Quality Improvement Team Report

Title Information and Clearance Requirements for Low Value Parcels

Federal Highway Administration

Regions 4 and 5

July 10, 1992

Don Keith (IL)
Murray Piper (WO)
Walt Gibson (FL)
Pete Nyberg (R5)
Roger Szudera (WI)

TABLE OF CONTENTS

Background 1

Objectives 2

Scope 2

Methodology 3

Findings and Recommendations 3

Conclusions 10

Exhibits 12

QUALITY IMPROVEMENT TEAM (QIT) SURVEY OF TITLE INFORMATION REQUIREMENTS AND TITLE CLEARANCE FOR LOW VALUE PARCELS

Background

Federal regulations state that interests acquired in all rights-of-way for Federal-aid highway projects shall be adequate for construction, operation and maintenance of the highway and for the protection of both the transportation facilities and the traveling public. Refer to 23 CFR Sections 710.203(d) and 712.203(a). There is no Federal requirement for a specific type of title to be acquired. If needs can be met by acquiring partial interest in property, then the regulations contain the flexibility for acquiring permanent easements and other less than fee-simple interest. Also, the title or interest acquired may be acquired subject to other rights or interest such as the various classes of liens and encumbrances as long as the risks are reasonable. State acquiring agencies may take advantage of the flexibility contained within 23 CFR to the extent allowable by State laws, regulations, policies and Attorney General opinions.

In acquiring rights-of-way States must of course determine who owns the property and who has possessory interest. In addition it is usually necessary to also determine what other interests encumber the property. Thus, the acquiring agency must obtain sufficient title information to assure successful acquisitions which will not unduly jeopardize the highway investments. What constitutes sufficient title information is a decision that each acquiring agency must make. Virtually all privately owned real estate is encumbered in some manner, e.g., mortgages, taxes, easements, various liens, tenant interest, etc. In addition there are often ownership questions resulting from such items as trusts, wills, and divorces. One of the actions taken by the acquiring agency is the clearance or satisfaction of encumbrances of title in order to sufficiently protect the right-of-way. The question is, however, how far do the acquiring agencies need to go to protect the right-of-way recognizing there are vast differences in the use of real estate, ownership complexities, nature of the right-of-way acquired, and values of the acquisitions? Is it necessary or desirable to obtain the same title information and to clear title encumbrances to the same extent for all parcels acquired regardless of dollar amount or complexity of the taking?

Although most States continue to have large and complex land acquisition programs involving high value and difficult acquisitions, a significant percentage of the acquired parcels (half or more in the States surveyed) are of the low value and noncomplex nature often encountered on many of the widening and resurfacing type projects. Flexibility in the acquiring agencies' title procurement and title clearance procedures for parcels of

various value and complexity would seem as necessary and logical as the need for flexibility in appraisal requirements. For example, we now have various appraisal formats to fit the complexity of the appraisal problem including waiver of appraisal up to $2,500 on noncomplex parcels. Why not then consider various title information/clearance formats for low value and noncomplex parcels within the parameters of reasonable risk?

Objectives of Survey

The objective of the Quality Improvement Team survey was to examine procedures used by various State agencies in obtaining title information and in clearing title encumbrances for noncomplex parcels of low value. Elements of this objective included:

- Evaluate risk management opportunities.
- Seek good business practices and innovative ideas.
- Make recommendations for cost-effective title information and title clearance policies and procedures.
- Identify potentially unnecessary procedures in the title procurement and title clearance areas.
- Make recommendations on techniques of obtaining and updating title information.

Scope

The survey was conducted in Regions 4 and 5. The QIT visited the States of Georgia, North and South Carolina and Tennessee in Region 4, and the States of Illinois, Indiana, Michigan, Minnesota and Ohio in Region 5. Interviews were conducted with key personnel in both the Division and the State offices. At the State level, Right-of-Way Directors, Acquisition Managers, Chief Counsel Office representatives and Attorney General Office representatives were interviewed. In those States with decentralized offices, visits included both the Central Office and one District or Region Field Office.

For the purposes of this QIT survey low-value parcels were defined as noncomplex and not to exceed $10,000. The team reviewed and analyzed States' policies and procedures for title procurement and title clearance. Data source documents were limited to those less than two years old.

Methodology

Questionnaires/guidelines were developed for use in interviews. Copies of State policies and procedures were obtained and reviewed prior to each State visit. Field reviews and interviews were by teams of two or three members except in the States of Florida, Illinois and Wisconsin where team members Gibson, Keith and Szudera were sufficiently familiar with the States' operations to allow those team members to individually conduct surveys in their respective States. At the conclusion of each State survey, individual State QIT Findings reports were prepared and presented to the respective Division Realty Officer prior to the team's departure with a request that the Division and the State review and comment on the State Findings report. The Division Realty Officer in the State surveyed, then reported back within one week to the QIT team on any suggested changes or clarifications. This process helped to avoid misunderstandings. The individual State Findings reports have been retained as back-up reports. The team then developed a draft summary report which included findings and recommendations to help accomplish the objectives of the QIT survey. The recommendations presented within this report are considered as good business practices which should be, but are not required to be, adopted by the State. The final report will be distributed to all interested parties through the Regional and Washington Offices.

Findings and Recommendations

1. <u>Authority for Title Requirements</u>:

None of the States visited had specific statute requirements regarding the type or quantity of information to be obtained. States obtain title information, abstracts, commitments and other evidence of title based on policy or Attorney General opinions. Several States were, however, required to obtain marketable title or comply with other laws which more clearly defined title. In general, the States are required to obtain title which is sufficient to protect the transportation facility and the traveling public. A few States are required to obtain title information on all parcels acquired, but most State laws are not specific as to the type of information required.

It appeared in many instances State personnel had assumed there is a State law which requires the complete title search for each parcel no matter what the value of the parcel and that title abstracts, commitments, opinions, etc., must be obtained. Upon further questioning, however, the State personnel agreed that perhaps this was not entirely the case.

Recommendation:

The States should look at their respective legislation and rules to determine just what is required to be done in this regard and see if there are opportunities to limit the amount of information that will support a determination that adequate title is being acquired.

2. Initial Title Data Procured:

The title information gathering phase generally begins when the surveyors go to the courthouse or contact property owners to obtain information for the road survey. This information often includes last deed of record or other limited searches. The information obtained is used to prepare the preliminary right-of-way plans. These plans are then generally sent to the right-of-way section which verifies the plan information by title searches in the courthouse and in many instances, interviews with property owners and tenants. In those States that use title companies/attorneys/etc., the plans and/or specific title information (last owner, 5-year search, etc.) may be provided to the company by the State.

In some States, all title work is performed by State personnel. The State of Georgia has a detailed training program for training staff agents in title search. In most surveyed States, staff personnel verify title information upon the initial visit with property owners. Staff personnel also verify title information when preliminary plans are received. In many cases title information collected by staff personnel is made available to appraisers for use in appraisals. This information is also provided to title companies and attorneys for title reports. In some cases, the information is returned to the State with little change or additional information except a signature of approval from the title company or attorney. In most cases the information gathered by the State would be sufficient to verify ownership and title for low-value parcel acquisition purposes.

There are differences in the information obtained. In Minnesota every parcel gets an Attorney's Certificate of Title which is based on a 40-year search (required by the Minnesota Marketable Title Act). Michigan obtains title commitments for all parcels. In South Carolina title certifications are obtained for parcels valued at greater than $20,000 and in North Carolina title reports are obtained from attorneys for parcels valued at greater than $10,000. A last deed of record is used in these two States for low-value parcels. In Georgia parcels of less than $50,000 can be handled by staff personnel searching back 50 years, but parcels of less than $10,000 require a search back only 20 years. Any parcel handled by an attorney is searched back 50 years so that it conforms to

Georgia's condemnation styling. Ohio, as of January 21, 1992, uses a last deed of record for parcels valued less than $2,500 but requires a 42-year title abstract for all other parcels and requires a full title report for all parcels which go to condemnation. Indiana, until September 20, 1991, required a 20-year search as opposed to a last deed of record for low-value rural or residential properties. Indiana has now adopted the last deed of record procedures for low-value rural or residential properties. Consideration is being given to using the same criteria for low-value commercial properties. Low value has not been specifically defined in Indiana.

Recommendation:

States should establish a low-value parcel threshold for title purposes and obtain the last deed of record for verification of title. Where this is not possible because of State law or administrative procedure, corrective legislation, administrative rule change, or legal opinion should be pursued to allow such a change. States should use staff personnel when possible for the title verification to maximize savings. (The State of Georgia has a detailed procedure for training staff agents in title searches.)

3. Costs:

The costs of obtaining title information are represented by time and money. The time to obtain title information did not seem to present a great problem when staff personnel did the work. Normally, title companies and attorneys did a reasonably timely job. However, title work for the State would take a back seat to other title company work in some cases. In some situations, this presents a problem and creates delays in meeting letting schedules. The companies/attorneys were also slow to respond to requests to deliver the titles in accordance with contract requirements. Alternatives for the State in these situations were to contract with someone else, do the work in-house or wait for the work to be delivered.

The monetary cost of obtaining title information ranged from $50 to $300 per parcel. The cost when staff personnel were used could not be determined. Most States indicated that the cost would be less than that charged to contract for the information. The services supplied by contracts include the initial title opinion or commitment, generally one update, and in a few cases, a minimal amount of title insurance.

Title insurance, in most cases, is not obtained by the States since most States are self-insuring. (As a general note of information on title insurance, the State of Idaho has revised its requirement of obtaining title insurance on each individual parcel and now obtains one title insurance policy

on the entire project which has resulted in significant savings.) For those States that buy title insurance, costs were found to be in the $2.50 to $3.50 range per $1,000 of the value of the acquired right-of-way.

Recommendation:

As noted earlier, in many cases title information obtained by staff agents is supplied to title contractors. This information is sufficient to be used on low-value parcels, and the States should consider using the staff-obtained title information as the sole basis of title information for low-value parcels. If contracting is to be used, minimal information should be requested such as last deed of record. Title insurance is generally not recommended on low-value parcels unless the title policy covers the entire project.

4. Title Updates:

Regardless of the type of preliminary title report obtained, most of the States require updates or datedowns after four to six months from the date of the original report and prior to closing. In cases involving condemnation, updates are generally required at the time of the filing of the condemnation petition. In Indiana all updates are obtained by staff agents even in those cases where the preliminary reports have been submitted by fee abstractors or by title insurance companies. In other States the updates are provided by the same party that supplies the preliminary report. Updates are required to assure that there have been no changes in ownership or additional encumbrances since the time of the preliminary report. Updates generally require an additional trip to the court house by staff agents or additional work by the contractor.

All States surveyed check with property owners at various stages of the right-of-way project to obtain owners' information as to the condition of title. For example, appraisers and negotiators obtain ownership information and also attempt to ascertain the existence of any unrecorded interest in the property such as tenants' interests, potential mechanics' liens, and unrecorded contracts for deed. In addition, several States such as Georgia and Ohio obtain an "Owner's Affidavit" at the time of closing of the parcel. This owner's affidavit is a sworn and notarized statement from the owner which identifies any unrecorded interest not shown on the title reports. Several States are obtaining an owner's affidavit or some similar document at or near the time of closing and; at the same time, are making a return trip to the courthouse to update preliminary title reports. Return trips to the courthouse for updating of title is time consuming. The QIT survey team discussed with several States the

desirability and the feasibility of using the owner's affidavit as a substitute for returning to the court house to update the preliminary title. It was the consensus of opinion that this would be an effective procedure for low value parcels.

Recommendation:

The owner's affidavit can serve as a title check for unrecorded interest and as an update of ownership information from the preliminary title report for low-value parcels. The owner's affidavit could also eliminate the need to return to the courthouse for title updates or requests for updates from contractors.

5. Consultant Prepared R/W Plans and Title Requirements:

When consultants prepare right-of-way plans, title information is generally provided by the States following the same State procedures as if done in-house. Consultants preparing right-of-way plans are not generally allowed to do their own title searches. Preliminary title reports are supplied by the State or by approved abstracting attorneys, or approved title companies. This same restriction is also generally applicable to turn-key consultants, i.e., the State will provide the consultant with the necessary title reports. This helps to assure quality control and that the States acquire sufficient interests.

6. Computer Technology in Title Work:

Most States surveyed have limited use of computer technology for their title work. Most of the counties in the various States have not computerized their title records with the exception of some of the more sophisticated, urban counties. One exception, TennDot, has computer links with its counties which have computerized all of their county title records. This obviously saves staff agents considerable time in searching the records. In Indiana, staff agents are using laptop computers when gathering title data for preliminary abstracts. Illinois has a Land Acquisition System (LAS) with computerized project and parcel data including a warrant request screen that tracts the status of all parcel title encumbrances listed on schedule B of the title commitments. This helps the Central Office assure certain title objections have been satisfied prior to release of warrants.

Recommendation:

States should assess the feasibility and desirability of increased use of computer technology in their title data procurement and title clearance process.

7. Title Approved Subject To Exceptions:

Most of the States surveyed approve title subject to certain exceptions. Refer to attached matrix exhibit No. 1. Only two States indicated they must clear all title objections which affect permanent takings regardless of dollar value or complexity. Most States can and will waive partial mortgage releases for low value and noncomplex takings when the remainder property is unaffected and the remainder property is of sufficient value to cover the mortgage balance. For example, North Carolina will waive partial releases up to $2,500 on Federal-aid ROW projects and up to $5,000 on straight State projects. Consideration is being given to making the $5,000 applicable to Federal-aid right-of-way projects. Most States will also waive tenant releases on minor, low-value takings where the tenant is obviously unaffected. In those States which waived the partial release of mortgages, there were no negative repercussions. However, there were considerable savings of time and money since many releases can take 30-45 days and processing fees of $150 to $200 per mortgage are not uncommon. The States which are acquiring low-value parcels subject to exceptions have found that the risks are negligible.

Recommendation:

All States should consider seeking needed administrative and/or legislative relief to enable them to acquire low-value parcels subject to exceptions in those instances where the cost and time savings would obviously outweigh any minor increment in risk to the agency.

8. Title Approval:

In most of the States surveyed the State Right-of-Way Directors have the authority to approve title prior to closing; and unless a parcel is assigned to condemnation, the Attorney General's Office or the Chief Counsel's Office is rarely involved except in an advisory role. In Wisconsin the authority to approve title has been delegated to the District Highway Office. Thus, title approval, including decisions to acquire low-value parcels subject to exceptions, is delegated to the acquiring agency without the need to seek approval from the Attorney General or the Chief Counsel. For low-value parcels this saves time and money and frees the legal offices to concentrate on more consequential legal matters.

Recommendation:

Title approval, including the decision to acquire subject to exceptions, for low-value parcels should be delegated to the lowest possible level within the acquiring agency. For

decentralized States, consideration should be given to delegating this authority to the District or Regional level with the Central Offices acting in an advisory role.

9. Title Clearance Problems with Mortgagees - Other Federal Agencies:

Many States are experiencing difficulties with certain lenders in obtaining partial releases of mortgages, especially on loans which are insured or guaranteed by Federal agencies such as the Veterans Administration (VA), the Federal Housing Administration (FHA) and the Farmers Home Administration (FmHA). Oftentimes the Federal agency wants additional information from the mortgage companies handling the loan releases, and delays of six months to a year were sometimes encountered. The State of Georgia has developed procedures to facilitate and expedite the processing of VA insured loans by developing an "Acquisition Summary Sheet" which accompanies all release requests to lenders of VA backed loans. See exhibit No. 2. The summary sheet along with a plat of the partial acquisition is provided to the lender and forwarded to the VA along with the mortgage release package. Also, in Georgia, it has been determined that VA releases on parcels $2,500 or less are not required according to VA policy.

In those States which have the option to acquire low-value takings without partial releases, there are, at times, potential liabilities for the grantor due to the "due on sale clauses" in some mortgages. The lender may require that the owner pay all or part of the compensation for the portion of the property acquired for the project. In those particular cases, the State can offer to assist the owner in obtaining a release from the lender and pay any release fees. However, this does not present a major problem, and does not require that mortgagees' interest be cleared to close a parcel for most low-value takings.

Recommendation:

States experiencing problems in obtaining timely mortgage releases from government insured or guaranteed loans administered by the VA, FHA, FmHA or other Federal agencies should consider procedures similar to those developed by Georgia DOT. Letters of understanding should be sought to expedite partial releases or to waive partial releases for low-value, partial takings where the remainder is unaffected and of sufficient value to cover the loan balances. The Federal Highway Administration Regional and Division offices will be available as needed to assist in seeking agreements.

10. Title and Title Clearance for Contaminated Properties:

If hazardous substances are on, or are suspected to be on a parcel, the States surveyed will generally investigate title as far back as needed and will generally not acquire title subject to exceptions. These parcels are of high risk by definition, and abbreviated title and title clearance procedures are not deemed prudent. In Tennessee the State's title contract includes a clause which requires a search for liens filed under the Hazardous Waste Management Act of 1983. If such liens are found, a copy of the lien must be furnished. If the liens have been released, then a copy of the release must be furnished.

Recommendation:

Abbreviated title search and title clearance procedures should generally be avoided on high-risk, contaminated or potentially contaminated parcels.

11. Condemnation Required as a Result of Title Clearance Problems:

As a positive finding, there have been very few condemnation actions required by the surveyed States caused by the inability to obtain a timely release or subordination of title objections. Most condemnation cases are over money matters. Also, there are occasional so-called friendly condemnation cases generated by unknown owners, inability to convey, bankruptcy proceedings, incompetent owners, etc. These cases are related to who actually owns the property and whether they have legal power to convey. They are generally cases dealing with possessory rather than nonpossessory interests and require formal title clearance procedures.

Recommendation:

States should avoid condemnation for relatively minor title clearance issues.

Conclusions

The title search and title clearance process has traditionally been one of the most conservative aspects of the states right-of-way program; one that has not been receptive, until recently, to "risk management" techniques/procedures. Past trends were to obtain the full-blown title reports and to clear the title of each and every title objection regardless of the value and complexity of the parcel being acquired. The current trends, however, are to consider and to analyze the risks and the benefits to the acquiring agency of obtaining abbreviated title reports and of acquiring title subject to certain title exceptions on low value parcels.

The States surveyed exercising this risk management have concluded that the risks are minimal and the cost and time savings are significant. We encourage and continue to support more cost effective and efficient procedures by all states in their title work.

	Title Subject to Exceptions	Waive		Process Fees	Comments
		Mtg Partial Rel	Tenant Int		
MN	Yes-State Director ROW	Yes	Yes	200-400	
IN	Yes-Chief of Land Acq.	Yes-On Parcels < $2,500	Yes	100-1,000	-no neg repercussions -time/cost savings, no condemnations -30-45 days clearance
OH	Yes	Yes	Yes	150	-no serious problems -time/cost savings -few condemnations due to waiving releases -1 day -> months for clearance
TN	Yes-Regional ROW Director	Yes < $150	Yes	75-150	-legal ethical standards personal liability results in most releases being obtained -no condemnations -closing fees <$100/tract
GA	Yes-<$2,500 ROW management	Yes	Yes	100-500	
MI	Seldom-State Laws	Seldom	Seldom	Generally None	-3-6 wks to close after sign. of owner -closing fees $150-$200; -no condemnations
IL	Not allowed by AG opinion	No	Yes	100-260	-2 wks for clearance up to 6 mths for condemnation title
SC	Yes-Director of ROW	Yes	Yes	Minimum, if any	-Low-value parcels up to $20,000
NC	Yes-ROW Branch Management	<$2,500 FA <$5,000 NFA		100	-No condemnation -time/cost savings -60-90 days clearing title for $500 -low-value parcels = $10,000
WI	Yes-District RE Chief	Yes	Yes	50-250	-each of the 8 Districts process exceptions differently

Exhibit No. 1

GEORGIA DEPARTMENT OF TRANSPORTATION

ACQUISITION SUMMARY SHEET

PARCEL NO. _____ PROJECT NO. _____ COUNTY _____

OWNER: _____

ADDRESS: _____

_____

VA LOAN NO: _____

AREA OF TRACT TAKEN: _____ (SEE ATTACHED PLAT)

AREA OF TRACT REMAINING: _____

VALUE OF PROPERTY TO BE ACQUIRED FOR RIGHT-OF-WAY

VALUE BEFORE TAKING	$ _____
VALUE OF LAND TAKEN	$ _____
VALUE OF IMPROVEMENTS TAKEN	$ _____
OTHER	$ _____
CONSEQUENTIAL/SEVERANCE DAMAGES	$ _____
VALUE AFTER TAKING	$ _____

FOR ADDITIONAL INFORMATION CONTACT:

Mr. David P. Meshberger
Office of Rights of Way
Department of Transportation
No. 2 Capitol Square
Atlanta, Georgia 30334
(404) 656-5372