

COMMON PITFALLS OF RIGHT OF WAY CERTIFICATION
LAP PROJECTS

The following summarizes a few of the many “lessons learned” in regard to obtaining right of way certification. These are some of the commonly encountered barriers to certification, all of which should be discussed ***at the earliest point possible*** between appropriate District and local agency staff, as follows:

Do you have the necessary property rights to accomplish the project?

- If work is to be performed where a contractor and/or equipment must temporarily or permanently enter property that is not owned by the local agency to construct the project, a right to do so (via fee acquisition, permanent easement, or temporary construction easement) must be acquired in accordance with the Uniform Act. ***Such acquisition must be performed by the Department.***
- If any part of an improvement must temporarily or permanently be placed outside of the local agency’s property, a right to do so (via fee acquisition, permanent easement, or temporary construction easement) must be acquired in accordance with the Uniform Act. ***Such acquisition must be performed by the Department.***
- License agreements may be used under certain limited circumstances when work to be performed in the license area can be abandoned if a property owner does not wish to execute a license agreement, no permanent improvements will remain beyond construction and the local agency will not be maintaining the area. ***The form of the license agreement document must be approved by the Department before execution by either party.***
 - A license agreement does not run with the land if there is a change in ownership and may be cancelled by the property owner at any time.
 - Areas within the plans where license agreements have not been acquired at time of certification must be depicted with no work shown on private property.
- A license agreement may ***be*** used ***ONLY*** to make a connection which is already safe and already within the applicable standards even smoother, flatter and “better.”
- The use of license agreements must be accompanied by a written assurance from a person with authority at the agency that in the event a license agreement is not executed by the owner, a safe transition, within applicable standards, can be accomplished within existing right of way. This assurance must be received prior to right of way certification.
- A license agreement cannot be used instead of a temporary construction easement.

Are you planning to use any existing easements for the project?

Although an easement may exist along the project area, this does not mean that the easement may be used for project construction.

- Any easement to be used for a project must be evaluated by the local agency’s attorney to ensure that the proposed use of the easement is allowable under the easement document. Easement documents for easements that are proposed to be used shall be provided to the Department for review.
- Recording references for easements are to be included in the construction plans.

Have you investigated title for all property to be used for the project?

- There may be areas where there is “concurrent jurisdiction. A right of way use or other such permit is required and if not obtained by the time of certification, there must be written confirmation that there is a reasonable probability it will be acquired.
- For properties, including easements, to be used for a project that are owned by the local agency, ensure that there are no encumbrances on that property. For example, there may be a utility easement that would need to be addressed before certification.
- For properties to be acquired for a project by the local agency, clear title must be procured. A title search that goes back to the beginning of records would be needed to identify all encumbrances on the title. This is relevant to the acquisition of permanent and temporary easements as well as fee title.
- The process to clear title may take many months to complete and so it is especially important that encumbrances be identified early in the project.

Are there any encroachments within the project boundaries?

- Encroachments into publicly held property within the project area must be cleared if they conflict with construction, and construction plans should clearly depict this work. If an encroachment exists that is within the area of construction and it is not addressed in the plans, the question arises of how the work can be accomplished.
- If public improvements encroach onto private property and will be accessed as part of the project, appropriate rights will be necessary.
 - The local agency will not be able to allow construction of all or part of an improvement that is encroaching onto private property (e.g., a sidewalk replacement when part of the sidewalk lies on private property) unless the appropriate right to do so (via fee acquisition or permanent easement) is acquired in accordance with the Uniform Act. ***Such acquisition must be performed by the Department.***
 - The local agency will not be able to connect to an improvement that is encroaching onto private property (e.g., tying into an existing control box) unless the appropriate right to do so (via fee acquisition or permanent easement) is acquired in accordance with the Uniform Act. ***Such acquisition must be performed by the Department.***
 - It may be necessary to modify the plans to avoid the work on private property. Alternatively, the filing of a maintenance map may be warranted, especially if the encroachment is extensive.

Does the agency propose to “tie into” Department property, work in Department right-of-way or place any improvements on Department property?

- Ensure that appropriate Department personnel have been consulted and that any needed permits or permission is clearly provided and documented as early as possible in the project.

Rules of thumb:

- All right-of-way lines are to be depicted on the plans and all work is to be shown within the right-of-way. This includes signage, pavement markings and landscaping.
- A general note should be included in the plans instructing the contractor to perform all work within and from existing right-of-way.
- Symbols that extend beyond the right-of-way will be interpreted to mean the improvements they represent extend beyond the right-of-way.

- The acquisition of property or property rights must be performed in accordance with the Uniform Act by the Department using Department staff or a prequalified Right of Way consultant. A schedule reflecting appropriate acquisition activities would be developed. Only in very rare instances, such as the acquisition by donation of needed property or property rights from another governmental entity, would the Department approve acquisition by the agency. This should be discussed very early in the process to obtain the necessary Department approval.

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