

Title Exception Guide for NRCS Conservation Easement Programs

Following is a general guide of how common title exceptions should be handled for NRCS conservation easement programs. The following is only intended as a guide and does not supersede any advice from the USDA Office of the General Counsel (OGC) or instructions from NRCS or otherwise take into account special circumstances that may result in handling a particular exception in a different manner as each transaction is case-specific. Any exceptions not determined to be acceptable must be removed or subordinated. For some complex transactions, obtaining a revised title commitment that details the additional requirements needed for the title company to address unacceptable exceptions is recommended in order to facilitate their removal.

Description of Title Exception	Non-NRCS-Held Easements	NRCS-Held Easements
General or Preprinted Exceptions. (i.e., <i>parties in possession, unrecorded easements, and encumbrances not of record; matters that an accurate survey would disclose; unrecorded liens for services and materials by mechanics and materialmen</i>)	Generally acceptable if such exceptions deemed acceptable through the completion of Certificate of Inspection and Possession and Certificate of Use and Consent processes. Execution of owners’ affidavit or surveyor affidavit may be needed have the title company remove the exception or to fully document the rationale for accepting the exception.	Generally acceptable if such exceptions deemed acceptable through the completion of Certificate of Inspection and Possession and Certificate of Use and Consent processes. Execution of owners’ affidavit or surveyor affidavit may be needed have the title company remove the exception or to fully document the rationale for accepting the exception.
Lack of Right of Access	Generally must be removed unless alternative access has been approved by NRCS (440-CPM Part 528, Subpart G, Section 528.62B).	Must be removed.
Access Subject to Terms and Conditions of xxxx	Generally must be removed; review referenced document to determine whether conditions of access are acceptable to United States.	Generally must be removed; review referenced document to determine whether conditions of access are acceptable to United States.
Taxes for Current Year, Due But Not Yet Payable	Generally acceptable.	Acceptable, unless OGC requests to place taxes in escrow until payable.
Outstanding Taxes for a Previous Year or Rights of Purchaser at Tax Sale	Must be removed.	Must be removed.
Liens and Judgments	Must be removed.	Must be removed.
Lis Pendens	Must be removed.	Must be removed.

Description of Title Exception	ACEP-ALE Easements	Non-ACEP-ALE Easements
Mortgage or Deed of Trust	Must be removed or subordinated.	Must be removed or subordinated.
Utility Right of Way	Generally acceptable subject to determination that inclusion will not impact the purposes of the easement.	Generally acceptable if the right of way does not allow improvement (such as paving, mowing, etc.) and subject to determination that inclusion will not impact the purposes of the easement.
Public Road (e.g., county road, State highway, etc.)	Public road should not be within boundaries of easement – therefore should be removed.	Public road should not be within boundaries of easement – therefore should be removed. Ensure public road is not within easement boundary description.
Public Road Right-of-Way (no existing road in right-of-way)	Generally acceptable.	If held in fee, right-of-way should not be within boundaries of easement – therefore should be removed. Subject to OGC approval, if held as an easement, generally acceptable subject to determination that inclusion will not impact the purposes of the easement.
Change in Boundary Due to Accretion or Avulsion of Waterway	Generally acceptable.	Generally acceptable. Consult with OGC if portions of the offered land were acquired as a result of accretion/avulsion.
General Public Right to Body of Water	Generally acceptable.	Generally acceptable.
General Exception for Mineral Interests	Generally must be removed, refer to mineral matrix for additional guidance.	Generally must be removed, refer to mineral matrix and consult with OGC for additional guidance.
Reserved Mineral Rights	Generally must be removed or subordinated, refer to mineral matrix for additional guidance.	Generally must be removed or subordinated, refer to mineral matrix and consult with OGC for additional guidance.
Mineral Leases or Deed	Oil/gas lease, generally must be removed or subordinated. Surface mining leases, must be removed.	Must be removed.

Description of Title Exception	ACEP-ALE Easements	Non-ACEP-ALE Easements
Life Estate	Must be removed and life estate and remaindermen holder must sign the deed.	Must be removed and life estate and remaindermen holder must sign the deed.
Rights of heirs	Must be removed.	Must be removed.
Terms and Conditions of NRCS Conservation Easement Deed	Only acceptable if it excepts from coverage the terms and conditions that limit the rights of the grantee.	Generally removed, only acceptable if specific OGC language is used.
Existing Conservation Easement	Only acceptable if the terms of the existing easement offer less protection than the proposed NRCS easement and the terms are compatible.	Only acceptable if the terms of the existing easement offer less protection than the proposed NRCS easement and the terms are compatible.
Within Boundaries of Irrigation or Diking District; Drainage Easements; Levee Easements	Generally acceptable if it does not interfere with the purposes of the conservation easement.	Only acceptable if determination is made that rights of irrigation or diking district or drainage or levee easement will not interfere with the purposes of the conservation easement.
Flowage Easement	Generally acceptable if it does not interfere with agricultural viability.	Only acceptable if the flowage easement does not allow for the removal or manipulation of soil or vegetation or otherwise limit or interfere with the restoration and management of the easement.
Leases or Easements for Wind or Solar Energy Development	Must be removed or subordinated unless determined compatible with agricultural uses of the land.	Must be removed or subordinated.
Leases for Cellular Towers or Billboards	Must be removed or subordinated, if includes the right of first refusal or determined incompatible with the purposes of the conservation easement.	Must be removed or subordinated if includes the right of first refusal or determined incompatible with the purposes of the conservation easement. Consult with OGC regarding issues or questions regarding the impacts of the lease on the project as designed.

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Agricultural Leases	Must be subordinated.	Must be terminated prior to acquisition, or subordinated to the conservation easement if it is an acceptable grazing lease on a grazing reserved rights WRE or an HFRP easement.
Public Access Easements or Hunting Leases	Generally acceptable unless use levels interfere with easement purposes.	Generally acceptable unless use exceeds levels authorized in the deed.
Bankruptcy	Consult with OGC or an EPD realty specialist before proceeding. Must have bankruptcy court approval prior to closing the easement.	Consult with OGC or an EPD realty specialist before proceeding. Must have bankruptcy court approval prior to closing the easement.
Existing Covenants or Restrictions	Must be released and removed if the existing covenant or restriction would frustrate the purposes of or provides similar protections to the conservation easement.	Must be released and removed if the existing covenant or restriction would frustrate the purposes of or provides similar protections to the conservation easement. Consult with OGC on the impacts of these restrictions/covenants on title as laid out in DOJ Title Regulation 6.2.1.
Contracts for Sale	Consult with an EPD realty specialist before proceeding.	Consult with an EPD realty specialist before proceeding.
Options to Purchase	Must be terminated or subordinated.	Must be terminated and removed.
Rights of First Refusal	Must be terminated and removed.	Must be terminated and removed.
Previously Reserved Rights	Review reserved right; determine impact; accept or require subordination or release.	Review reserved right; determine impact; accept or require subordination or release.
Unrecorded Leases and Tenancies	Generally acceptable for the title commitment but must be addressed in the certificate of use and consent. Tenants are identified on Certificate of Inspection Possession and may need to execute disclaimer.	Attempt to remove through affidavit by landowner. Generally acceptable for the title commitment but must be addressed in the certificate of use and consent. Tenants are identified on Certificate of Inspection Possession and may need to execute a DOJ disclaimer.

Description of Title Exception	ACEP-ALE Easements	Non-ACEP-ALE Easements
Private Right-of-Way	Generally acceptable as long as the scope and location of the private right of way is fully described; treat this similar to a road.	Generally acceptable as long as the scope and location of the private right of way is fully described; treat this similar to a road.
Other Encumbrances or Exceptions of Record	Must be removed.	Must be removed
Other Exceptions Not of Record	Generally acceptable.	Generally acceptable, but should try to remove with owner’s affidavit.
Gap Check (i.e., items appearing after the date of the title commitment but prior to closing)	Must be removed.	Must be removed.
Other Federal Agency Interests	Consult with an EPD realty specialist before proceeding.	Consult with OGC. Must be resolved in accordance with DOJ Title Regulation 6.2.3, which identifies that the later arriving agency must initiate communications with the agency holding the pre-existing interest before proceeding. If the pre-existing use is compatible with the intended use of the land, agreement should be reached to document the respective rights of each agency in a memorandum of understanding or other appropriate document. If the existing Federal interest is incompatible with the new intended use, the two agencies must determine how to proceed. The second acquisition should not take place until the conflict is resolved.