



**DEPARTMENT OF THE ARMY**  
U.S. Army Corps of Engineers  
WASHINGTON, D.C. 20314-1000

REPLY TO  
ATTENTION OF:

CEMP-CR/CECC-R

JUN 10 2008

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Real Estate Policy Guidance Letter No. 26 – Easements to Support Water Supply Storage Agreements and Surplus Water Agreements

1. Purpose. To establish new policy on the timing of the issuance of easements for water supply storage agreements and surplus water agreements and the issuance of a special format for water pipeline easements that contains an explicit termination for noncompliance provision. For purposes of this guidance, "water supply agreement" is used to describe a water supply storage agreement, surplus water agreement, or any other agreement authorized by law between the Army Corps of Engineers and a non-Federal entity for the storage, withdrawal, or other authorized use of water or storage in a Corps project or facility.
2. Background. Under 10 USC 2668 and earlier statutes that have subsequently been repealed, the Army is authorized to grant easements for various purposes including water pipelines to support water supply agreements at various projects. These easements are granted for no consideration and may be perpetual, although subsequently repealed statutes did limit the term to 50 years. Recent litigation involving various water supply agreements highlight the need to revise the timing and content of easements entered into by the Corps for water pipelines and facilities. Based on a review of easements currently in litigation, the following scenarios were revealed.
  - a. Easements were executed for water intake facilities and water pipelines prior to execution of water supply agreements; however, the easements did not contain conditions which tie the easement to the water supply agreement nor a reservation of the right to terminate the easement if the water supply agreement was not entered into or was terminated by the parties.
  - b. Many of the easements clearly stated that only the right to construct, operate, and maintain water intake facilities and water pipelines was granted. Other easements specifically stated that the easement did not authorize the withdrawal of water and that a separate water supply agreement was required. However, in some instances, once the facilities and pipelines were constructed, withdrawal of water began without a water supply agreement and there was no apparent attempt to enforce the lack of authority for water withdrawal.

c. In some cases the easements implied that a water supply agreement existed, when in fact it did not, and in other cases the easements referenced a water supply agreement that was properly executed but is now in default or void and is no longer in effect.

d. Both the earlier and now rescinded ENG Form 1361, Easement for Right of Way (Pipeline), and the standard easement form for water pipelines, Figure 8-D-2 of ER 405-1-12, Chapter 8, dated 30 September 1994, describe conditions for termination of a water pipeline easement, including interference with the use or disposal of the land and the statutory termination clauses of failure to comply with the terms, non-use for a two-year period or abandonment. If an existing easement references a water supply agreement and contains a condition that requires compliance with the water supply agreement, this clause in the standard easement would allow termination of the easement in the event of noncompliance with any of the terms of the water supply agreement.

3. Policy. In order to correct these situations, promote preventative law and otherwise protect the interests of the United States, effective immediately, no easement that supports any type of water supply agreement will be executed prior to the water supply agreement being executed by all parties. In addition, a special format for water pipeline easements has been developed. This new format provides for an explicit reference to the water supply agreement and provides an explicit provision for termination for noncompliance with any of the terms and conditions of the water supply agreement. This revised format is attached and will be used for all future easements, including renewals, granted to support any type of water supply agreement. Finally, if an existing easement for water pipelines associated with a water supply agreement is supplemented, an explicit condition requiring compliance with the water supply agreement and the revised termination-for-noncompliance provision will be added to the easement.

4. Non-applicability. This memorandum does not apply to easements granted to municipal or other entities as part of just compensation for preexisting water rights and facilities under a relocation agreement or to individuals with documented water rights that pre-date the project.

5. Duration. The policies stated herein will remain in effect until amended or rescinded by Policy Memorandums, Policy Guidance Letters, Engineers Circulars or Engineer Regulations.

FOR THE COMMANDER:

  
SCOTT WHITEFORD  
Acting Director of Real Estate