State of California
DEPARTMENT OF TRANSPORTATION

Business, Transportation and Housing Agency

Memorandum

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To: DISTRICT DIRECTORS
DEPUTY DISTRICT DIRECTORS
DIVISION CHIEFS

Date: December 21, 2010

From: RICHARD D. LAND
Chief Engineer

Subject: Reference Guide for the Issuance of United States Department of Transportation Highway Easements or Special Use Permits

The Divisions of Design, Environmental Analysis, and Right of Way and Land Surveys frequently receive questions pertaining to the consultation, coordination, environmental documentation, and other steps necessary for Federal agencies to authorize the Department of Transportation's (Caltrans) use, operation and maintenance of the State Highway System on U.S. Forest Service (USFS) lands. The use, operation, and maintenance of the State Highway System on USFS lands occur either through the issuance of a United States Department of Transportation (US DOT) Highway Easement to Caltrans by the Federal Highway Administration (FHWA) or by Special Use Permit Authorization (SUP) issued directly to Caltrans by the USFS.

Various documents dealing with the issuance of an easement or SUP, such as Memoranda of Understanding (MOU), various sections of the Federal law and regulation, the FHWA Federal Lands Transfer Manual, and the Caltrans Right of Way Manual, adequately serve as the framework for obtaining a US DOT easement or SUP. However, answers to some issues and questions that are incessantly challenging those charged with preparing, obtaining, or overseeing the issuance of easements or SUPs are not easily found in those documents. The attached Reference Guide is an attempt to clarify issues and provide answers to common questions.

This Reference Guide will serve as an interim tool for Caltrans and USFS personnel pending revision of the 1989 USFS/Caltrans MOU. A copy of the guide should be provided to your respective district and division personnel who are involved in processing and obtaining US DOT Highway Easements or SUPs. It is important for personnel to coordinate these activities with the FHWA and USFS in the early stages of project development in order to avoid project delay.

Mr. Maiser Khaled of FHWA and Ms. Christine Nota of USFS have been asked to distribute the Guide to their personnel who are involved in the easement and SUP processes.

Questions regarding the attached Guide may be directed to Mr. Tim Craggs, Division of Design at (916) 653-1027, Mr. Don Grebe, Office of Right of Way Project Delivery at (916) 654-4456, or Ms. Christine Nota with USFS at (916) 498-5901.

c: Malcolm Dougherty, Chief Deputy Director
Tim Craggs, Assistant Chief, Division of Design
Don Grebe, Office Chief, Division of Right of way and Land Surveys
Donna Clark, Deputy Attorney, Legal
Maiser Khaled, Director of State Programs, FHWA
Christine Nota, Regional Forester's Representative, USFS

REFERENCE GUIDE

CALTRANS
US FOREST SERVICE
FEDERAL HIGHWAY ADMINISTRATION

Coordination from Planning to Complete Project Design and Through the US DOT Easement and Perfection of Title Phases

The purpose of this guide is to provide a reference for the California Department of Transportation (Caltrans) and the U.S. Forest Service (USFS) when planning, preparing, and coordinating project plans for highway projects located on USFS lands. This reference guide identifies the process used to consult, coordinate and complete environmental documentation and other steps necessary for the USFS to authorize the use, operation and maintenance of the State Highway System on USFS lands. The use, operation and maintenance of the State Highway System on USFS lands occurs either through the issuance of a US DOT Highway Easement to Caltrans by the FHWA or by Special Use Permit Authorization (SUP) issued directly to Caltrans by the USFS. This guide should not be construed to replace the 1989 Memorandum of Understanding (MOU) between the USFS and Caltrans or the 2001 MOU on Perfection of Title between the California Division of Federal Highway Administration (CA Div FHWA), Caltrans and the USFS. Where there are conflicts between this Reference Guide and the 1998 and 2001 MOUs, the language in the MOUs will prevail. This guide is being provided primarily to facilitate project delivery pending revision of the 1989 MOU.

For additional information and to download the 1989 and 2001 MOUs go to Caltrans intranet site:
http://pd.dot.ca.gov/row/offices/federal_land_transfer/MOUs/?datebox=

AUTHORITIES AND REFERENCES

- 16 U.S.C. § 498
- 23 U.S.C. § § 107(d) and 317
- 31 U.S.C. § 9701
- 23 CFR § 710.601
- 36 CFR § 211.3
- 36 CFR § 251.58
- 1989 Memorandum of Understanding between the United States Department of Agriculture, Forest Service and Caltrans
- 1998 FHWA & USFS MOU
- 2001 Memorandum of Understanding between the United States Department of Agriculture, Forest Service, Caltrans and CA Div FHWA regarding Perfection of Title

DEFINITIONS

District: "District" as used in this guide is one of the 12 Caltrans Districts.
Region: "Region" as used in this guide means one of the two Caltrans' Regions; the North Region and the Central Region. "Districts" 1, 2 and 3 comprise the North Region and Districts 5, 6, 9 and 10 comprise the Central Region. Districts 4,7 8, 11 and 12 are not regionalized.
District Ranger: "District Ranger" as used in this guide is the head of one of the several ranger districts in a National Forest.
Regional USFS: "Regional USFS" as used in this guide is the Pacific Southwest Region, one of the 9 regions in the US Forest Service.

GENERAL

Caltrans may require temporary or permanent use of property owned by the United States and controlled by a federal agency. Rights of way, material sites or other interests in these lands are secured under appropriate Federal statutes.

Title 23, United States Code (USC), §§ 107(d) and 317, provide for the transfer of lands, or interests in lands, owned by the United States (U.S.) to a State Highway Department. Caltrans' need to traverse lands under jurisdiction of the USFS will be made under provisions of the Federal Highway Act of August 27, 1958 (23 USC Section 317). If the project is on the Interstate System, Section 107(d) will also apply.

Federal Highway Administration

The FHWA is the appointed lead agency for all requests to traverse federal property for a highway or highway related purpose. Though some federal agencies, including the USFS, have their own statutory authority to authorize occupancy and use of National Forest System land to Caltrans without FHWA's involvement, coordination with FHWA is recommended and encouraged in all instances.

Caltrans' Region and District Federal Land Transfer Coordinator

Effective May 18, 1998, Regions and Districts were delegated the full responsibility for the processing of Federal Land Transfers (FLT). This includes contact with FHWA.

The Region/District FLT Coordinator (FLTC) typically resides within the Right of Way organization, and is responsible for initiating discussions with the USFS through the District Ranger. Any project specific meetings should include, in addition to the FLTC and USFS District Rangers, the Caltrans project manager, project engineer, and environmental staff, as well as the USFS Lands Officer and an environmental specialist.

The FLTC processes all requests to transfer permanent or temporary rights to Caltrans, and is responsible for the full review, final approval, and transmittal of all Federal Land Transfer requests to FHWA. The FLTC also works with the District design engineer to determine the real property requirements and to request maps of the proposed right of way needs. The FLTC should identify as early as possible all USFS resources, such as timber, which may have an effect on the final Right of Way (R/W) certification for the project.

PROJECT INITIATION
PREPARE DRAFT PROJECT REPORT
PERFORM ENVIRONMENTAL STUDIES

Early Project Coordination

Caltrans must coordinate with the USFS regarding the proposed state highway project at the earliest possible stage of project development, preferably at the project initiation (PID) phase. Early and frequent coordination with the USFS throughout the PID and preliminary engineering phases will help ensure the project's impacts on USFS lands are evaluated and addressed in a timely manner without delaying project development. The FLTC should arrange for an initial meeting with the USFS to provide project mapping and discuss the purpose of the project, design concepts and alternatives, environmental considerations, right of way and permitting needs, and workload. Such early coordination will facilitate identification of potential problems and collaborative development of possible solutions, as well as to help identify some of the conditions and stipulations that will need to be addressed in the FLT package to be provided to FHWA.

SECURE PROJECT APPROVAL
PROJECT APPROVAL AND ENVIRONMENTAL DOCUMENT (PA&ED)

During the Environmental Scoping Stage of the PA&ED Phase of Highway Projects:

Caltrans will consult the District Ranger regarding the laws, regulations and policies applying to the USFS lands in the proposed state highway project area. Caltrans will seek early and appropriate coordination with the USFS as Caltrans carries out any and all federal environmental compliance responsibilities it has assumed from FHWA. The USFS will always be a National Environmental Policy Act (NEPA) cooperating agency on projects located on USFS lands.

When acting as NEPA lead agency on projects for which an Environmental Impact Statement (EIS) is being prepared, Caltrans' District or Region Environmental Divisions, in accordance with SAFETEA-LU § 6002 (codified at 23 U.S.C. § 139) and 40 CFR § 1501.6 will:

(1) Request the participation of the USFS as a cooperating agency at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies, with jurisdiction by law or special expertise, to the maximum extent possible consistent with Caltrans' responsibilities as lead agency.

As a cooperating agency the USFS will:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process.

(3) Assume, on request of the lead agency, responsibility for developing information and preparing environmental analyses for environmental documents when the USFS has special expertise.

(4) Make staff available, at Caltrans' request, to enhance the latter's interdisciplinary capability.

(5) Normally use USFS appropriated funds to support the project. The lead agency shall, to the extent available funds exist, fund those major activities or analyses it requests from the USFS. Caltrans should include such funding requirements in their budget requests.

During the Permit Stage of the PA&ED Phase of a Highway Project:

If a state highway project is located on USFS lands, but is not situated within an existing US DOT highway easement, then the project work outside of the existing US DOT easement, prior to obtaining a revised US DOT Easement, will require a SUP authorization. SUP authorizations are also appropriate for temporary highway-related uses when actions occur outside of a US DOT highway easement on USFS lands. If a SUP authorization is required, and requires USFS resources to review the SUP application and monitor compliance with the SUP, cost recovery may be sought by the USFS in accordance with 36 CFR § 251.58

PREPARE PLANS, SPECIFICATIONS AND ESTIMATES; ACQUIRE RIGHTS OF WAY; AND OBTAIN APPROVALS, AGREEMENTS AND PERMITS

The FLTC, as a member of the Project Development Team, coordinates with the design engineers early in the project planning or environmental document phases to determine the real property requirements and the type of FLT required. For more information concerning the FLT process, see the "Manual for Federal Land Transfers" available at: http://www.fhwa.dot.gov/realestate/fltmanual/fltman1.htm, and the Caltrans Right of Way Manual, Section 8.18.01.00, located at http://www.dot.ca.gov/hq/row/rowman/manual/ch8.pdf.

US DOT Easements

A US DOT Easement must be acquired for any permanent state highway use of USFS lands.

A US DOT Easement provides Caltrans permanent, recorded rights over U.S. land for the construction, operation, and maintenance of a highway, and the use of the space above and below the established grade line of the highway pavement for highway purposes on, over, across, in, and upon the required parcel of land.

Sometimes there is a need to amend an existing US DOT Easement such as when the project area adjacent to the existing easement areas needs to be incorporated into the project. For example, Caltrans acquired a US DOT Easement from the USFS ten years ago for a two lane highway, and now the proposed four lane project requires the acquisition of more land. Since Caltrans is proposing to change the "footprint", a new US DOT Easement will be requested for the additional properties. Amending an existing US DOT Easement is permitted using the same FLT process as securing a new US DOT Easement.

Special Use Permits

Occupancy of USFS land for highway related use outside of the public road or highway easement may be authorized by either temporary or annual SUP authorizations. Examples of special uses are:

- Temporary construction easement area
- Temporary detour
- Access road
- Construction staging area
- Material sources
- Waste areas
- Borrow pits
- Maintenance sites
- Channel changes
- Restoration work for a slide
- Seasonal location to conduct tests
- Other similar items

Caltrans initiates the SUP authorization process by forwarding an application to USFS, which reviews the terms and conditions of the application. When approved by USFS, the District Director or his designee executes the permit on behalf of Caltrans. The conditions of the occupancy and use of the property are summarized in the SUP.

Special Use Permits expire within days or years of the date the permit was issued. Renewals may require a new environmental document. The permit is not recorded.

Special Use Permits are used ONLY to obtain temporary access and/or use rights. Property rights for permanent highway related facilities crossing USFS lands must be obtained through a U.S. DOT Easement.

The USFS is authorized to collect cost recovery fees for the issuance of Special Use Permit authorizations pursuant to 31 U.S.C. § 9701 as implemented by 36 CFR § 251.58.

Cost Recovery Fees apply to SUP authorizations only and do not apply to U.S. DOT Easement requests or to projects situated completely within an existing U.S. DOT Easement.

What are Cost Recovery Fees?

Cost recovery fees are application and compliance monitoring fees assessed by the USFS, pursuant to the statutes and regulations noted above, to recover its processing costs associated with reviewing applications for special use permits, and for monitoring compliance with these permits.

When do Cost Recovery Fees Apply?

Cost recovery fees apply only to applications for use and occupancy requiring a new SUP, when there are changes to existing SUPs, when a new SUP is required due to termination of an existing SUP, and for the monitoring of SUPs issued or amended after March 23, 2006.

Cost recovery fees do not apply to Perfection of Title activities.

What is included in SUP processing and monitoring fees?

Processing Fees include:

- Reviewing applications for SUP authorization.
- Conducting environmental analyses on the effects of the proposed use, i.e. Wild and Scenic River Section 7 Analysis.
- Reviewing any applicant-generated environmental documents and studies.
- Conducting site visits.
- Evaluating an applicant's technical and financial qualifications.
- Making decision whether to issue a SUP authorization.
- Preparing documentation of analyses, decisions, and authorizations for each SUP application.

These processing fees are to be based solely upon costs necessary for processing the particular application for a SUP authorization. "Necessary for" means that but for the application, the costs would not have been incurred and that the costs cover only those activities necessary to process the application. The costs incurred for processing an application, and thus the processing fee, depend on the complexity of the project; the amount of information necessary for the authorized officer's decision in response to the proposed use and occupancy; and the degree to which the applicant can provide this information to the USFS.

Monitoring Fees:
Monitoring fees are assessed based on the estimated time needed for the USFS to ensure compliance with the SUP during construction or reconstruction of temporary or permanent facilities and rehabilitation of the construction or reconstruction site. The monitoring fees are assessed independently of any fee charged for processing the application for the SUP. Payment of the monitoring fees is due upon issuance of the SUP.

How are Cost Recovery Fees paid?
Payment should come from preliminary engineering support funds and not from Right-of-Way funds.

Who coordinates the application of a SUP?
The FLTC typically submits the SUP application to a USFS District's Lands and Special Uses Officer. An application (or multiple applications) can also be coordinated through the USFS Supervisor's office.

The SUP Application

The SUP application package should include:

- A legal description of the property needed. For material sites, the application must describe the area of the material source and the haul road by metes and bounds.
- A plat or map adequately showing the area to be covered by the SUP authorization.
- The estimated cost and time schedule for the construction of the project.
- A copy of the proposed environmental document(s) and other supporting documents such as Coastal Zone Management (CZM) consistency determinations, archeology reports, U.S. Army Corps of Engineers permits, etc.

Projects within a US DOT Highway Easement

If the project is primarily located within an existing US DOT easement, then review by USFS should be minimal. If there are project impacts expected outside the easement, then more USFS involvement may be needed. The USFS will make every effort to respond in a timely manner to requests from Caltrans for project review or input. If they are unable to respond in a timely manner due to the lack of appropriated funds, then they may request funds from Caltrans to cover the USFS review or input associated with the project through a Cooperative Work Agreement (Collection Agreement) pursuant to 16 U.S.C. § 498 and 36 CFR § 211.3.

What is a Cooperative Work Agreement?

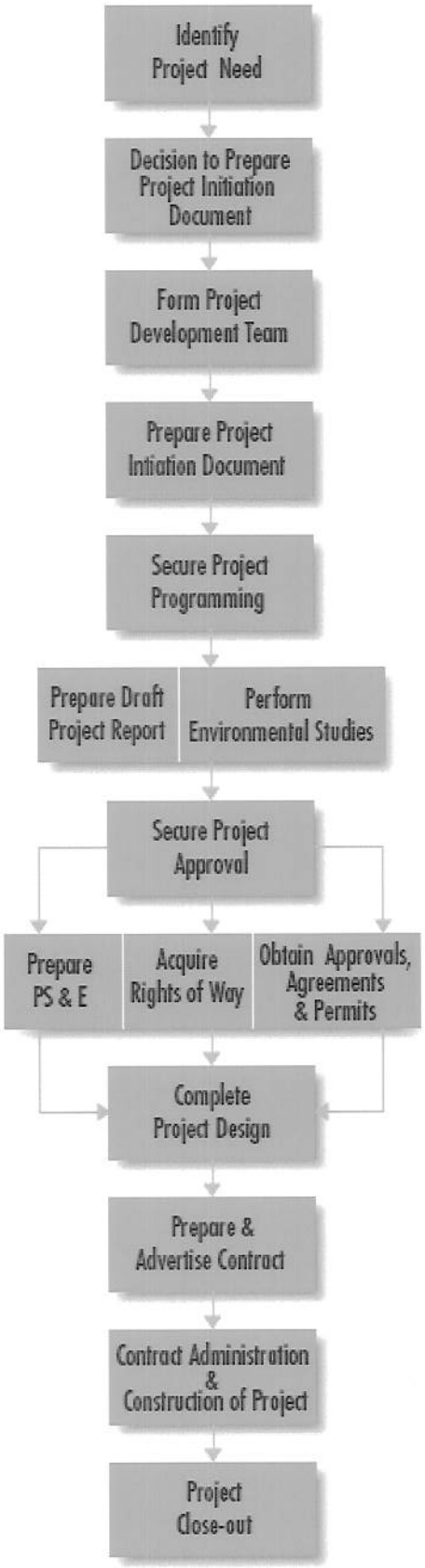
A Cooperative Work Agreement (Collection Agreement) is a voluntary agreement developed between the USFS and Caltrans to allow the use of Caltrans' funds to support and expedite the work by the USFS to support a Caltrans' project. A Collection Agreement may be appropriate when the improvements will be authorized under a new US DOT easement for a state highway project to expedite project delivery at the discretion of Caltrans. A Collection Agreement is not appropriate when the request is for a SUP authorization and should not be needed when the work and impacts are entirely within an existing US DOT highway easement(s). Generally the agreement should not be needed for minor projects involving minimal USFS review, but may be appropriate when preliminary engineering support work is extensive or when there are multiple projects requiring timely responses from the USFS. When this happens, Caltrans may agree to cover USFS expenses through this agreement in order to expedite project delivery. The USFS will request this help when appropriated funding is not available and it is unable to respond to the unfunded work in a timely manner. The work the USFS will perform and the estimated cost of the work will be specified in the Collection Agreement. When utilizing a Collection Agreement, the USFS will prioritize the work identified in the agreement and expedite the work. The Caltrans Project Manager will budget, and coordinate the execution, processing and payment of USFS collection agreements utilizing preliminary engineering support funds.

The USFS tasks funded using this instrument primarily include environmental compliance review by USFS specialists, actual analysis for environmental compliance by USFS specialists, review of Caltrans' contractor work by USFS specialists, or organizing, researching and responding to resource data requests by Caltrans' environmental specialists. Examples include completing or review of biological assessments or evaluations, Section 106 certifications, completion of fire plans, etc.

Perfection of Title US DOT Highway Easements

In 2001, Caltrans, CA Div FHWA, and USFS entered into a MOU to perfect title on all existing rights of way across USFS lands in the State of California. This Perfection of Title process was designed to convert temporary rights within California (such as R.S. 2477 rights of way, SUP areas, and areas of no known rights) to recorded US DOT Highway Easements. The 2001 MOU is available to Caltrans staff at http://pd.dot.ca.gov/row/offices/federal_land_transfer/MOUs/?datebox=

A Letter of Consent from the Regional USFS to FHWA authorizes the transfer of National Forest lands to Caltrans in a US DOT Highway Easement deed. This work will be completed in a timely manner at Regional USFS expense.

ATTACHMENT A

HOW CALTRANS BUILDS PROJECTS