## Acquisition By Purchase

## Donation And Transfer

3-13. General.

a. Purpose. This Chapter describes the procedures for the acquisition of land and interests therein for both military and civil works projects by purchase, donation and transfer.

b. Applicability. This Chapter is applicable to all Divisions and Districts having real estate responsibilities.

## c. Acquisition Authority.

(1) Limitation. Acquisition of land for use by the United States requires authorization (10 U.S.C. § 2664, 41 U.S.C. § 14).

(2) Military. Title 10 U.S.C. § 2696 authorizes transfer of real property between armed forces elements without compensation if the Secretaries approve. Title 10 U.S.C. § 2662 provides that acquisition of fee title or transfer of real property owned by the United States to another Federal agency, military department or a state must be reported to the Committees on Armed Services of the Senate and House of Representatives if the estimated value is more than that set forth in the statute and the transaction may not be consummated until after 30 days have expired from the date the report is submitted to the Committees or 14 days if a copy of the report is provided in an electronic medium on or before the first day of the month.. Title 10 U.S.C. § 2663 provides for acquisition by the Secretary of a military department during time of war or when war is imminent of any interest in land, including temporary use, required for a Defense installation, munitions plant or power plant for production of munitions, through negotiation and purchase, by condemnation or by gift. Title 10 U.S.C. § 2663 also provides that the Secretary of a military department may acquire any interest in land, including temporary use, by gift, purchase, exchange of United States owned land or otherwise that the Secretary or designee determines is needed in the interest of national defense and does not cost more than the statutory threshold exclusive of administrative costs or the amounts of deficiency judgments.

(3) Civil Works. Acquisition of real property for civil works projects may be authorized by specific project authority or under a general authority such as 33 U.S.C. §§ 558b, 558b-1, 591-595a, and 701. As in the case of military projects, the Secretary of the Army is also authorized to acquire by gift, purchase, exchange of real property owned by the United States, or otherwise an interest in real property (including a temporary interest) and materials required for civil works projects.

(4) Specific Project Authorization. Acquisition of land may also be authorized by a specific Act of Congress.

3-14. Prerequisites to Acquisition.

a. Approval to Begin Acquisition. Action to acquire a tract of land will not be initiated until the Real Estate Decision Document (e.g., Real Estate Design Memorandum, Real Estate Plan, Real Estate Planning Report, etc.) is approved (see ER 405-3-10, *Planning*, {military} and ER 405-2-12, Real Estate Planning, Acquisition Responsibilities, and Crediting Principles for Civil Works Projects {civil}). Upon such approval, the District Chief of Real Estate may initiate action for the acquisition of the estate(s) approved for the particular project in accordance with the procedures set forth below.

b. Mapping and Legal Descriptions. Maps, surveys and legal descriptions will be prepared in accordance with ER 405-1-03, Mapping.

c. Title Evidence. Title evidence is a prerequisite to negotiating for acquisition of the land or interests therein. Specifications for obtaining title evidence are found in Chapter II of this Regulation.

d. Appraisals. The appraisal, when approved, forms the basis for the Governments estimate of fair market value which will not be less than the approved appraised value. Normally, one appraisal per tract (ownership) will be obtained; however, in unusual cases such as those which involve novel, unique or controversial appraisal concepts, more than one appraisal may be obtained. Appraisals should be current, no older than six months from the initiation of negotiations. Outdated appraisals may be updated. The appraisal procedures are covered in ER 405-1-04, *Appraisal*.

e. Environmental and Historical Preservation Considerations.

(1) Prior to the initiation of negotiations for the acquisition of interests in land, compliance with the National Environmental Policies Act (NEPA) and the National Historical Preservation Act (NHPA) is required. Exceptions must be approved by the appropriate HQUSACE, Regional Integration Team in coordination with other appropriate HQUSACE staff.

(2) It is USACE policy not to acquire contaminated land. Prior to the initiation of negotiations, investigations must be conducted to assure that contaminants are identified and required cleanup issues addressed.

(3) The real estate planning document must discuss environmental and historical preservation compliance and investigations.

f. Timing of Acquisition for Fish and Wildlife Mitigation and for Recreation.

(1) Fish and Wildlife Mitigation. As required by Section 906(a) of WRDA 86, interests in land required to support mitigation must be acquired concurrently with the interest in land required to support the basic project purpose.



(2) Recreation. As required by Section 926(a) of WRDA 86, interests in land for recreation purposes must be acquired along with the acquisition of interests for the basic project purpose.

g. Replacement Housing. Planning for satisfactory replacement housing must be developed before acquisition is begun. The District will be proactive in seeking out replacement housing and judicious in the early relocation of owners and tenants before market changes reduce the available supply of replacement homes. The District must provide the required relocation assistance advisory services and benefits authorized by the law. See ER 405-1-16, Relocation Assistance.

### 3-15. Negotiations.

#### a. Acquisition Objectives.

(1) The requirement of a Federal land acquisition program is to acquire land needed for an authorized project. Landowners are to receive "just compensation" as required by the Fifth Amendment to the Constitution of the United States as that term has been defined by Federal courts. The requirement of just compensation has also been statutorily enacted by the Uniform Act. U.S. Department of Transportation, Federal Highway Administration, is the Federal Lead Agency for the Uniform Act. FHWA duties are carried out by the Office of Real Estate Services.

(2) The Government cannot and will not pay less than the approved appraised value for acquisitions unless a donation is intended, except in the circumstances set forth in paragraph 3-15c(3) below, of this regulation.

#### b. Negotiation Objectives and Letter to Landowner.

(1) Prior to initiating negotiations, the negotiator will receive adequate guidelines and explicit instructions and thoroughly review the appraisal. Promptly after the amount of the estimated compensation is established, the negotiator shall make an initial offer of no less than the full amount of the estimated fair market value, shall advise the landowner that the offer is based on an approved appraisal, and shall furnish the landowner a written statement of, and summary of the basis for, the appraisal.

(2) This written statement will be in the form of a letter which shall be delivered personally or sent by certified, registered, first class mail. See ER 405-1-16, Relocation Assistance Such summary in the letter will include, as a minimum, the following items:

a. An accurate legal description and location identification of the real property and the interest(s) therein to be acquired (legal description and estate may be attached).

b. Definition of the term "fair market value".

c. The amount of the offer and a statement that such amount is not less than the approved appraisal of the property;

d. A description of the appraisal technique used, i.e., market approach, income approach, or cost approach, in sufficient detail to explain clearly to the landowner the process by which his property was valued.

e. An identification of land classification categories and the Government's opinion of highest and best use. (do not show acreage breakdown).

(3) The District or Division negotiations do not limit the discretion of the HQUSACE Director of Real Estate to set the compensation at an amount higher than the appraisal. Just compensation is the end result by either negotiations or a Court award.

(4) A statement that the estimate of appraised value disregards any increase or decrease in the fair market value caused by the project for which the property is to be acquired, or by the likelihood that the property would be acquired for such project, other than that due to physical deterioration within the reasonable control of the owner;

(5) A statement that the estimate of appraised value does not reflect any consideration of or allowance for any relocation assistance and payments which the owner is entitled to receive.

(6) On the first contact with the landowner, the negotiator will take an inventory identifying the buildings, structures, fixtures, and other improvements, including appurtenant removable building equipment, which are considered to be part of the real property for which the offer of just compensation is made. The inventory shall include a statement of the utility and condition of said buildings, structures, fixtures, and other improvements and an allocation of value for tenant owned improvements. Where appropriate, identify other separately held ownership interest, such as tenant owned improvements, and indicate that such interest is not covered by the offer.

(7) If only a portion of a property is to be acquired, apportionment of the total estimated just compensation for partial acquisition shall be between:

(a) The amount representing the Government's estimate of value for the real property to be acquired;

(b) The amount, if any, representing severance damages to the remainder, together with a brief narrative description of the cause thereof; and

(c) In the event "off-setting benefits" are involved, the landowner must be shown a narrative explanation and given a "person-to-person" explanation by the negotiator. See ER 405-1-04, *Appraisal*.

(8) In the event acquisition is limited to willing seller, the owner will be informed that the Government will not condemn unless agreed to by the owner in writing.

f. Prohibitions on Voluntary Acquisition.

(1) USACE Employees. If an employee of the USACE has a direct interest in a tract of land being acquired by USACE for public use, the tract will be acquired by condemnation. In cases of this nature, appraisal reports should be prepared, reviewed and forwarded together with a declaration of taking, with the condemnation assembly. The negotiator's report, of course, will not be included. The Department of Justice will be requested to handle all further matters pertaining to settlement or trial of the case. The Department of Justice has agreed to accept full responsibility for negotiations and approval of settlements or awards in such cases, without contacting any USACE personnel other than the owner of the interests being acquired. See ER 405-1-19, *Condemnation*.

(2) Members of Congress. Under 18 U.S.C. § 431, members of Congress or a Resident Commissioner who hold interests in lands required for project purposes cannot contract for sale of such interests to the Government. These interests will not be negotiated and will therefore be acquired by condemnation. The determination of just compensation must be made by judicial proceedings. Appraisal reports and the condemnation assembly should be prepared and forwarded as set forth in subparagraph (1) above. . Under 18 U.S.C. § 432, an officer or employee of the United States contracting with a member of Congress shall be fined. See ER 405-1-19, *Condemnation*.

(3) Where property is currently offered for sale through the open market, the Government may, without entering into negotiations, accept the owner's open market offer, even if the asking price is less than the Government's estimate of fair market value.

g. Negotiating Guidelines.

(1) The negotiator shall be thoroughly familiar with the Division and District negotiating guidelines and shall study the background data of the project, consisting of the authorizing act, survey report, project document, design memoranda; the applicable appraisal reports; tract ownership data; preliminary title certificates; and other related material. Negotiators shall be entirely familiar with the project and the owner's individual property before initiating negotiations.

(2) The negotiator shall make all reasonable efforts to contact the owner or the owner's representative and discuss the offer to purchase the property. The owner shall be given reasonable opportunity to consider the offer and present materials which the owner believes are relevant to determine the value of the property and suggest modifications in the proposed terms and conditions. The owner shall be provided with available brochures which explain the project and the Uniform Act benefits, together with the written statement and summary required by paragraph 3-15b above. The negotiator shall explain to the landowner the amount of land required by the Government, the estate(s), conditions in the format Offers to Sell discuss title issues and the fact that relocation assistance benefits may be available. The landowner should be furnished a copy of a map indicating the boundaries of the land to be acquired. In partial takings, the map should normally also show the owners entire tract. The formats issued by HQUSACE (CEMP-CR) for Offer to Sell will be used. Standard conditions may not be altered or revised unless the proposed

deviations are fully justified by the District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review from CECC-R.

(3) A concentrated effort will be made to acquire the land from the initial offer. Negotiations will be continued in an effort to obtain acceptance of the Government's offer or a reasonable counteroffer from the landowner, or until it is definitely determined that such a counteroffer will not be forthcoming. It is not intended that negotiations be continued until an unacceptable counteroffer is finally obtained. However, in an effort to obtain a reasonable counteroffer the negotiator will, if necessary, take the initiative in suggesting a counteroffer in accordance with the guidelines in paragraph 3-16.

(4) The interests of both owners and tenants must be considered and protected. The tenant is a proper party to the transaction and every effort must be made to obtain the consent of the landowner and tenant as to the price to be paid to the tenant for his leasehold interest. This can be accomplished by the tenant's execution of the Consent to Offer to Sell Real Property, which shall then accompany the owner's offer to sell. In cases where the tenant executes this form, payment for the tenant's interest can be made in the closing of the purchase transaction. An exception is permitted in those cases where the landowner and tenant prefer to handle the matter as a private transaction between themselves. In such cases, it should be determined that a satisfactory agreement has been made by the landowner and tenant. Consideration should be given to any interest which the tenant may have in growing crops. The formats issued by HQUSACE (CEMP-CR) for Consent to Offer to Sell will be used. Standard conditions may not be altered or revised unless the proposed deviations are fully justified by the District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review from CECC-R.

(5) Negotiations with landowners will be conducted in a fair and courteous manner. The negotiator must not, under any circumstances, resort to coercion or threats of condemnation.

(6) The negotiator has no authority to modify the Offer to Sell nor to enter into oral promises or understandings not contained in the Offer to Sell.

(7) Appraisal reports or the appraiser's analysis (complete breakdown of principal value elements) will not be revealed by the negotiator unless specifically authorized. Although appraisal reports cannot be made available for inspection by a landowner, the various elements of value considered by the appraisers should be discussed with the landowner to ensure that all elements of compensable value and damages have been considered in arriving at an overall value for the property being acquired. Care will be exercised during any discussion not to reveal specific amounts related to any elements considered in the appraisal.

(8) The negotiator shall not have any interest in a tract of land to be acquired, or any type of relationship with the owner. When a conflict exists, a different negotiator will be assigned to the tract.

(9) No appraiser or review appraiser shall negotiate for real property which that person has appraised or reviewed unless specifically authorized. See ER 405-1-04, Appraisal, and the Uniform Act.

a. Discussions with Landowners. In order to avoid the creation of negotiating patterns, and keeping in mind that counteroffers must be justified as being just and reasonable, discussions with landowners should be conducted without disclosing the extent of the delegations and redelegations of authority to accept counteroffers.

b. Obtaining the Written Counteroffer; Preparation of Negotiators Report. A complete written record of negotiations with respect to each tract or ownership, as appropriate, will be contemporaneously maintained by means of the Negotiator's Report using the format issued by HQUSACE (CEMP-CR). Conditions may only be deleted or modified if so indicated in the format. Standard conditions may not be altered or revised unless the proposed deviations are fully justified by the District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review and concurrence from CECC-R. This record will state the chronological history of negotiations, all elements considered in evaluating the landowner's final counteroffer, and the justification for such recommendation in accordance with paragraph 3-16 of this Section. A counteroffer in excess of the approved appraised value should be considered for acceptance. If deemed acceptable, the counteroffer will be reduced to writing on the Offer to Sell Real Property, or on Offer to Sell Easement, and be properly executed by the landowner.

c. Concluding Negotiations. When price cannot be resolved by negotiations, the landowner must be advised that, in the event of condemnation, the deposit will be in an amount no less than an approved appraised value. It must further be made clear that this advice is not in the nature of a threat, but as an effort on behalf of the Government to secure an impartial determination by the court of the differences of opinion as to value, and in order to make funds more immediately available to the owner. The negotiator will also inform each owner that offers and counteroffers made during negotiations are made without prejudice. The negotiator will make a notation on the Negotiator's Report to the effect that the owner was so informed.

d. Coercive Action. The District shall not advance the time of condemnation or defer negotiations or condemnation or the deposit of funds with the court, or take any other coercive action in order to induce an agreement in the price to be paid for the property.

### 3-16. Counteroffers.

a. Consideration of Counteroffers. The lowest price demanded by the landowner should be evaluated by the District Chief of Real Estate or the approving official. The following factors may be considered:

(1) Variations in Appraisals. Two equally competent appraisals may reflect reasonably divergent opinions of value as to the same property.

(2) Built-in-Costs, Prior Counteroffers, Settlements and Liability Risks of Proceeding to Trial. There are Government administrative costs and liability risks involved when property is condemned and the land value is judicially determined. Consideration should also be given to prior counteroffers which have been accepted and settlements approved prior to trial.

(3) Non-Compensable Elements of Value. Elements of value based on consequential damages or speculative values, as defined by the Federal courts, may not be recognized in considering a landowner's counteroffer.

b. Application and Limits of Delegated Authority. Real Estate Contracting Officers, with the appropriate delegated authority and warrant level, may accept any counteroffer that is reasonable, prudent, and in the public interest.

c. Exercise of Delegated Authority. Counteroffers as delegated above may be approved by the appropriate official as part of the acceptance of the Offer to Sell, as provided in paragraph 3-19.

d. Counteroffers. Recommendations to accept counteroffers which are considered reasonable but beyond the authority of the approving official will be submitted to the Real Estate Contracting Officer, with the appropriate delegated authority and warrant level, for approval or denial. Approval of HQUSACE is not required. Negotiator's Reports, prepared in accordance with paragraph 3-15g, will accompany this submission; the contents thereof need not be repeated in the transmittal letter or in forwarding endorsements. The assembly will consist of the forwarding correspondence and the Negotiator's Report, with any additional material needed to support the District recommendation. An analysis should be made of this offer as compared with other counteroffers accepted for the project, as well as with results in condemnation cases. Where only a portion of an ownership is required, information should be furnished in the Negotiator's Report or in the transmittal correspondence (1) as to whether or not the remainder portion is considered to be an uneconomic remnant and (2) if so, as to whether or not an offer was made to acquire the entire property. Further, a statement is required as to whether or not it is considered that the acquisition will have any adverse effect on the acquisition of the remaining land required for the project.

### 3-17. General Negotiation Procedures.

a. Provisions of Authorization and Appropriation Acts. The provisions in authorization and appropriation acts must be reviewed before negotiations begin to determine whether any limitations on acquisition were included in such acts.

b. Cost Shared Projects. Acquisition by a non-Federal sponsor in a Federal or Federally-assisted project will be in accordance with the law and ER 405-2-12, *Real Estate Planning, Acquisition Responsibilities, and Crediting Principles for Civil Works Projects.*

c. Negotiations on the Basis of Ownership; "Package-Deal" Negotiations.

(1) Normally, negotiations for all interests in all tracts that are being acquired from one parent ownership will be negotiated at one time. These tracts will usually consist of all those to which the same basic tract number has been assigned. Exceptions may be made only where negotiations for some of the tracts in a series must be accomplished to obtain possession, or for other critical reasons. Piecemeal acquisition should be avoided.

(2) When more than one tract is operated by the owner as a unit, a single negotiation should take place.

(3) Tracts which are in the same ownership, but which are not operated as a unit, should, unless the owner desires otherwise, be negotiated separately, on the basis of the separate appraisals. However, where an owner insists on a "package-deal" negotiation on all tracts in the same ownership, the tracts may be negotiated as a unit.

(4) The authority to accept counteroffers will be applied to the entire transaction and not to individual tracts. Multiple offers to sell shall be considered one transaction.

d. Dissemination of Information Relative to 33 U.S.C. § 597 and land acquisition policy. Care should be exercised on the information disseminated to the public on Army military or/and civil works projects will reflect the procedure for engaging in practical negotiations, in an effort to avoid litigation. See ER 405-3-10, Planning, or ER 405-2-12, Roles and Responsibilities: Civil Works. The dissemination of information relative to extent of delegated authority will not be made in project brochures and will not be disclosed in public meetings. However, in individual negotiations, and in answer to specific questions raised in public meetings or by letter, the existence of such authority may be disclosed, but the extent thereof will not be divulged. The objective is to reach a just and reasonable price agreement with landowners. The exact extent of present delegations and redelegations of authority include the exercise of internal departmental discretion at delegating and operating levels, subject to change at any time. The extent of delegated authority is information which should be withheld from release to avoid the possible creation of negotiating patterns; and to give Districts freedom to exercise true discretion within the limits of current delegated and redelegated authority.

e. Acquisition by Condemnation if Negotiations Fail. When it is determined that a satisfactory agreement cannot be reached, action will be promptly taken to acquire the property by condemnation proceedings, in order to make funds available to the landowner and to maintain the project acquisition schedule. The landowner must be advised in writing that condemnation proceedings will be recommended and the reason therefore in advance of the submission of the condemnation assembly. See ER 405-1-19, *Condemnation*, for the specific requirements of a condemnation assembly and the condemnation regulation.

### 3-18. Exceptions and Reservations.

#### a. Outstanding Rights.

(1) When the United States is acquiring title subject to outstanding rights, the offer will differentiate between:

(a) Property which the landowner is excepting or rights which are reserved; and

(b) Rights which third parties have acquired in the past, generally referred to as outstanding rights in third parties.

(2) Exceptions or reservations of rights which the landowner may retain, without interfering with the construction or operation of the project, must be set forth in the offer and in the deed by a clause following the description, beginning with the words: "Excepting \*\*\*\*\*" or "Reserving \*\*\*\*\*." Any other outstanding rights, subject to which the United States is acquiring title, held by third parties, will be set forth in the offer and in the deed by a clause, following the description, beginning with words, "Said premises are conveyed subject to \*\*\*\*\*."

b. Right to Repurchase Prohibited. In no case will an offer be obtained in which the landowner reserves the right to repurchase the property. Such a reservation would be contrary to the federal disposal authority, contained in the Public Buildings, Property, and Works Act of 2002, as amended, 40 U.S.C. § 101, et. seq, (the Property Act) formerly known as the Federal Property and Administrative Services Act. This is not the same as a reverter, as in a donation.

c. General Reservation Guidelines.

(1) Reservations of the right to remove crops, timber, buildings, and improvements during a specified period will not be permitted without express approval of the District Chief of Real Estate of Real Estate on civil works projects, the Army using service on military projects, or the Federal agency, if other than the Army, for which the land is being acquired.

(2) At the time of the approval of the acquisition, a determination will normally have been made as to whether subsurface rights and/or water rights will be acquired or left outstanding. Lands will be acquired subject to minerals, oil and gas rights or other similar interests severed and outstanding in third parties by purchase or lease and as approved for the project.

(3) Concurrently with the negotiations to acquire from surface owners, negotiations should be opened with the owner of subsurface rights severed and outstanding in third parties by purchase or lease and required for the project, unless these interests are held in "block ownerships." Block ownership exists where a person, corporation, or other entity owns subsurface in connection with more than one surface tract, and in sufficient amount for the entire holding to have added utility. Piecemeal acquisition of block ownerships will be avoided.

d. Reservation of Buildings and Improvements.

(1) The reservation by landowners of the right to remove buildings and improvements may be permitted under the following conditions:

(2) If the District Chief of Real Estate in civil works projects, the using service in Army and Air Force projects, or the Federal agency (if other than the Army or Air Force), for which



the land is being acquired, has determined that they will not be needed for the purpose of the project;

(c) The consideration to the Government for the reservation will be an amount negotiated at not less than the appraised salvage value of the building and improvements which are reserved, and such amount will be deducted from the negotiated price at the time of negotiation prior to execution of the offer; excepting and reserving to the landowner the right to remove all buildings and/or improvements, which will be considered to be personal property upon removal of said buildings and/or improvements, on or before \_\_\_\_\_, subject to the following terms and conditions: (a) landowner acknowledges that retention of the salvage rights to said buildings and improvements is upon the express condition that landowner shall completely remove all buildings and improvements and clear the land to the satisfaction of the United States of America on or before said date. The term "completely remove" includes, but is not limited to, filling in any basement areas. Acceptable fill materials shall be limited to earthen material(s), rock, brick and/or block. Foundations, stoops, steps, etc., must be cleared to ground level. In the event that the buildings and improvements are not completely removed on or before said date, The United States of America shall continue to have good and indefeasible title to said buildings and improvements which remain without notice to the landowner; (b) landowner will comply with all Federal, state and local environmental laws and regulations including, but not limited to, those pertaining to asbestos; (c) to ensure landowner's performance of complete removal, the United States of America will withhold from the purchase price to be paid for said land the sum of ONE THOUSAND DOLLARS (\$1,000), which sum shall not be paid the landowner at the time of transfer of title to the land, but shall instead be retained by the United States of America until the land has been completely cleared as aforesaid, whereupon it shall be paid to landowner; however, if the United States of America, in its sole discretion, determines that the condition of complete clearing has not been met, the ONE THOUSAND DOLLARS shall be retained by the United States of America as liquidated damages;

(d) The landowner agrees not to relocate the buildings or improvements or any part thereof on other land to be acquired for the \_\_\_\_\_ Project. In the event said buildings and improvements or any part thereof are relocated on other lands to be acquired for the project, landowner agrees the United States of America shall continue to consider said buildings and improvements as personal property and shall not be obligated to again pay compensation for the buildings and improvements, or for any part thereof, nor will the United States of America pay relocation benefits associated with removal of the buildings and improvements from said other land

(e) In the event the said buildings and improvements or any part thereof are sold by the landowner, the landowner shall, as part of any such sale contract, make this reservation provision a part thereof binding on the purchaser of such buildings and improvements or any part thereof; and (f) Although the terms and conditions aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the landowner, landowner agrees that the ONE THOUSAND DOLLARS (\$1,000) withheld to assure complete removal shall, in the event of compliance with this reservation, be paid unto landowner (or his/her heirs, executors, administrators or successors), and that the right to receive such payment cannot be assigned.

(3) The date on which the buildings or improvements must be removed must be fixed so that there is no interference with construction or carrying out the mission of the project.

The date for the removal should allow a reasonable time for removal of the improvements, usually not more than ninety days, except that for valid reasons the District Chief of Real Estate of Real Estate may grant an extension of time for removal. The right to remove such buildings cannot be prolonged indefinitely and certainly such right cannot survive the limited right of possession reserved to former owners and tenants as provided in paragraph 5-18c. Reservations of buildings containing asbestos or other hazardous materials are discouraged due to the risks to the Government.

e. Reservation of Growing Crops.

(1) The reservation by the owners of the right to harvest and remove growing crops should be encouraged in order to conserve land acquisition funds and to avoid the costs incident to disposal of crops by the Government, whenever there is a probability that possession of the land will not be required prior to the harvest season.

(2) Where a reservation is permitted, the following clause will be inserted in the offer, following the description of the land: "Reserving to the landowner the right to harvest all of the growing crops located on the above described land on or before \_\_\_\_\_. In the event the crops are not harvested on or before said date, the right of removal shall terminate automatically, and the United States shall have a good and indefeasible title to said crops, without notice to the landowner." The date on which the crops must be removed must be fixed so that there is no interference with construction or carrying out the mission of the project.

(3) The consideration to the Government for the reservation will be an amount not less than the appraised value of the crops as of the date of surrender of possession as disclosed by an approved appraisal report, and such amount will be deducted from the purchase price at the time of preparation and execution of the offer.

(4) Where a tenant has an interest in growing crops, the value of his/her interest may be fixed by use of Consent to Offer to Sell Real Property, which provides that the value of the tenant's interest, as agreed upon by the landowner and tenant, will be paid from the purchase price for the land. The use of this form not only protects the tenant but, in addition, provides a simple method for extinguishing rights which the United States is legally bound to recognize. Where a tenant wishes to reserve the right to remove crops, it must be done in the name of the landowner, and in like manner. To accomplish the foregoing, any other form is satisfactory, in lieu of the Consent to Offer to Sell Real Property, as long as closing requirements are satisfied.

f. Reservation of Timber.

(1) The reservation of the right to remove timber by landowners will be permitted only with the express approval of the District Chief of Real Estate of Real Estate, with the concurrence of the using service in cases other than civil works projects of the USACE.

(2) Reservation of the right to remove timber will be handled in substantially the same manner as that described for the reservation of buildings and improvements. If owned by a third party, the Consent to Offer to Sell Real Property will be used in the same manner as for crops unless the timber interests are held in block ownerships. The consideration to the Government for the reservation will be an amount not less than the appraised value of the timber. See ER 405-1-04, *Appraisal*, for details regarding appraisal of timber. An amount not less than this appraised value will be deducted from the purchase price at the time of preparation and execution of the offer.

(3) Where a reservation is permitted, the following clause will be inserted in the offer following the description of the land: "Reserving to the landowner the right to cut and remove on or before \_\_\_\_\_, all trees in excess of inches in diameter at breast height (DBH) located on the above-described land. In the event the timber is not removed on or before said date, the right of removal shall terminate automatically, and the United States shall have a good and indefeasible title to said timber, without notice to the landowner."

g. Coal, Oil, Gas or Other Minerals. Acquisition of land or interests therein for project purposes will usually include the subsurface as well as the surface. When the mineral rights have an identifiable value or are the subject of separate estates in the land, such mineral-rights will not be acquired except where the development thereof would interfere with project purposes, but mineral rights not acquired will be subordinated (unless the approved decision document provides otherwise) to the Government's right to regulate their development in a manner that will not interfere with the primary purposes of the project, including public access, and not be harmful to the environment. Details for determining whether minerals are acquired subordinated or excepted are found in ER 405-3-10, *Planning*, or ER 405-2-12, Real Estate Planning, Acquisition Responsibilities, and Crediting Principles for Civil Works Projects and in AR 405-30, Minerals, or its replacement regulation.

(1) If the owners of the surface and subsurface rights are agreeable, the separate interests can be acquired in a single transaction by use of Consent to Offer to Sell Real Property.

(2) When subordination of the subsurface interest is permitted or required, the value will be based upon the diminution of fair market value of the minerals in place caused by the subordination. See ER 405-3-10, *Planning*, or ER 405-2-12, Real Estate Planning, Acquisition Responsibilities, and Crediting Principles for Civil Works Projects, for detailed treatment in the section pertaining primarily to Real Estate planning document.

(3) Any subordination agreement, together with additional regulations incorporated by reference, must clearly include:

(a) The rights and obligations of the Government and the mineral owner, operator, and/or lessee.

(b) The control to be exercised over site development.

(c) Required land reclamation or restoration.

(d) That the owner will comply with federal laws and regulations.

(e) Provisions for compliance inspection by the Government of all site development and mining activities over which the Government has control.

(f) The right of the Government to inspect and monitor the activities of the mineral owner.

(4) Where it has been determined that the subsurface rights and interests therein need not be acquired, but the owners of such rights must be excluded from the area, and the owner of the surface is the owner of the subsurface estate, the offer will contain a clause providing that for the period that title to the tract is vested in the Government, the landowner will relinquish all rights to enter upon the lands covered by the offer or that the landowner will limit entry and exploration in a named manner so as not to interfere with the operation of the project. If third parties own subsurface rights or interests, a similar extinguishment of the exercise of such rights must be procured from all third parties having any interest in the subsurface estate, whether as lessees or assignees. This must be obtained at the time the offer is procured for the surface estate, unless these subsurface interests are held in block ownership.

h. Title Exceptions - Administrative Waivers.

(1) Title defects, objections, liens or encumbrances which, if not eliminated, might possibly defeat or adversely affect the Government's title and limit its ability to convey or use the land must be eliminated. All encumbrances, defects, and outstanding interests which cannot be waived under subparagraphs (2), (3), and (4) below must be eliminated or a waiver of the defect secured from DOJ through Division and HQUSACE (CEMP-CR and CECC-R).

(2) Districts Chiefs of Real Estate wishing to take title subject to outstanding third party interests may do so upon the approval by CEMP-CR that such interests could not possibly defeat or adversely affect the Government's title and limit its ability to convey or use the land. Requests for administrative waivers shall be submitted through the Division Chief of Real Estate CEMP-CR for consideration and should include: the determination by the District Chief of Real Estate that the outstanding interests have no contributory value to the estate being acquired and will not interfere with the purpose for which the property is being acquired and the concurrence by the Office of Counsel. Recommendations for waivers should be coordinated with the using agency, if other than the Department of the Army (military or civil works). For requests that are not or cannot be approved CEMP-CR, CEMP-CR may seek an administrative waiver from DOJ through CECC-R.

(3) It has previously been determined by DOJ in its published standards that all lands for military or civil works projects may be acquired "subject to existing easements for public roads, public highways, public utilities, railroads and pipelines," and "to the reservations, exceptions and any other outstanding rights contained in or referred to in patents issued by the United States," and also "to water rights, claims or title to water, if any, or other similar

title exceptions." A decision as to whether any of these exceptions should be eliminated should be based on whether the utility or facility interferes with the construction, operation or maintenance of the project. This decision is the responsibility of the Chief of Real Estate, after coordination with the using service, if other than the Department of the Army, and approval by the Reviewing Attorney. If such interests are to be left outstanding, they should be included in the "subject to" clause of the Offer to Sell for inclusion in the Deed.

(4) Offers to Sell may be accepted subject to subsurface mineral interests owned by third parties in accordance with paragraph 3-18g. In such case, the "subject to" clause of the Offer to Sell and the Deed should recite the interest which is being left outstanding. However, where only a fractional interest in minerals is left outstanding, no particular quantity of mineral shall be specified as outstanding; e.g., "coal outstanding in third parties", not "a 1/2 undivided interest outstanding in third parties". Where it is not possible to acquire or subordinate an outstanding subsurface interest by negotiations and the outstanding interest will not interfere with construction, operation or maintenance of the project, consideration may be given to obtaining a waiver as set forth in paragraph 3-18h(3) on the basis of taking a calculated risk rather than resorting to condemnation. Such waivers may be considered on a tract-by-tract, segment-by segment or project basis. Where a number of small mineral interests in a project are to be recommended for waiver, it is preferable that the recommendation be submitted on an entire project or group of segments at one time. Such a recommendation should specifically identify the subsurface mineral interests which are to be left outstanding, together with the estimated value of each interest, and should be accompanied by a map(s) on which the areas affected by the outstanding interests have been outlined. The basis for the calculated risk should be explained fully. Subsurface minerals is an important issue and the decision to leave them outstanding may require legal and policy research.

i. Possession Reserved to Landowner.

(1) The objective in acquisition is to obtain possession for project purposes at the earliest practicable time. It is recognized, however, that there are occasions when possession by the Government may be delayed and provision may be made for continued possession by the former owner in order to meet the requirements of the Government and to reduce the impact of the Government's acquisition on the landowner. For example, the retention of possession can enable the owner-occupant of farm land, or residential property, to receive the purchase money and remove the reserved improvements, and permit occupants who may be former owners or tenants sufficient time to relocate and the privilege of harvesting growing crops. Accordingly, the District Chief of Real Estate may make reasonable provisions for the former owner, occupant, and/or tenant(s) to temporarily remain in possession of the land after title vests.

(a) If the tract is to be acquired by direct purchase, the provision for retention will be included in the offer and will read substantially as follows: "Notwithstanding the provisions of paragraph x of this offer, (and/or consent to option) the occupant (landowner and/or tenant) now in possession of the property, in consideration of the protection and maintenance of the land, buildings, and structures, and protection of the property against loss by fire, waste, or

other causes, to which the occupant hereby agrees, reserves the right to occupy the property until \_\_\_\_\_. Such occupancy is subject to revocation by the District Chief of Real Estate at any time by giving 30 days notice in writing to the occupant if possession of the property is required by the United States; and provided further that the landowner-occupant or his tenant will remove no improvements or timber unless otherwise provided herein."

(b) When the tract is to be acquired by condemnation, refer to ER 405-1-19, Condemnation for the process. The retention of possession without payment of rent is directed to the benefit of the former owner of the property with some property maintenance consideration to the Government.

(c) Possession may be permitted for a sufficient time to allow orderly relocation, but no longer than twelve months after title vests in the Government.

(d) When the land being acquired is utilized by the owner and/or tenant for agricultural or related purposes, a period of possession may be allowed, if consistent with project requirements and to permit the crop owner to harvest growing crops. The period of possession reserved in the offer, or for which request for the order of the court is deferred in declaration of taking cases, should generally be co-extensive with the crop season or the date that, by custom in the community, leases of such properties ordinarily expire, provided, however, that such period does not exceed twelve months from the date title vests in the Government. Reservation of possession or delay in entry of order of possession that will interfere with the Government's requirements for use of the land will not be allowed.

(e) The reservation of use and occupancy in the landowner and/or tenant under the terms of the offer must be based on adequate consideration to the Government. It is anticipated, however, that items such as the landowner's maintenance of the land, buildings, and structures, protection of the property against loss by fire, waste, or other causes, and the fact that possession can be revoked within a short period of time, will, in most instances, offset any rental for the period of the reserved occupancy.

(f) Special provisions for protection of the Government on such issues as environmental protection, historic preservation and soil and water conservation are contained in lease formats found in ER 405-1-80, *Management and Outgrant Programs*. One or more of these clauses may be added to the reservation clause in the offer in cases where, in the opinion of the District Chief of Real Estate, they are necessary or desirable.

(2) Farmers may experience difficulty in finding substitute farms needed for their livelihood, and other owners and tenants may encounter difficulty in relocating. Therefore, the District Chief of Real Estate, as an exception to the procedure in subparagraph (1) above, may lease properties to former owners or tenants at the fair market rental value for up to one additional year where the circumstances justify such action, and, in such event, the record will contain the reasons justifying the action. Any occupancy by the former owner or tenant beyond 12 months from the date the property was acquired by the Government will be covered by a lease and will provide payment of the fair market rental value of the property leased.

(3) The District Chief of Real Estate may grant exceptions to this regulation where unusual circumstances warrant such consideration. In keeping with the intent of this action, such cases will be minimal in number. Exceptions should be coordinated with the customer and documented in the files. In no event will the use create any type of preference that circumvents the usual agricultural and grazing outgrant program.

j. Schools, Cemeteries, and Facilities of State and Local Governments. ER 405-1-17, Relocation of Utilities and Facilities, provides guidance for the relocation of schools, cemeteries, public utilities and facilities. ER 405-1-17 will be followed in the acquisition and relocation of cemeteries.

k. Reservations Prior to Completion of Offer. Where immediate possession of areas is necessary and is obtained by right-of-entry, owners often wish to move, taking with them buildings and improvements, or wish to harvest timber or crops, prior to any offer by the Government for the sale of their land. This action is authorized only under the following conditions:

(1) Appraisals of all the land, buildings, improvements, timber, and crops of the particular tract are completed and approved.

(2) A determination is made by the District Chief of Real Estate that the buildings, improvements, and timber will not be needed, and the harvesting of timber or crops will not interfere with construction or operation of the project.

(3) Agreement for Removal of Property will be obtained from all persons having an interest in the property to be removed. This agreement will recite the amount which the owner is willing to have deducted from the value of the tract as a whole for the right of removal, which may not be less than the appraised salvage value of the buildings, improvements and timber, and the appraised value of the crops, as set out in paragraphs 3-18g, 3-18h, and 3-18i.

(4) Agreement for Removal of Property will be obtained and accepted by the District Chief of Real Estate.

(5) If an Offer to Sell is obtained later, an appropriate reservation must be inserted in the Offer to Sell to reflect the prior agreement relative to reservations and removals of property and the agreed value of same.

(6) If it is necessary later to file a declaration of taking on the particular tract, a copy of the agreement will be forwarded with the correspondence transmitting the declaration of the taking assembly for use by the DOJ in the court action. The agreement by its own terms will serve as a stipulation as to the amount to be deducted from the ultimate award for the right of removing buildings, improvements, timber, or crops. See ER 405-1-19, Condemnation.

(7) Formats issued by HQUSACE (CEMP-CR) for Agreement for Removal of Property will be used. Conditions may only be deleted or modified if so indicated in the format. Standard conditions may not be altered or revised unless the proposed deviations are fully justified by the

District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review from CECC-R.

1. Other Reservations. The following rights may be reserved to the owner wherever such reservation will not be to the financial detriment of the Government and it has been determined by the District Chief of Real Estate that the reservation of the rights will not interfere with the operation of the project. These rights may be reserved in the Offer to Sell and should be reserved in the Deed and reflected in the Inventory documents as an outstanding right. To ensure that the right reserved is established in perpetually or for a definite period of time, an easement may also be granted as shown in ER 405-1-80, Management and Outgrant Programs, citing the original deed. Right reserved will be transferred to the Management elements of Real Estate who will ensure that the operational using service knows for the future recognition of such rights.

(1) Rights-of-Way for Stock to Water. Reservations of rights-of-way will be permitted for watering livestock. Such rights-of-way will be limited to a reasonable width and will not be permitted in public access and use areas. Reservations will not require the owners to fence the rights-of-way, but to provide that if they elect to do so, they must provide gates at satisfactory intervals to permit crossing.

(2) Rights-of-way for Water Pipeline for Domestic Use. Reservations of rights-of-way for water pipelines for domestic use, may be permitted by providing for the reservation of a temporary or permanent easement. Such easements shall not be only for the purposes of irrigation use.

(3) Rights-of-way for Water Pipeline for Irrigation Use.

(a) In areas where irrigation is commonly practiced, owners with remainder or contiguous lands may be permitted to reserve a sufficient real estate interest to place water pipelines across Government-owned lands. In "water rights" States (prior appropriation of water rights), the reservation of such interests will be permitted only to those owners who have established water rights from the state, or who may in the future obtain such rights. When irrigation is a project purpose, such reservation must be coordinated with the Bureau of Reclamation (BOR)(see ER 405-1-80, Management and Outgrant Programs, for easement policy).

(b) Under these circumstances, a landowner may be permitted to reserve an easement and right-of-way for a water pipeline and pumping unit across the land conveyed, by appropriate provisions in the Offer to Sell and in the deed to the United States. In "water rights" States, this reservation will be "for the exercise of established water rights, although no right to use water is created hereby." (This phraseology is to be incorporated in the reservation.) The reservation will also include any pertinent provisions considered essential by the District Chief of Real Estate, such as requirement to install the pipeline underground and at a specified depth.

(c) Reservations of this nature will also be permitted in those cases where acquisition is by condemnation. In these acquisitions, the reservation may be recited in the complaint and



declaration of taking, whenever full agreement except as to just compensation has been reached, or it may be permitted later by stipulation.

(d) When the project is located in an area in which the Bureau of Reclamation is developing, or planning to develop, irrigation districts or systems, prior coordination with the Bureau will provide that copies of all deeds and final condemnation judgments which recite reservations under this subparagraph will be furnished to the local office of the Bureau. Thereafter, the Bureau will be responsible for supervising the exercise of the easements to insure compliance with appropriate laws.

(e) Plans to provide for irrigation will be fully covered in the Real Estate planning document.

### 3-19. Preparation and Execution of Offers.

a. Fee Acquisition Offer Form. The use of the latest revision of Offer to Sell Real Property, is required in all authorized projects, except in those cases where agreements with the landowners can be fully reflected in an executed deed, and where the provisions of paragraphs 3-13, 3-14 and 3-18 are not applicable or can be fully complied with without the use of an Offer to Sell. When an agreement as to terms has been reached with the owner, or a counteroffer has been received which will be considered for acceptance or submitted for consideration by higher authority, an Offer to Sell will be prepared, with particular attention to the following instructions:

(1) No changes in the approved standard format Offer to Sell will be permitted, unless authorized by HQUSACE (CEMP-CR). CEMP-CR will obtain legal review from CECC-R.

(2) Insert legal description of property to be acquired, or attach description by Exhibits to be identified on page 1.

(3) The word "none" should be inserted in the blank spaces following the first and third lines, respectively, on page 2 of the Offer form when title is being acquired free and clear of all rights outstanding in third parties and the landowner is not permitted to except or reserve any right or interest in the property to be conveyed to the United States.

(4) Particular attention is directed to paragraph 3-18 of this Section, regarding exceptions and reservations and outstanding rights in third parties. No exceptions or reservations of crops, timber, buildings and improvements, subsurface rights, or any other interest will be incorporated in any Offer to Sell unless the required approvals have first been obtained.

(5) In any case where the Offer contains any conditions, exception, or reservation contrary to these instructions, the Offer, any pertinent information, and a request for approval will be submitted to the Division to approve the Offer. This request for approval may be submitted at the same time a counteroffer is submitted for approval. All changes in the format Offer to Sell will be clearly identified by providing a redlined and proposed version of the instrument. Internal copies of the Offer to Sell will always be accompanied by the redline version.

(6) The landowner's name will be set forth in the offer in the exact way in which it appears on record. Use of a/k/a (also known as) and f/k/a (formerly known as) is authorized. The Offer will show any additional name information that will be needed for the Closing Agent and the Reviewing Attorney to complete closing and deed preparation.

(7) When it is necessary for a corporate agent, fiduciary, or any person other than an individual owner to execute the Offer, satisfactory evidence of the authority to act for the owner must be attached to each of the copies of the Offer to Sell.

(8) Where it is necessary to attach pages to the Offer in order to fully set forth the terms of reservations, exceptions, or outstanding rights in third parties, such additional pages must be securely attached and initialed by all parties signing the Offer to Sell.

(9) The name and address of the person or persons to whom notice of acceptance is to be sent must be accurately set forth. The address where the landowner can be reached after vacation of the property, if different from the address to which the notice is to be sent, should be obtained.

b. Submission, Acceptance, and Distribution of Offers to Sell

(1) For each purchase transaction, an original offer and necessary copies will be signed by the landowners and their spouses. A copy will be left with landowners when the offer is obtained.

(2) See paragraph 2-16b of this regulation for authority to accept offers to sell for the acquisition of land or interests in land and easements, licenses, permits, or similar acquisition instruments. Upon approval of the offer or other instrument requiring payment to the landowner, a determination that necessary funds are available, and acceptance of the instrument under the authority contained in this subparagraph, the instrument will be numbered in conformity with existing regulations and original offers to sell will be retained at the district for site audit.

(3) A written acceptance of the Offer to Sell is required. Upon acceptance of the Offer to Sell, the District will notify the landowner by transmitting a signed copy of the contract (accepted offer) to landowner by Notice of Acceptance of Offer to Sell Real Property, or Notice of Acceptance of Offer to Sell Easement. Formats issued by HQUSACE (CEMP-CR) for these Notices will be used. Conditions may only be deleted or modified if so indicated in the format. Standard conditions may not be altered or revised unless the proposed deviations are fully justified by the District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review from CECC-R.

(4) Upon acceptance of the Offer to Sell, the District will notify the using service, in the case of military acquisition, or other Federal agency that the Offer to Sell has been accepted and whether the Government has "the right of immediate occupancy and use of the land," subject to the terms of the accepted offer. The land should be clearly identified.

c. Easement Acquisition Offer Form.

(1) The use of the format Offer to Sell Easement is required for the acquisition of all types of easement estates, except in those cases where agreements with landowners can be fully reflected in an executed deed, and where the provisions of paragraph 2-16b and paragraph 2-18d are not applicable or can be fully complied with without the use of an Offer to Sell. Pages 1 and 2 of the Offer to Sell, containing the terms and conditions of the acquisition, are standard and need no modification. The tract of land in which the particular easement will be acquired will be described in Exhibit "A," and the easement estate will be set forth in Exhibit "B" to the Offer.

(2) Offer assemblies will be prepared, accepted, and distributed in the same manner as provided for fee acquisition.

(3) In the acquisition of easements for rights-of-way for access roads, utility lines, etc., which cross or encroach upon rights-of-way or property of railroad companies, public utility companies, cities, counties and states, License for Installations in Right-of-Way, issued by HQUSACE (CEMP-CR) may be accepted, at the discretion of the District Chief of Real Estate, provided it is determined that such companies, municipalities, counties, or states are not vested with authority to convey a perpetual easement and the granting of a license under the conditions recited in the format will protect the interests of the United States and grant sufficient use of the right-of-way or land for project purposes. In cases where the licensor demands compensation above a nominal amount, consideration will be given to the acquisition of a perpetual easement by condemnation, if the licensor is not vested with authority to grant such an easement. Licenses should only be revocable by the United States; provide specifically for access to the site; be based on at least a one owner search of the records; contain an adequate description of the property and a source of title; provide for no costs or, at most, a one time nominal cost to the United States; and be recorded in the public records.

d. Payment. Payment will be made as provided in Chapter I of this Regulation.

e. Cancellation of Contracts. If, for any reason, it is necessary to cancel a contract for acceptance by of the Offer to Sell, the cancellation will be effected by using an "Agreement for Mutual Cancellation of Contract" format. A format is issued by HQUSACE (CEMP-CR) for this Agreement for Mutual Cancellation. Conditions may only be deleted or modified if so indicated in the format. Standard conditions may not be altered or revised unless the proposed deviations are fully justified by the District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review from CECC-R. Upon execution of this agreement by the landowner and the District Chief of Real Estate, or the Division Chief of the Real Estate, distribution of the original and copies of the agreement will be the same as for the accepted Offer to Sell.

f. Transfer of Tracts from Purchase to Condemnation. If at any time it becomes apparent that acquisition by purchase will involve substantial delay or cannot be accomplished, action will be taken to acquire the land by condemnation. See ER 405-1-19, *Condemnation*.

g. Vacation of Property by Landowners and Tenants.

(1) Notice of Vacation. From the inception of the project, landowners and tenants will be instructed to notify the District Chief of Real Estate or Real Estate Project Manager, as soon as they vacate their property; to turn in their keys whenever possible in order that the buildings may be kept under lock; and to keep the District Chief of Real Estate or Real Estate Project Office advised of any changes in address in order to expedite title clearance, payment, closing action, and the distribution of funds in condemnation proceedings. The risk of loss remains on the landowner until:

(a) The title to the land and deed to the United States has been accepted by the United States or the right of occupancy or use of the land is exercised by the Government; or

(b) The landowner receives notice that the Government has taken possession of the property in cases where possession was not obtained at the acceptance of the offer or the filing of a condemnation.

(2) Inspection of Property.

(a) As soon as a landowner or tenant gives notice of vacating the property, the District Chief of Real Estate will immediately have a member of his/her staff make a personal inspection of the property and execute a "Report on Vacation of Property" format. A format is issued by HQUSACE (CEMP-CR) for the Report. Conditions may only be deleted or modified if so indicated in the format. Standard conditions may not be altered or revised unless the proposed deviations are fully justified by the District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review from CECC-R. The inspection will be made to determine whether all buildings, improvements and crops on the land to be acquired, as listed in the appraisal report, are still on the land and in substantially the same condition as on the date of the appraisal.

(b) Where buildings, improvements and crops have been removed under a reservation in the offer, an appropriate entry will be made in the Report on Vacation of Property.

(c) Where buildings, improvements, and crops have been removed or destroyed in the conduct of construction work on the project, an appropriate entry will be made in the Report on Vacation of Property.

(d) It will be determined whether or not the land is unoccupied or vacant and whether there is evidence of present use.

(e) Environmental concerns, including the presence of asbestos, should be noted on the Report on Vacation of Property.

(f) The report will be retained in the real estate project files. A copy will be held for the use of the Reviewing Attorneys on purchase cases, or by the local representative of the Department of Justice in condemnation cases.

### 3-20. Acquisition of Land by Donation.

(a) General. If USACE is actively acquiring land or interest in land for an approved project, military or civil, the acquisition can be accomplished by gift. The following applies if there is no active acquisition.

(1) Military donations. Donations to the Active Army, Army National Guard and the US Army Reserve are governed by AR 1-100, Gifts and Donations. Military donations should be coordinated through the appropriate Regional Office, Installation Management Command, for requirements validation. Districts will submit a package through Division to HQUSACE (CEMP-CR), for review and submittal of the request in accordance with AR 1-100 with appropriate reviews by staff elements and the Office of the Deputy Assistant Secretary of the Army (Installations, Housing and Partnerships).

(2) Civil Works. Civil Works acquisitions of land by donation procedures vary by whether or not the acquisition is part of an authorized project. If the project has been approved, and the donation is an acceptable method of acquisition and the District will accept the donation in compliance with the requirements of this regulation. If the donation is not part of an approved project, the donation must be evaluated and submitted through the Division, to HQUSACE, CEMP-CR, for processing.

(b) If the request is to be forwarded to HQUSACE, then the following information is required in the District's transmittal requesting approval of a donation: the authority for the project or name of installation for which the property is donated; a complete description of the property; an approved appraisal or an estimate of value if an appraisal is waived by the owner; a statement from the donor showing intent to donate the property and that the donor has waived the right to receive just compensation; a statement why the property should be acquired; a statement that the donation has been reviewed in accordance with the Joint Ethics Regulation, DODD 5500-7R, and found not to be in violation of any ethics rules; a statement of the administrative cost to the District to process the donation, a statement on future operation and maintenance cost that will arise from accepting the donation, and a description of environmental investigations including a statement of whether the property contains sources of contamination that could impact either soils or groundwater.

(c) In cases where the acquisition of real property has been authorized and approved by donation, an Offer-to Sell Real Property or Offer to Sell Easement will be entered into setting forth the terms and conditions of the donation and conveyance to the United States.

(d) All hazardous, toxic, radioactive waste (HTRW) requirements in law and regulation apply to the acceptance of donated lands.

(e) Requirements for title evidence, title clearance, closings and submission of final title opinions described in Chapter I of this regulation are applicable to donations.

3-21. Other Acquisition.

a. Acquisition from Other Federal Departments and Agencies.

(1) Transfers of Accountability. Transfers will be obtained from other Government agencies after approval of the acquisition. Districts should obtain sufficient documentation from the transferring agency that will enable USACE to dispose of the property if necessary. The action will only be forwarded to the HQUSACE (CEMP-CR), if Army Secretariat involvement is required. If so, the action will include the original transfer letter or document. Title 10 U.S.C. § 2697, Real property: transfer between armed forces and screening requirements for other Federal use provides for the transfer of real property within the armed forces. Reporting requirements of 10 U.S.C. § 2662 are applicable.

(2) Use Agreements or Permits. Upon receipt of a proper request from an authorized command, service or agency, District Chief of Real Estates are authorized to obtain, accept, and renew use agreements or permits from other Government departments or agencies for the temporary use of land (except public domain for Air Force) and buildings. There is no limitation on the length of term. Permits may be obtained for indefinite terms from other Federal agencies. Otherwise, a termination date should be specified on the permit. If an extension of the term is required, a new permit should be processed.

b. Withdrawal of Public Domain Lands and Right-of-Entry Permits for Temporary Use.

(1) Definition. The term "withdrawal" means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than "property" governed by the Federal Property Act (40 U.S.C. § 101, et seq) from one department, bureau or agency to another department, bureau or agency. See ER 405-3-10, Military Planning, or ER 405-2-12, Real Estate Planning, Acquisition Responsibilities, and Crediting Principles for Civil Works Projects, for further guidance.

(2) Withdrawal of public domain lands will be necessary if a site is selected for construction and/or there is a continuing military use. Except in time of war or national emergency declared by the President or the Congress, withdrawals in excess of 5,000 acres for any Department of Defense Project or facility must be by authority of an Act of Congress (43 U.S.C § 156).

(3) Requests for withdrawal of public domain land will be made pursuant to the rules and regulations contained in 43 CFR 2310, which implements Federal Land Policy and Management Act (FLPMA) (43 U.S.C. § 1714), as amended. See ER 405-3-10,

*Planning*, or ER 405-2-12, Real Estate Planning, Acquisition Responsibilities, and Crediting Principles for Civil Works Projects, for further guidance. See discussion of public domain in ER 405-1-80, Management and Outgrant Programs.

(4) Necessary rights-of-way for Federal agencies will be obtained under the authority of the FLPMA, 43 U.S.C. § 1701, et seq.

c. Acquisition of Outstanding Rights on Public Domain.

(1) Acquisition of Possessory Rights to Mining Claims.

(a) Upon approval of real estate acquisition to extinguish outstanding private mining interests in the public domain, and notification that the Bureau of Land Management (BLM) has withdrawn the public domain from appropriation under the public land laws and the public mining and leasing laws, the District Chief of Real Estate will, if necessary to obtain possession for construction or other project purposes, recommend to the HQUSACE (CEMP-CR), the filing of a complaint in an eminent domain proceeding, based on a perimeter description of the project, and the obtaining of an order of immediate possession. Reference ER 405-1-19, *Condemnation*. Thereafter, the District Chief of Real Estate will promptly determine the possessory private mining claims within the area withdrawn, and he is authorized to acquire such claims for either a nominal sum or an amount not to exceed the combined estimated costs of obtaining a detailed appraisal report and having the validity of the claim investigated by the BLM. The United States can not condemn itself, therefore USACE can not condemn mineral rights owned by the United States, managed by BLM.

(b) If an offer to settle is made on the basis provided in subparagraph (a) above, and is not satisfactory to the possessory mineral owner, the District Chief of Real Estate will request the BLM to investigate the validity of the private claim. In such case, the District Chief of Real Estate is authorized to make an agreement with the BLM for reimbursement of the following (See 40 Comp. Gen. 369):

(1) Examination of the claim itself and assembling of the evidence to support the claim of invalidity.

(2) The presentation of the evidence, the cross-examination of witnesses for the mining claimant and other related expenses.

(c) The USACE is not authorized to reimburse the BLM for cost of the hearing and the rendering of the decision as to the validity of the private mining claim.

(d) If determined to be valid, claims will be appraised and an offer will be made to the owner at the approved appraised value. BLM is authorized to determine value of the claims and the District Chief of Real Estate may wish to arrange with BLM to perform this service on a reimbursable basis. In the event the offer based on the approved appraisal is not acceptable to the owner, and a reasonable settlement cannot be effected by negotiation, the District Chief of Real Estate should make a recommendation as to whether the claim should

be acquired by condemnation or be left outstanding, per ER 405-1-19, Condemnation. Those cases in which occupants were dispossessed under the order of immediate possession, referred to in subparagraph [a] above, will be given priority attention in all phases of the procedure set out herein, including preparation and submission of condemnation assemblies in appropriate instances.

(2) Acquisition of Grazing Rights.

(a) Grazing rights in the public domain are granted pursuant to the provisions of a series of Congressional acts commonly referred to as the Taylor Grazing Act, 43 U.S.C. § 315 et seq. The Taylor Grazing Act provides as follows: "Whenever use for war or national defense purposes of the public domain or other property owned by or under the control of the United States prevents its use for grazing, persons holding, grazing permits or licenses and persons whose grazing permits or licenses have been or will be cancelled because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war or national defense purposes. Such payments shall be deemed payment in full for such losses. Nothing contained in this section shall be construed to create any liability not now existing against the United States." It is emphasized that payments under this section are administrative.

(b) Upon issuance of a real estate directive to acquire or terminate grazing rights in the public domain or other property owned or controlled by the United States and notification that the Government department controlling such lands has granted a right-of-entry or transferred the lands to the Departments of Army, the District Chief of Real Estate will initiate action to acquire or terminate such grazing rights.

(c) Appraisals will be prepared in accordance with ER 405-1-04, Appraisal, and the guidelines set forth in Comptroller General Decision No. B-132774, Claims for Losses of Grazing Rights, dated 9 October 1957.

(d) Discussions with landowners concerning acquisition of a ranch unit will be conducted in accordance with the procedures for fee acquisition.

(e) Offers will be prepared, accepted, and distributed as provided in paragraph 2-19 of this Section.

(f) Title procurement and title clearance relating to the acquisition of title to any fee lands within the ranch unit will be the same as in any other fee acquisition. In preparing title evidence covering leasehold interests, a search of the records will be made by the Reviewing Attorney and an Attorney's Preliminary Certificate of Title, will be prepared by the reviewing attorney. In connection with the search of the records, it should be noted that Federal grazing privileges may be pledged or encumbered with mortgages.



d Acquisitions under Provisions of Relocation Agreements.

(1) It is necessary to procure title evidence under the guidelines set out in Chapter II of this Regulation for lands (including subordination of minerals) acquired under the provisions of relocation agreements (See ER 405-1-17, Relocation of Utilities and Facilities). While this type of acquisition does not involve the same closing procedure set forth in Chapter I of this Regulation, so much of the title assembly described as is applicable, plus an executed or certified true copy of the relocation contract, will be used in the examination and approval of the title. The disposition of final title opinions is governed by this Regulation.

(2) When it has been determined that there is no necessity for providing substitute facilities, particularly highways or roads, but it is necessary to extinguish the real estate interests of the owner, the owner will be asked to permanently vacate and abandon existing facilities without cost to the Government, and to initiate the necessary proceedings according to local law to accomplish the vacation and abandonment or subrogate or convey its rights to the United States.

e. Acquisition by Exchange

(1) Military. A prerequisite to any acquisition by exchange is authority for the acquisition. The authority to acquire land by exchange for military projects is provided in 10 U.S.C. § 2663, in the National Defense Authorization Act passed each year, and other Acts of Congress. Title 10 U.S.C. § 2662 provides that a transfer of real property owned by the United States to another Federal agency or another military department or to a state must be reported to the Committees on Armed Services if the estimated value of the property is more than the statutory amount.

(2) Civil Works. The authority to exchange land or other Government property for private lands or property in execution of an authorized river and harbor or flood control work or improvement is found in 33 U.S.C. §§ 558b and 558b-1.

(3) Requirements for Title Evidence. Requirements for title evidence, closings and submittal of final assemblies described in Chapter I of this Regulation are applicable to the lands acquired in an exchange. See ER 405-1-90, Disposal Programs, for procedures for the disposal part of the exchange.

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## CHAPTER 4

### Acquisition of Rights-Of-Entry

4-1. General. This section describes the procedures relative to obtaining rights-of-entry on lands for both military and civil works projects and in the USACE acquisition programs for other Federal Government agencies. It is applicable to all Division and District Chief of Real Estates having real estate responsibilities.

4-2. Definition. A right-of-entry is a bare authority to do a specified act or series of acts upon land that is not owned or controlled by the United States without acquiring any estate or interest therein. A right-of-entry authorizes an act which, in the absence of the right-of-entry, would constitute a trespass. The written instrument furnishes evidence of the permission granted to the Government and the obligations, responsibilities, and liabilities assumed by the Government.

4-3. Procedures.

a. Right-of-Entry for Survey and Exploration will be used to obtain authority from the owner of lands to perform surveys, make test borings, and conduct other exploratory work on the land as may be necessary to complete the particular investigation.

b. Right-of-Entry for Construction will be used to obtain authority from the owner of lands to begin construction on the land when all of the following conditions apply:

(1) There is specific project authority to acquire an interest in real property.

(2) The construction schedule does not allow sufficient time to secure the right of possession by normal acquisition procedures.

c. These formats are issued by HQUSACE (CEMP-CR). Conditions may only be deleted or modified if so indicated in the format. Standard conditions may not be altered or revised unless the proposed deviations are fully justified by the District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review from CECC-R.

(1) Purchase/Condemnation of Rights-of-Entry. In the event the landowner will not voluntarily grant a right-of-entry, an appraisal of the required interest should be made and negotiations conducted on the basis thereof. If the negotiations are not successful, a declaration of taking should be submitted to acquire the necessary rights. See ER 405-1-19, Condemnation.

(2) District Chiefs of Real Estate may modify these Right-of-Entry formats with the concurrence of USACE counsel, where necessary, to meet requirements of landowners, provided such modifications do not increase the scope of the liability or responsibility of the United States over that contained in the standard formats.

(3). It is necessary to recognize not only the effects of entry upon a particular parcel of land, but also the effects of the passage of any vehicle (land, air, or water) on the area traversed. All possibilities of disturbing effects on the countryside shall be considered and routes selected to eliminate or minimize such disturbances.

(4). Any cash settlements in lieu of restoration for damages, incurred under the Right-of-Entry will be consummated by supplemental agreement in accordance with ER 405-1-90, Disposal Programs.

(5). It is noted that specific form rights-of-entry have been approved for use in certain programs such as Defense Environmental Restoration Program (DERP) and Formerly Utilized Sites Remedial Action Program (FUSRAP). The guidance contained in this section is applicable to obtaining rights-of-entry for other programs where it does not conflict with specific program guidance. The DERP manual and FUSRAP policy guidance should be consulted for current versions of those rights-of-entry.

## CHAPTER 5

Obtaining Options Prior To  
Real Estate Authorization (Military)

5-1. Purpose and Scope. This section describes the procedures relating to obtaining options to purchase real estate interests for Army military requirements prior to the final authorization. It is applicable to all District Chiefs of Real Estate having military real estate responsibility.

5-2. Authority and Applicability.

a. Authority. Title 10 U.S.C. § 2663, provides that:

(1) The Secretary of a military department may acquire an option on a parcel of real property before or after its acquisition is authorized by law, if considered suitable and likely to be needed for a military project of the department.

(2) As consideration for an option so acquired, the Secretary may pay from funds available to the military department for real property activities, an amount that is not more than twelve percent of the appraised fair market value of the property.

b. Applicability. An option may be acquired when any of the following apply:

(1) Land is needed for proposed construction and the siting of said construction is firm.

(2) There is a definite indication of material enhancement in value due to change, or proposed-change, in use by the landowner, price increase due to publicity given to contemplated Government acquisition, or abnormal increases in market value.

(3) There is a definite possibility of private construction which would constitute obstructions in existing or proposed glide angle planes and transitional planes at air bases.

5-3. Implementation. When a District Chief of Real Estate determines that any of the conditions described in paragraph 5-2 exist in connection with any proposed land acquisition project for military purposes not yet authorized by law, the following actions will be initiated:

a. Planning Report. A planning report will be developed and submitted in accordance with the ER 405-3-10, Military Planning. The report will include the purpose for which the property is "likely to be needed;" the estimated probable increase in value, if applicable; and the justification for negotiating for options under the authority cited in paragraph 2-52. The report will identify any real estate planning reports previously prepared which included the land in question. Any future planning reports relating to the same land will contain appropriate references to this report.

b. Property Identification. Upon receipt of authority to acquire options and determination that funds are available, the District Chief of Real Estate will obtain and verify

ownership data in accordance with ER 405-1-13, Mapping. Title evidence may be obtained in accordance with Chapter I, this regulation.

c. Appraisal. Detailed tract appraisals will be prepared in accordance with ER 405-1-04, Appraisal.

d. Obtaining Options.

(1) Negotiations for the option will be in accordance with procedures outlined in Chapter II, this regulation, except that Option to Purchase Real Property, will be used. An attempt should be made to include a provision in the option giving the Government the right to acquire all or part of the land covered by the option. Acquisition of the entire tract may not be required as planning is developed.

(2) The Option to Purchase Real Property formats will be issued by HQUSACE (CEMP-CR). Conditions may only be deleted or modified if so indicated in the format. Standard conditions may not be altered or revised unless the proposed deviations are fully justified by the District and forwarded through Division (Real Estate and Counsel) to HQUSACE (CEMP-CR) for review and approval or disapproval. CEMP-CR will obtain legal review from CECC-R.

(3) The following instructions for the use of an Option to Purchase will be followed:

(a) Insert amount to be paid for the option privilege. This amount cannot exceed twelve percent of the appraised value.

(b) If the land has been separated into definable parcels in accordance with (1) above, the option should describe each parcel and provide for a separate purchase price inclusive of any severance damage, as well as an agreed purchase price for the entire tract. The amount to be paid for the option privilege will be apportioned among the separate parcels.

(c) The expiration date of the option on unauthorized projects should be far enough in advance to permit required clearances, approvals, Congressional action, if any, and allotment of funds.

(d) Since options obtained under this section will normally be recorded, Option to Purchase will be acknowledged in the form used in the jurisdiction in which the real property is located.

e. Report. When all options within the approved area have been acquired, and prior to their being exercised by the Government, the District will notify the Division of the project, the number of tracts optioned, the expiration date of options, total amount to be paid if options are exercised and the total amount paid for option privilege.

5-4. Exercise of Options. Refer to ER 405-3-10, Military Planning, on authority to proceed with an acquisition. Upon authority to proceed, the District Chief of Real Estate will be authorized to exercise the option and proceed with the acquisition in accordance with the procedures outlined in Chapters I and II, this Regulation.

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