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23 CFR Parts 635, 710, and 810
Right-of-Way and Real Estate; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 635, 710, and 810

[Docket No. FHWA–2014–0026]

RIN 2125–AF62

Right-of-Way and Real Estate

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is revising its regulations governing the acquisition, management, and disposal of real property for transportation programs and projects receiving funds under title 23, United States Code. The revisions are prompted by enactment of the Moving Ahead for Progress in the 21st Century Act (MAP–21). Section 1302 of MAP–21 includes new early acquisition flexibilities that can be used by State departments of transportation (SDOT) and other grantees of title 23 Federal-aid highway program funds. This final rule addresses the use of those new early acquisition flexibilities. The FHWA is also updating the real estate regulations to reflect the agency's experience with the Federal-aid highway program since the last comprehensive rulemaking for part 710, which occurred more than a decade ago. The update clarifies the Federal-State partnership, streamlines processes to better meet current Federal-aid highway program needs, and eliminates duplicative and outdated regulatory language. The enactment of the Fixing America's Surface Transportation (FAST) Act had a minimal effect on this rule.

DATES: This final rule is effective September 22, 2016.

FOR FURTHER INFORMATION CONTACT: Arnold Feldman, Office of Real Estate Services, (202) 366–2028, email address: *Arnold.Feldman@dot.gov;* or Robert Black, Office of the Chief Counsel, (202) 366–1359, email address: *Robert.Black@dot.gov*; Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 7:30 a.m. to 5:00 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

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Electronic Access and Filing

This document and all comments received may be viewed online through the Federal eRulemaking portal at *http://www.regulations.gov.* The Web site is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: *https://www.federalregister.gov.*

I. Background

The FHWA published a Notice of Proposed Rulemaking (NPRM) on November 24, 2014 (79 FR 69998), proposing to amend regulations governing the acquisition, management, and disposal of real property for transportation programs and projects receiving funds under title 23, United States Code.

Since the publication of the NPRM, the FAST Act was enacted into law on December 4, 2015. The FAST Act has minimal effect on this rule. The FAST Act at section 1109 repealed the Transportation Alternatives Program (TAP) (23 U.S.C. 213) and replaced it with a set-aside of Surface Transportation Block Grant (STBG) program funding for transportation alternatives (TA). The final rule has been changed to reflect the new program name.

This final rule retains the major NPRM provisions without change. In particular, this final rule adds new authorities for early acquisition of property to part 710 and clarifies the Federal-aid eligibility of a broad range of real property interests that constitute less than full fee ownership. It streamlines program requirements, clarifies the Federal-State partnership, and provides a comprehensive update of part 710. Related regulations in 23 CFR parts 635 and 810 were also updated to ensure consistency with the part 710 changes. The updates to 23 CFR parts 635, 710, and 810 better align the language of the regulations with current program needs and best practices.

As proposed in the NPRM, important changes in the final rule include:

(1) Expanding the permitted use of conditional right-of-way certifications that allows a grantee to proceed with construction contract bidding in certain situations where not all real property interests needed for the project have been acquired;

(2) clarifying the roles and responsibilities of SDOTs, their subgrantees, and those entities carrying out a Federal-aid project on behalf of the SDOT;

(3) clarifying the use of Stewardship/Oversight Agreements between FHWA and the SDOT, and specifying which approvals required under part 710 are assigned to the SDOT;

(4) providing authority as to how grantees other than the SDOT can use acceptable right-of-way (ROW) procedures other than the SDOT ROW manual to meet their compliance and oversight responsibilities for real property;

(5) simplifying right-of-way use requirements, including combining the concepts of air space and air rights agreements into the one concept of ROW use agreements to handle leases and other time-limited non-highway uses;

(6) eliminating detailed ROW requirements for design-build projects;

(7) establishing a requirement for a real property agreement between FHWA and an acquiring agency for certain eligible transportation alternative projects funded under the STBG Program; and

(8) implementing the early acquisition provisions of MAP–21 that improve a State's ability to preserve real property for a transportation facility.

As part of the NPRM, FHWA estimated the incremental costs associated with the new requirements proposed in the NPRM that represented a change to current practices for State DOTs and Metropolitan Planning Organizations. The FHWA believes that the expected qualitative and quantitative benefits from the use of the early acquisition flexibilities alone will exceed the cost of implementing the rule. In addition, FHWA believes that significant benefits may accrue because this rule will clarify and streamline additional requirements including property management requirements, stewardship and oversight requirements, and Federal Land transfer requirements. The FHWA did not receive comments on its cost estimates or discussion of benefits.

All comments received in response to the NPRM have been considered in adopting this final rule. Comments were received from 18 entities. The commenters included: 14 SDOTs, the American Association of State Highway Transportation Officials (AASHTO), one Federal Agency, one consultant, and one private citizen.

II. Analysis of Comments

The following discussion summarizes the comments submitted to the docket on the NPRM, notes changes that have been made to the final rule, and states why certain recommendations or suggestions have not been incorporated into the final rule.

General Discussion of Comments

In general, most of the commenters expressed support and appreciation for

the revisions and concurred that the rule will improve efficiency, effectiveness, and accountability in the delivery of transportation programs and projects receiving funds under title 23 of the United States Code. Three commenters asked that FHWA include provisions for Construction Manager General Contractor (CMGC) and appraisal valuation waiver limits. Several commenters proposed that additional flexibilities be included in this final rule and also requested additional guidance or regulatory language on implementation of several provisions.

The FHWA has responded to each comment received during the comment period and has made changes to the final rule where necessary. The FHWA is developing an implementation guide and a set of frequently asked questions to assist with the implementation of the final rule.

Comments on Construction Manager/General Contractor

Two commenters, both from the California DOT (Caltrans), proposed to include CMGC in the final rule. One commenter suggested referencing it in the regulation at 23 CFR 635.309, the section on authorization of ROW and the other commenter suggested developing a new section of the regulation on CMGC. Also, Caltrans noted that CMGC methods are no longer a demonstration project but rather an alternative method of project delivery and as such, should be referenced by this section (23 CFR part 635).

The FHWA does not believe that incorporating CMGC by reference in 23 CFR 635.309 will effectively address all issues pertinent to CMGC. The FHWA also does not believe that addressing CMGC is within the scope of this final rule on real estate acquisition, as CMGC is a broader topic focused primarily on contracting and project development issues. Although CMGC will not be further addressed in this final rule, FHWA published an NPRM on CMGC on June 29, 2015, at 80 FR 36939.

Comments on Right-of-Way Certification

Several commenters (AASHTO, New York State DOT (NYSDOT), Oklahoma DOT (ODOT), and Washington State DOT (WSDOT)) supported providing additional flexibility in the use of conditional ROW certifications.

The AASHTO suggested that a ROW certification should not be required as early as the submittal of Plans, Specifications, and Estimates (PS&E) to FHWA, but States should instead be allowed to provide this certification as late as 30 days prior to issuance of the Notice to Proceed (NTP).

The FHWA does not believe that a standard allowing submission of a ROW certificate 30 days prior to issuance of a NTP is consistent with the purpose, intent, and timing of the ROW certificate. In part, a standard allowing submission of a certificate 30 days prior to the NTP may introduce uncertainty in the bid process, give rise to contractor delay claims, and may cause property owners to be more frequently in the path of construction. The FHWA believes that requiring a ROW certification at the time of PS&E, coupled with the flexibility to utilize conditional ROW certifications to allow advertising the project for bid while continuing to clear the ROW, strikes the appropriate balance between advancing a project while also ensuring property owners' rights are protected.

The NYSDOT noted that it might be clearer to use terminology other than NTP since it is typically associated with design-build projects, not design/bid/build projects, and inquired whether the intent of this rule was to apply only to design-build projects. Also, NYSDOT suggested that it might be clearer to add the phrase ''or award'' to clarify that these provisions apply to either NTP or award.

The FHWA clarifies in this final rule that the ROW certification requirements apply both to design-build projects and design/bid/build projects. The certification requirements for design-build projects are specifically addressed in § 635.309(p). The FHWA does not believe that adding ''or award'' would be appropriate, as this addition could be interpreted as allowing construction to begin in instances where all properties have not been secured as a normal part of the process. This final rule clarifies that allowing construction to begin before all properties have been cleared should only be done in exceptional circumstances where it is in the public interest to proceed with construction before acquisition activities are complete.

The ODOT expressed concern that the statement in the conditional ROW certification that the FHWA will approve the request unless it finds that it will not be in the public interest to proceed with the bidding before acquisition activities are complete, may be subject to misinterpretation. Instead, ODOT suggested that if comparable housing is available for displaced persons, the requirements for approving a conditional ROW certification should be deemed to be met for all requests.

The FHWA appreciates that the determination that comparable housing is available is an important milestone to ensure that displaced persons' rights are protected. However, ensuring that comparable housing is available is only one of several factors FHWA will consider in making such a determination. The SDOTs should work directly with their FHWA Division Office to develop additional details relevant to the use, consideration, and approval of conditional ROW certifications in their ROW manuals. In addition, the SDOT's Stewardship and Oversight agreement may serve to document approval authorities and reduce any uncertainty as to process.

The WSDOT requested clarification on FHWA's expectation regarding the requirement to provide an updated notification prior to issuing an NTP when there are excepted parcels. It asked if there was an expectation that the ROW certificate be updated after bid opening, but prior to issuing the NTP.

The final rule at § 635.309(c)(3)(iv), states that ''Prior to the State issuing a notice to proceed with construction to the contractor, the State shall provide an updated notification to FHWA identifying all locations where right of occupancy and use has not been obtained along with a realistic date when physical occupancy and use is anticipated.'' The updated notification must be provided to FHWA prior to issuing an NTP. Updating the ROW certificate may be sufficient; however, FHWA leaves it to the discretion of the FHWA Division office to determine the type of form used to document the updated notification. The procedure must be documented in the State ROW manual.

Comment on Increasing the Threshold for an Appraisal and a Waiver

One public agency, the *U.S.* Fish and Wildlife Service, requested that the threshold for an appraisal and a waiver valuation be increased.

The FHWA believes that making the suggested changes would require changes to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Pub. L. 91–646, 84 Stat. 1894; primarily codified in 42 U.S.C. 4601 *et seq.*) (Uniform Act) regulation, which is outside of the scope of this rulemaking.

Comment on the Length of Occupancy Requirements

The Connecticut DOT commented that because the length of occupancy requirements changed under MAP–21 (for home-owners it was reduced from 180 to 90 days), it would seem logical that the ''valid lien'' requirement period for the determination of Mortgage

Differential Payments would have been reduced to 90 days as well.

The FHWA believes that making the suggested changes would require changes to the Uniform Act regulation, which is outside of the scope of this rulemaking.

Comments on New Terminology—Grantee/Subgrantee at § 710.103 and Definition of Grantee at § 710.105

Three commenters, AASHTO, South Dakota DOT (SDDOT), and Colorado DOT (CDOT) expressed concern that the specific terms (including grantee, subgrantee, SDOT, and State) and the definition of grantee used to describe to whom and when the requirements of this rule apply, are unclear. In part, the commenters noted that they are primarily attempting to comply with eligibility requirements to receive reimbursement and do not believe that the use of grantee or other similar descriptors is an accurate use of the terms.

In addition, Caltrans noted that the terms ''title 23 funds,'' ''title 23 grant funds,'' ''grant funds provided under title 23,'' and ''grant funds,'' are used interchangeably in the regulations and suggested that for purposes of clarity only one term be used to describe these funds.

The FHWA acknowledges that the regulations cover a broad range of subjects and entities. The FHWA continues to believe that the scope of the regulations, the many parties referred to in the regulations, and the nature of each reference make it impractical to use a general definition and description. Doing so would lead to uncertainty about the applicability of provisions of this rule. As a result, this final rule will continue to include definitions for the terms ''grantee'' and ''subgrantee.'' The term ''grantee'' is used to refer to all parties directly receiving title 23 grant funding. The term ''subgrantee'' is used to refer to parties receiving funding indirectly.

Comment on the Removal of ''Air Rights'' and ''Air Space'' Definition—§ 710.105

The WSDOT and a private citizen commented on the removal of the definition of air space. The WSDOT noted that the definition, although proposed to be deleted, was used in the regulations as a part of the definition for real property and real property interest. Also, the private citizen was concerned that eliminating the concepts of air space and air rights and instead using a ROW Use Agreement will mask the intent of the regulation and remove transparency.

The FHWA recognizes that the term ''airspace'' is used in sections 111(a) and 142(f) of title 23, U.S.C., as well as in FHWA regulations. The FHWA notes that the terms airspace and air rights are still valid description of a real property right; however, these terms are now referred to under a comprehensive title—''real property interest.'' The FHWA believes that the terms ''air rights'' and ''airspace'' are describing interests that do not need separate definitions. As defined in the current rule, air rights means real property interests defined by agreement, and conveyed by deed, lease, or permit for the use of airspace. Airspace is defined as that space located above and/or below a highway or other transportation facility's established grade line, lying within the horizontal limits of the approved right-of-way project boundaries. The FHWA believes that describing and granting requests using a singular comprehensive description rather than several definitions will ensure clarity within the regulation. Real property interests will no longer be granted by an air rights agreement; rather, FHWA will now use a blanket agreement called a ''ROW use agreement.'' The FHWA does not believe that using this type of agreement will result in any misuse because the requirements for considering and approving a proposed use have not changed. The intent is not to mask or to remove transparency, but rather to streamline this process by eliminating redundant terms and more effectively focus on the various highway uses and the impact on the facilities.

Comment on Mitigation Definition—§ 710.105(b)

The Caltrans noted that including mitigation in the definition of ROW may result in delaying a ROW certification until all mitigation commitments are purchased. The Caltrans stated that these transactions are often between other States and/or Federal agencies and any significant time delay could impact construction advertisement and financial expenditures.

The FHWA does not believe that the inclusion of the term ''mitigation'' in the definition of ROW requires that all real property interests in mitigation properties necessary for the project be secured at the time of ROW certification or that it will necessarily cause other delays. The FHWA believes that real property interests in mitigation parcels needed for the project, to the extent practicable, should be secured and included in the ROW certification statement.

Notification that real property interests in mitigation parcels needed for the project have not been secured at the time of ROW certification must be provided in the bid proposals identifying that work to ensure the contractor is aware that the process for acquiring the necessary real property interests will be underway concurrently with the highway construction. Consequently, proceeding with construction while attempting to secure real property interests needed for mitigation may create exposure to delay claims and other risks to the SDOT. While the FHWA does not believe that such risks will be great, SDOTs should carefully consider the risks.

Comment on Option Definition—§ 710.105(b)

The CDOT agreed with the addition of the definition of ''option'' and the use of the term as it will ensure that eligibility requirements for reimbursement when an option is used are understood.

The FHWA appreciates the comment and agrees that the definition is needed.

Comment on the RAMP (Real Estate Acquisition Plan) Definition—§ 710.105(b)

The NYSDOT requested that in addition to the definition of a RAMP in the final rule, a sample of a RAMP and what it includes should be added to the final rule.

The FHWA does not believe that it is practical to provide samples of a RAMP or a list of what should be included in a RAMP in a way that addresses each SDOT's needs. The SDOTs should work with their respective FHWA Division office partners to develop updates to their ROW manual which lists requirements for a RAMP, and the process to be followed in requesting, reviewing, and approving a RAMP.

The WSDOT stated that the definition of a RAMP included in the final rule should include information captured in the NPRM summary, which in part stated that the use of a RAMP is appropriate for a subgrantee, non-SDOT grantee, or design-build contractor if that party infrequently carries out title 23 programs or projects, the program or project is non-controversial, and the project is not complex.

The FHWA agrees with the comment that adding the information discussing the appropriate parties who may use a RAMP at § 710.201(d)(3) will provide needed details on appropriate use of RAMPs. The FHWA has incorporated the language in this final rule.

Comment on ROW Use Agreement Definition—§ 710.105(b)

Pennsylvania DOT (PennDOT) commented that the definition of a ROW use agreement should not include a highway occupancy permit because a highway occupancy permit is not a real property interest. The PennDOT expressed concern that the definition may lead to future ROW damage claims when the utility is required to relocate as a result of a highway project.

The FHWA notes that the final rule definition does not specifically include highway occupancy permits, but instead focuses more broadly on non-highway uses. The final rule addresses utility permits at § 710.405(a)(2), which lists a number of exceptions that do not apply to the ROW use agreement, including utilities and railroads (which are governed by other sections of this title), bikeways, and pedestrian walkways.

Comment on Legal Settlement Definition—§ 710.105(b)

Caltrans noted that this section references an ''authorized legal representative.'' Caltrans suggested deleting this reference and using instead the same statement found in § 710.305(c), a ''responsible official of the acquiring agency.'' They commented that the term ''legal'' seems to imply that the delegated representative must be an attorney.

The FHWA agrees that a minor change is necessary to ensure that the applicability and meaning of this section is clear. The final rule now references a ''responsible official.'' The definition of ''legal settlement'' in the final rule is a settlement reached by an authorized legal representative or a responsible official of the acquiring agency that has the legal power vested in him or her by State law.

Comment on ROW Manual Requirements—§ 710.201(c)

Caltrans suggested that the final rule include ''legal settlements'' in the list of ROW functions and procedures to be described in the ROW manual.

The FHWA agrees that adding ''legal settlements'' to this list adds clarity and has made the change in this final rule. However, the requirements in this part of the regulation are not meant to be an exhaustive list of functions and procedures that must be described in the ROW manual, but rather a list that illustrates several of the functions and procedures. The FHWA believes that each SDOT should determine the appropriate functions to list in its ROW manual.

Comments on ROW Manual Alternative (RAMP)—§ 710.201(d)

Six commenters (AASHTO, SDDOT, Caltrans, ODOT, Georgia DOT (GDOT), and Wisconsin DOT (WisDOT)), supported the requirement that a State ROW manual be used by all agencies in a State. The AASHTO and SDDOT voiced concern about the proposed allowance for use of alternatives to a State ROW manual, and noted that permitting the use of alternatives to the State ROW manual does not seem compatible with the statement in the NPRM that FHWA believes that it is necessary to ensure that other grantees of title 23 funds meet the same requirements that the SDOT currently meets.

Caltrans commented that the oversight required to review alternatives to an approved SDOT ROW manual would be ''devastating'' because Caltrans is not sufficiently staffed to conduct these reviews. Several commenters (ODOT, GDOT and WisDOT), voiced similar concerns about the administrative effort necessary to review and approve alternatives to SDOT ROW manuals.

The ODOT noted that FHWA anticipated in the NPRM that the number of non-State DOT grantees will continue to increase, and that the role of non-State DOT parties in title 23 projects and programs will continue to evolve and grow. The ODOT further noted that additional funding for increased oversight was not addressed in the proposed rulemaking and that it supports this measure, but only if the proper structure is put in place for the program to succeed.

The GDOT commented that it believes that the creation of separate, local, right-of-way manuals and utilization of RAMPS that may conflict with SDOT manuals could create challenges as SDOTs provide oversight and issue ROW certifications.

The FHWA appreciates the insight provided in the comments regarding the potential difficulties and costs of allowing alternatives to the use of an approved SDOT ROW manual. However, a number of the commenters incorrectly assumed that the use of an alternative to SDOT ROW manuals did not require SDOT permission. If an SDOT subgrantee would like to use an alternative to an SDOT ROW manual, it must first gain the SDOT's permission to do so. The FHWA has added language to this section clarifying that the ROW manual options can only be used with SDOT approval. The FHWA understands that not all SDOTs will permit the use of alternatives to the SDOT ROW manual. In developing a SDOT ROW manual, the SDOT must clearly state whether it will allow alternatives. If allowed, the manual must also include the SDOTs process for considering use of an alternative to the SDOT ROW manual and that the review and approval process for that alternative must be clearly documented.

The WisDOT requested that FHWA ensure that under the final rule SDOT's would have the authority to approve any RAMP or ROW Manual agreements developed by an entity that requires WisDOT oversight. The WisDOT was concerned about reviewing, approving, and cataloging the many RAMPs that local public agencies (LPA) may submit. It noted that WisDOT has drafted and maintained a LPA ROW manual which municipalities are already required to use and they felt that this process would be consistent with the rule's flexibility.

The FHWA agrees that the final rule does not require the use of alternatives to the SDOT ROW manual and thus ensures that an SDOT will have the discretion to decide whether or not to permit the use of a RAMP or other alternative to a ROW manual.

Comment on Assignment of FHWA Approval Actions to a SDOT—§ 710.201(h)

The Idaho Transportation Department (ITD) and WSDOT expressed concern regarding FHWA's proposed revisions pertaining to SDOT assumption of some of FHWA's approvals and property related oversight. They noted that the current regulation states that the SDOT and the FHWA will agree on the scope of property related oversight and approval actions that the FHWA will be responsible for. The NPRM proposed changing this language to provide that FHWA will be responsible for ''any action not expressly assigned to the State DOT'' in the Stewardship/Oversight Agreement between the State DOT and FHWA. The commenters requested that FHWA expand on this statement to clarify its intent.

After considering these comments, FHWA is retaining the language with one clarifying change. The FHWA inserted ''approval'' into the sentence so that it now reads as follows: ''The FHWA retains responsibility for any approval action not expressly assigned to the SDOT in the Stewardship/Oversight Agreement.'' This change clarifies that only the FHWA approvals and property-related oversight that FHWA transfers to the SDOT must be in the Stewardship/Oversight Agreement. The FHWA notes that in accordance with long-standing policy and the provisions of 23 U.S.C. 106(c), FHWA

uses the Stewardship/Oversight Agreement executed between FHWA and the SDOT to document the transfer of responsibility for an array of project decisions from FHWA to the SDOT. This policy of using the Stewardship/Oversight Agreement as the vehicle for transferring FHWA decisionmaking authority to the SDOT applies across the Federal-aid highway program, except in certain limited instances where stand-alone agreements are contemplated by statute (such as the assignment of environmental review responsibilities to States under 23 U.S.C. 327 and programmatic categorical exclusion agreements under Section 1318(d)(3) of MAP–21).

Accordingly, approvals and property-related oversight that will be made by the SDOT instead of FHWA must be documented in the applicable Stewardship/Oversight Agreement. The SDOT ROW manual cannot be used to assign or delegate decisionmaking authority to the SDOT, or to expand decisionmaking authority transferred to the SDOT under the Stewardship/Oversight Agreement. Any decisionmaking action not expressly given to the SDOT under the Stewardship/Oversight Agreement is retained by FHWA. There are many ROW oversight and project development activities that SDOTs carry out that do not involve an approval or property related oversight under the law (including regulations). Those other types of actions are documented in the SDOT ROW manual, which details how such responsibilities will be carried out by the SDOT, but will not typically be included in the Stewardship/Oversight Agreement.

The WSDOT inquired about programmatic agreements and whether a programmatic agreement would override a Stewardship/Oversight agreement.

As noted in response to the previous comment, any transfer of FHWA decisionmaking responsibilities for real estate matters to the SDOT must be through the applicable Stewardship/Oversight Agreement. Any other agreements and the SDOT ROW manual must be consistent with the Stewardship/Oversight Agreement.

Comments on the List of Activities Allowed Prior to NEPA (National Environmental Policy Act)—§ 710.203(a)(3)

The ODOT commented that it strongly endorses the revisions regarding the preparation of appraisals, appraisal reviews, and appraisal waivers that can occur prior to completion of a NEPA decision for a project subject to title 23. It estimates that this change will reduce the preconstruction phase by up to 3 months. The WSDOT also requested that preliminary relocation planning activities be added as an eligible activity in 23 CFR 710.203(a)(3) and as an eligible expense in § 710.203(b).

The final rule states that contact with potentially affected property owners is permissible for the purposes of developing an appraisal of real property. All negotiations and interviews with potentially displaced persons must be deferred until after the NEPA decision, except in two cases: 1) Early acquisitions under § 710.501; and 2) hardship or protective acquisitions under § 710.503. However, FHWA agrees that certain relocation planning activities and associated expenses which do not require personal contact or interviews with those who may be displaced should be eligible activities prior to a NEPA decision. The final rule allows eligibility for these preliminary relocation planning activities including, but not limited to, costs associated with developing a list of comparables, identifying replacement neighborhoods, and documenting available public services. This list is not exclusive.

Comments on Including Closing and Other Acquisition Cost—§ 710.203(b)

The CDOT provided comments supporting the inclusion of closing and other acquisition-related costs as eligible for reimbursement. The ITD welcomed the discussion and explanation of eligible costs. Three commenters (AASHTO, CDOT, and NYSDOT) commented that the subsection of the final rule allowing the costs associated with administrative settlements (in accordance with 49 CFR 24.102(i)), legal settlements, court awards, and costs incidental to the condemnation process, should specifically include the phrase ''closing and other acquisition-related costs'' so that it would be clear that these costs are also officially eligible for reimbursement.

The FHWA agrees that adding language from the NPRM preamble which directly addressed eligibility for these costs to the regulation will help to further clarify that costs associated with closing and costs of finalizing the ROW acquisition are direct eligible costs. The FHWA included a provision in this final rule at § 710.203(b)(1)(vi) which states that ordinary and reasonable costs in closing and finalizing the acquisition are reimbursable. However, FHWA does not believe that including an exhaustive list of eligible costs in this regulation, which would include costs associated with closing or finalizing the acquisition, is practical or necessary. Each grantee is expected to determine and document in its SDOT ROW manual what are considered customary and usual costs in that State.

Comments on Reimbursement of Attorney Fees—§ 710.203(b)(1)(iv)

The AASHTO supported including agency attorney fees and excluding other attorney fees, unless required by State law or approved by FHWA.

Two commenters, CDOT and NYSDOT, provided comments on reimbursement of attorney's fees. The CDOT stated that it supports including reimbursement of the acquiring agency's attorney fees and excluding other attorney fees unless required by State law or approved by FHWA. The NYSDOT asked whether the regulations should also include a provision for reimbursement of attorney fees for other parties (*i.e.,* property owner).

The FHWA appreciates CDOT's support of the reimbursement of acquiring agency's attorney fees. As a result no changes were made. Also, FHWA is aware that several States have statutes requiring reimbursement of a property owner's attorney fees, but notes that a number of States have no such statute. The FHWA agrees that a decision to provide for reimbursement of a property owner's attorney fees is appropriately left to State law and is more appropriately addressed and documented in the SDOT ROW manual.

Comment on Waiver Evaluation Instead of Appraisal Waiver —§ 710.203(b)(1)(v)

The AASHTO and CDOT commented that the use of the term ''waiver valuation'' instead of ''appraisal waiver'' is an improvement and that it relates more closely to the language in 49 CFR part 24.

The FHWA appreciates the comment and agrees that ''waiver valuation'' is a more appropriate term. As a result, the final rule now uses the term wavier valuation.

Comment on Alternate Access Point Eligible Expense—§ 710.203(b)(6)(ii)

The AASHTO and CDOT commented that adding a reference to ''alternate access points'' in this section and making expenses related to the provision of ''alternate access points'' outside the ROW an eligible expense for reimbursement was appreciated.

The FHWA appreciates the comment and agrees. No additional changes were made to this section of the regulation.

Comment on Non-State DOT Grantee Projects—§ 710.307(b)

The ITD requested clarification of the last sentence of § 710.307(b). It felt that the sentence was too general and it was not clear whether FHWA would review the subgrantee projects done through our oversight and administration.

The definition of a ''grantee'' found at § 710.105(b) states that grantee is a ''party that directly receives title 23 funds and is accountable to the FHWA for the use of such funds and for compliance with applicable Federal requirements.'' As a result, a non-State DOT grantee would be a recipient of Federal funds directly from FHWA, thereby requiring FHWA to provide review and approval of ROW availability statements, certifications, and other project documentation in accordance with applicable law. Subgrantees are not direct recipients of Federal funds since they receive their funds through the SDOT. The direct recipient of Federal funds in this rule is referred to as the SDOT, who in turn provides the Federal funds to the subrecipient. As such, the SDOT, not FHWA, is required to provide oversight and administration to the subrecipient.

Comments on Design-Builder Use of ROW Manual or RAMP—§ 710.309(d)(1)

Several commenters expressed appreciation for clarification of the design-build requirements. However, four commenters (AASHTO, Caltrans, GDOT and PennDOT) noted that all projects should be required to use the SDOT ROW manual and should not be allowed to use a RAMP. The PennDOT was concerned that allowing the use of a RAMP would effectively supersede the SDOT's oversight role.

The FHWA understands that several of the commenters interpreted the new RAMP flexibility within this final rule as allowing either FHWA or a subgrantee to approve use of a RAMP. The FHWA appreciates the question and clarified in the regulation that an SDOT or other grantee that is responsible for oversight must first make a determination that it will allow the use of a RAMP by its subgrantee. The SDOTs may choose one of three procedures to demonstrate that the FHWA-approved ROW procedures will be followed. According to §§ 710.201(d)(1) through (3), an acquiring agency may use: (1) The FHWA-approved SDOT ROW manual; (2) its own ROW manual which must be approved by the reviewing agency that it meets Federal and State requirements; or (3) a RAMP setting forth the procedures the acquiring agency will follow which must be approved by the reviewing agency. The decision as to which procedure is allowed is ultimately left to the discretion of the SDOT for all programs which use Federal-aid funds supplied by the SDOT.

Comment on Park and Ride Lots and Air Rights—§ 710.403(b)

The AASHTO was concerned that § 710.403(b) could possibly be interpreted as restricting beneficial non-highway uses, such as parking within the Interstate ROW, which could have a negative impact on Park and Ride lots and air space leases.

Park and Ride lots continue to be subject to the requirements and conditions of 23 U.S.C. 137 and 23 CFR 810.106. The FHWA does not believe that the requirements of 23 CFR 710.403(b) can be read as prohibiting park and ride lots or creating additional conditions for permitting them. In order to clarify this point, FHWA has added language to the final rule referencing 23 U.S.C. 137 and 23 CFR 810.106.

Comments on Determining Excess Property in ROW Manual or RAMP—§ 710.403(c).

The ITD requested that the section begin with the following statement: ''The purpose of this section is . . . .'' It commented that the section is new and believed that the additional language would help to better provide insight into the purpose of the section.

The FHWA appreciates the suggestion but believes that the first sentence adequately states the subject of the paragraph—that grantees shall specify their procedures in their approved ROW manual or RAMP.

The NYSDOT strongly preferred keeping the list of organizational units with whom the grantee must coordinate to make a determination of excess property in the regulations. It feared that once the final rule is published, it may appear that the requirements for coordination among organization units had been reduced, which would diminish the importance of following the prescribed process of circulating an excess determination request through the organizational units.

The FHWA understands the commenter's concern. However, the removal of the list of organizational units was not intended to reduce the requirements. Each State has its own internal structure and processes that differ. The FHWA believes SDOTs are best qualified to determine what type of internal coordination is appropriate. The FHWA notes that the process used and the determination of which organizational units should be contacted are to be documented in the State ROW manual, which FHWA approves.

Comments on Charging Fair Market Value—§ 710.403(e)

The PennDOT requested that § 710.403(e) be revised to include the following statement: ''. . . submitted to FHWA in writing and may be approved by FHWA (if not assigned to SDOT) in the following situations . . . .''

The FHWA uses the Stewardship/Oversight Agreement executed between FHWA and the SDOT to document the transfer of responsibility for an array of project decisions from FHWA to the SDOT. However, making an exception to the requirement to charge fair market value is not an action that FHWA may delegate or assign. The FHWA retains that approval authority. As a result, no change was made to the language.

The NYSDOT requested clarification of the phrase ''must be in the public interest.'' It asked whether that phrase would preclude the SDOT from issuing an Alternate Use and Occupancy permit for fair market value unless it makes a public interest determination.

The FHWA requires a public interest determination if the real property interest lies within the ROW limits, even though fair market value is charged. A public interest determination is needed in the following cases: (1) Proposing to use the existing ROW for a non-highway, alternate use (with the exception of permits issued for construction of a highway project such as utility permits.) (See §§ 710.405(a)(1)(2)); and (2) If real property interests inside or outside the ROW limits are sold or leased for *less* than fair market value (See § 710.403(e)). The FHWA does not require a public interest determination if the property is located outside of the ROW and sold or leased for fair market value.

The PennDOT also requested further explanation of what information would be acceptable to provide assurance that the public receives benefit to justify less than fair market value.

As stated in the preamble of the NPRM, the criteria for determining whether adequate social, environmental, or economic benefits are present must be clearly and unambiguously detailed in the approved ROW manual in order to clearly document the specific positive benefits that the grantee and public will be receiving as a result of the proposed disposal. The FHWA believes this final rule provides the SDOT and the FHWA Division Office the flexibility to determine and document the criteria necessary to justify whether adequate

social, environmental, or economic benefits are present to determine a fair return.

Comments on ROW Use Agreements for Non-Highway Use—§ 710.405(a)

The ITD requested a definition for ROW use agreement and was unsure of what uses can be included in the agreement, and also asked where bikeway and pedestrian walkways issues are explained in the final rule. The ODOT expressed concern that ROW use agreement is too broadly applied in this rule and may impact future permitting activities, such as utility permits, which are not properly the subject of ROW use agreements.

To address these comments, FHWA added clarifying language to this part (''except for the Interstate highways'') to ensure that the delegation questions above are clearly addressed for the Interstate. The FHWA provides a definition of the ROW use agreement in the final rule at § 710.105(b). To determine if a non-highway use is allowed within the ROW limits, the request must meet the terms and conditions outlined in § 710.405. However, there are exceptions where the ROW use agreement does not apply, including railroads, public utilities, bikeways and pedestrian walkways (see § 710.405(a)(2)). Although the previous terms, ''air rights or air space,'' have been replaced with ''real property interests,'' the FHWA fully expects the SDOT evaluation process to embody the same considerations for protecting the transportation facility that the current regulation calls for in its air space, air rights agreements, and leasing provisions.

Comments on Information Needed To Protect Federal Interest in Facilities.—§ 710.405(b)

The PennDOT requested a revision to the language at 23 CFR part 710.405(b)(7) to add ''if not assigned to SDOT'' when requiring FHWA approval if the agreement affects a Federal-aid highway.

The FHWA agrees and made the requested revision in order to clarify this sentence.

The PennDOT also requested that FHWA delete the references to a guidance document for additional terms and conditions appropriate for inclusion in the ROW use agreements. The PennDOT requested that any regulatory requirements for ROW use agreements be listed directly in the regulation. It reasoned that guidance can be revised outside the regulatory review process. If this reference remains in the regulation, the SDOT requested that the language be clarified so that it is clear that the other terms and conditions listed in the guidance are not mandatory requirements.

The FHWA referenced the air rights guidance to provide additional terms that SDOTs might employ in ROW use agreements, as needed. As such, the reference to air rights will remain. However, language will be added to clarify that the terms and conditions in the guidance document are not mandatory requirements.

In addition, PennDOT suggested that § 710.405(d) be revised if it is applied to the disposition of excess ROW since it should not have to conform to the current design and safety criteria. However, if there are proposed changes to the highway as a result of the proposed use of the excess ROW, then PennDOT agrees it would require compliance with current design and safety criteria.

The FHWA believes that in a situation where property within the project limits is determined by the SDOT to be in excess of its needs, the SDOT and FHWA Division office must ensure the proposed use and improvement to the excess ROW is in the public need and/or interest.

Comments on Application Requirements for Use of ROW Interests—§ 710.405(e)

The CDOT asked for clarification and guidance on how to document that the ROW use agreement is in the public interest.

The purpose of the phrase ''public interest'' is to require the development of a determination of whether the proposed use is consistent with public need and/or interest. The final rule does not require a specific standard or require that indicators be considered. Each SDOT should set the standards for documenting public interest in its ROW manual. Measures that might be used may include a benefit to the public expected from the proposed use, addressing a long standing public need, a financial benefit to the public from the use, or a social or environmental benefit from the use.

The Caltrans, NYSDOT, and PennDOT questioned whether the use of 3D plans should be necessary in all cases and also pointed out that 3D plans were not defined.

The FHWA or the grantee may require 3D plans or presentations on major projects such as air rights involving highway tunnels, subway tunnels, railroad tunnels, above and underground parking decks, etc. However, if the real property interest is used as vacant land, leisure activities (such as walking or biking), beautification, parking of motor vehicles, public mass transit facilities which do not require subsurface construction, excavation or other disturbance (such as a bus shelter) and similar uses, then 3D plans normally would not be required. The FHWA added the language ''if required by FHWA or the Grantee'' to add clarity. The FHWA does not believe that a definition of 3D plans is necessary because, as used in this rule, there is no one single standard that may be used. The FHWA expects that when 3D presentations are necessary, that the 3D plans will adequately depict the proposed use and its impacts.

Comments on Disposal of Excess Property—§ 710.409

The Colorado DOT and PennDOT were concerned that a request for disposal must comply with some of the criteria required for ROW use agreements. They reasoned that if a property is determined to be excess, then it should be subject only to the requirement that the SDOT receive fair market value for its disposal and that any potential use of the property need not be considered.

The FHWA has reviewed the regulation and agrees that applying all of the requirements and criteria applicable to a lease or other temporary ROW use agreement to a disposal action is overly broad. The FHWA has revised this section and eliminated the specific references to requirements in §§ 710.403 and 710.405, which are focused on ROW use agreement actions.

Comment on Property Acquisition Alternatives—§ 710.501

The CDOT noted that the proposed regulations provide a process for approving early acquisitions which gives an additional tool to deliver projects efficiently and effectively.

The FHWA appreciates the comment. No changes were made to this section of the regulation.

Comment on State Funded Early Acquisition Eligible for Future Credit—§ 710.501(c)

The ITD asked if a SDOT can acquire property using State funds and be credited toward its non-Federal share of the project cost up to the maximum limit of its financial involvement.

The FHWA has not included a change in the final rule to allow for what amounts to a method to apply excess credit to another project. The allowance for a credit continues to be a credit for costs of acquiring property for the project as part of the agency's non-

Federal share. Any costs which exceed the non-Federal share for that project are not creditable in most instances.

Comment on Timing of FHWA Concurrence—§ 710.501(c)(5)

The PennDOT asked for clarification on ''the timing of obtaining FHWA concurrence during the project development process for early acquisitions.''

The FHWA emphasizes that State funded early acquisition continues to be an at-risk acquisition for the SDOT. To be eligible for Federal-aid participation, the concurrence provided for in this section requires that the environmental review process for the transportation project be completed and that each of the six criteria in this section are determined to have been met. Each SDOT should specify the process and timing for seeking a credit in its ROW manual. A ROW certification would be one appropriate milestone for requesting a credit; other milestones might include when the project reaches a specified percentage of project completion or when the project is determined to have been completed.

Comments on State Funded Early Acquisition Eligible for Future Reimbursement—§ 710.501(d)

The PennDOT commented that it would like the regulation to list the terms and conditions of 23 U.S.C. 108(c)(3) rather than just reference the statute.

The FHWA agrees that this change will make it easier for the user of this regulation and has added the terms and conditions found at 23 U.S.C. 108(c)(3) to the regulatory text.

The WisDOT commented that it has concerns about the requirement that a State must have a mandatory comprehensive and coordinated land use, environment, and transportation planning process under State law and that the acquisition be certified by the Governor. The WisDOT was also concerned about meeting the requirements of statewide and nonmetropolitan planning as a part of this requirement. Further, WisDOT asked for clarification on meeting the requirements of this part and inquired about the possibility of getting a waiver for this requirement.

The FHWA does not have legal authority to issue a waiver for this statutory requirement. However, FHWA is completing a research project to examine several States that have processes that may be consistent with these requirements. The FHWA will share the research findings on its Web site as soon as the final report is completed. The FHWA believes that providing examples of processes will give interested SDOTs a starting point in determining if they have a process that meets the requirements for statewide and nonmetropolitan planning contained in 23 U.S.C. 108(c)(3).

Comments on Federally-Funded Early Acquisition—§ 710.501(e)

Several commenters (AASHTO, GDOT, CDOT, ITD, and WisDOT) provided comments on various parts of this section. The AASHTO and GDOT both welcomed the new authority for federally funded early acquisitions, but expressed concerns that procedural and documentation requirements could deter States from taking advantage of this new flexibility. They encouraged FHWA to implement this new authority in a way that avoids unnecessary administrative burdens and provides a high degree of consistency and predictability in FHWA's decisions.

The FHWA agrees that it is important to ensure that unnecessary administrative burdens do not deter the implementation of these flexibilities. The FHWA believes that SDOTs can develop and provide the required documents with the least administrative burden that is practical. The FHWA will continue to work with the SDOTs to ensure that FHWA's decisionmaking process is transparent, efficient, and reasonable.

The AASHTO and the CDOT commented that the factors listed in the preamble which address what FHWA may consider when deciding whether to approve a federally funded early acquisition are above and beyond the list of factors that must be covered in the State's certification under 23 CFR 710.501(e)(1) through (e)(4).

As noted in the NPRM, FHWA does not believe that it is practical to try to capture in the regulation every scenario for complying with the requirements in 23 U.S.C. 108(d)(3)(B). The preamble discussion did not create a list of factors that will be applied to every decision, but rather factors that it may consider and that SDOTs should also consider when carrying out federally funded early acquisition. The FHWA noted in the preamble that it expects to wait until it has more experience administering the certification process before considering issuing implementation guidance. This continues to be FHWA's position. In the interim, FHWA will work directly with SDOTs considering a federally funded early acquisition to address any questions that may arise about the discretionary factors to ensure that SDOTs can use these flexibilities.

Comment on Allowing 4(f) Property Acquisition—§ 710.501(e)(2)(ii)

The AASHTO, CDOT, and GDOT requested that FHWA reconsider the requirement in § 710.501(e)(2)(ii) that federally funded early acquisitions may ''not involve land described in 23 U.S.C. 138.'' Such lands are commonly known as ''Section 4(f) property,'' which is defined in 23 CFR 774.17 as ''publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance.'' The commenters suggested a more flexible approach, such as one that would allow for a case-by-case determination regarding early acquisition for Section 4(f) properties. Specifically, they suggested that the involvement of Section 4(f) resources could be listed as one of the factors that the FHWA considers in deciding whether to approve Federal funds for an early acquisition. They felt that this flexibility may be especially helpful when the Section 4(f) status of a property is uncertain, as would be the case with some historic properties.

The FHWA revised the final rule to provide additional flexibility by clarifying that the acquisition of a Section 4(f) property itself is prohibited but that all acquisitions that may involve a Section 4(f) property are not expressly prohibited. For example, if all of the other provisions in § 710.501(e) are met, a property that is adjacent to a Section 4(f) property could be acquired. Section 701.501(e)(2)(i) now states that the acquisition of the real property interest does not require FHWA approval under 23 CFR 774.3.

The FHWA did not adopt the request for case-by-case exceptions for early acquisition of a Section 4(f) property because the Section 4(f) regulation does not include such an exception. In addition, the regulations implementing Section 106 of the National Historic Preservation Act, 36 CFR part 800, do not contain an exception from consultation when the eligibility of a property is undetermined. However, as noted in the NPRM, the option of acquiring a Section 4(f) property early by using hardship acquisition and protective buying remains a viable alternative for SDOTs should the need arise. This alternative is more appropriate because a hardship acquisition or protective buying occurs when the proposed transportation project, for which the property would be needed, has progressed into the NEPA phase when more specific information is available about the location, design, alternatives, and other factors. This

information is necessary to determine what the requisite Section 4(f) determination and Section 106 consultation requirements are. Therefore, hardship acquisition and protective buying continue to be the only options that FHWA believes are appropriate for early Section 4(f) property acquisition.

Comments on Acquiring by Negotiation—§ 710.501(e)(2)(viii)

The WisDOT commented that it supports allowing a ''friendly condemnation'' to clear or quiet the title for real property interests acquired as part of a federally funded early acquisition project. In part of its comment, it referenced complex acquisitions as being a determining factor in the use of condemnation to clear title.

The FHWA is not proposing that a complex acquisition would necessarily be a requirement for using condemnation to clear title, but rather condemnation to clear title would be used in cases where the property owner and the agency have a binding agreement of sale, but cannot clear title for any number of reasons.

Early Acquisition Project Included as a Project in STIP/TIP—§ 710.501(e)(3)

The AASHTO, GDOT, CDOT, and ITD asked about the definition of an early acquisition project in this part of the regulation and asked FHWA to clarify in either the preamble or rule that compliance with this requirement does not necessarily mean that each individual acquisition be included as a separate project in the Transportation Improvement Plan (TIP). They requested that the final rule clarify that a package of related acquisitions—*e.g.,* all acquisitions for a project or portion of a project—can be included as a single line item within a TIP. In addition, ITD asked if there could be a generic project named ''early acquisition.''

A generic project named ''early acquisition'' would not meet the requirements. This final rule includes language which in part requires that each federally funded early acquisition project must be added as a separate project in the TIP or State Transportation Improvement Plan (STIP). Since a number of conditions and issues surround each early acquisition project, transparency is essential to provide proper management of these projects.

The AASHTO, CDOT, and GDOT correctly note that ''. . . all acquisitions for a project or portion of a project can be included as a single line item within a TIP.'' The NPRM and this final rule include a definition of early acquisition project which states: ''Early Acquisition Project means a project for the acquisition of real property interests prior to the completion of the environmental review process for the transportation project into which the acquired property will be incorporated, as authorized under 23 U.S.C. 108 and implemented under § 710.501. It may consist of the acquisition of real property interests in a specific parcel, a portion of a transportation corridor, or an entire transportation corridor.'' In most cases, acquisition of parcels unrelated to a specific project or portion of a project does not meet the definition or requirements of an early acquisition project in this regulation. A generic project or a statewide project for all early acquisitions would not, therefore, meet the requirements of this final rule.

Comments on Prohibited Activity—§ 710.501(f)

The AASHTO, GDOT, ITD, and WisDOT commented on the prohibited activities described in this part. The AASHTO and Georgia DOT agreed with the language stating that a State may carry out limited clearing and demolition activity, if the activities are necessary to protect the public health or safety and are considered during the environmental review of the Early Acquisition Project. They felt that this language helps to clarify that the statute's prohibition against ''developing'' property acquired as part of an early acquisition project does not prevent the State from taking actions necessary to protect the public health and safety.

The ITD asked if their assumption is correct that a SDOT can take ownership of real property before the completion of the NEPA process for the transportation project but not allow a change to the property's use or configuration in any way that might impact the NEPA process (except for the certain health and welfare reasons).

The FHWA agrees that ITD's understanding is correct. The NPRM preamble provided a detailed discussion of prohibited activities which, in part, states that this new acquisition authority is premised on a ''buy and hold'' concept, in which the acquisition activity results only in a change in ownership of the real property interest, but otherwise typically maintains the pre-acquisition uses and conditions. The State agency, as part of the environmental review of the federally assisted early acquisition project, must include an appropriate analysis of the impacts of the acquisition, including relocation, and any interim activity planned for the real property interests until the property is used for the proposed transportation project (such as property maintenance to maintain the existing condition of the property, or demolition for public safety reasons). This analysis will be used to determine whether the early acquisition project's impacts are acceptable.

The FHWA believes this ''buy and hold'' approach is consistent with the limitation in 23 U.S.C. 108(d)(6). That provision does not allow real property interests acquired as part of a federally assisted early acquired project to be developed in anticipation of the proposed transportation project until the NEPA review process for the proposed transportation project is concluded. The language in the final rule provides direction on what ''developed in anticipation of a project'' means. Prohibited activities include demolition, site preparation, clearing and grubbing, and construction that may have an adverse environmental impact or cause a change in the use or character of the real property. There may be very limited instances in which development activities may be appropriate.

The WisDOT was concerned that it would not be allowed to perform demolition or site preparation on properties it purchases as an early acquisition with Federal funding until the environmental review is done. It noted that depending on how long the review takes, there are concerns with vandalism on the property and the cost of managing (maintenance, snow removal, grass cutting, etc.) the property until such time the environmental review is finished. It stated that certain activities are allowed to protect public safety, but that it would need guidance and clarification on that.

The FHWA agrees that there will be costs associated with managing and maintaining real property interests acquired as a federally funded early acquisition. The WisDOT is also correct that certain activities necessary to protect the public health or safety which were considered during the environmental review for the early acquisition project can be carried out. The FHWA will consider developing additional guidance to further answer questions that may arise about prohibited activities for real property interest acquired as part of a federally funded early acquisition project.

Comment on Reimbursement—§ 710.501(g)

The ITD commented that the definition of ''offset'' in this section was not clear and asked if ''offset'' and ''local match'' are the same, and

requested clarification on both the intent and purpose for this section.

Local match and offset are not the same concepts. Local match allows for a credit based on contributions made towards the local share of the cost of a project. As explained in the NPRM, this section requires that when Federal-aid reimbursement has been made for early acquired real property, the real property must be incorporated into a project eligible for surface transportation funds within the 20-year time period allowed by 23 U.S.C. 108(a)(2). If the State agency does not meet this requirement, FHWA will offset the amount reimbursed against funds apportioned to the State. Offset in this context means a reduction in the States apportionment of title 23 funds. However, a local match refers to the Federal matching requirement on federally funded or assisted project or program funds—*i.e.* the portion of the total project cost that a State or local is required to contribute is commonly called the local match. The use of FHWA funds on a project typically requires a 10 percent or 20 percent local match of funds.

Comment on Relocation Assistance Eligibility—§ 710.501(h)

The AASHTO and GDOT commented that the language in the rule helps to ensure that relocation assistance can be provided at the time early acquisition occurs and need not wait until project construction.

The FHWA appreciates the comment and believes it is important to reiterate that the purpose of this provision is to establish relocation eligibility when there is a binding written agreement between the acquiring agency and the property owner for the early acquisition of the real property interests.

Comments on Protective Buying and Hardship Acquisition—§ 710.503

Two SDOTs and one private citizen commented on this section of the regulation. The ITD commented that the definition of ''project'' in this section is not clear. They requested clarification of what would need to be in the TIP or whether the early acquisition would need to be in the TIP itself.

The FHWA agrees that the term ''transportation project'' should be used in this section to clarify which activities the regulation is referring and what must be included in the TIP. The FHWA has revised the regulatory text accordingly. Transportation project as used in this regulation is defined in part as excluding early acquisition projects. In order to request reimbursement of hardship or protective buying costs (referred to as early acquisitions in the question) one of the requirements for this part is that the transportation project be included in the currently approved STIP. Hardship and Protective Buying is not early acquisition as used in this regulation. One private citizen requested that the use of option purchase contracts be added in addition to the protective buying and hardship acquisition approaches. The private citizen believes that this would be consistent with the intent of changes in MAP–21 related to advocating enhanced program delivery initiatives.

The FHWA recognizes the need to enhance program delivery initiatives as established by the expanded definition of real property interests. The expanded definition includes the use of option purchase contracts as a tool to acquire or preserve an interest in land. This rule does allow for the purchase of real property interests which by definition at § 710.105(b) does include options. Therefore, options could be used as a tool to acquire or preserve an interest in land when necessary.

The WisDOT commented that it was pleased that there was a possibility for reimbursement of funds spent on early acquisitions, but were generally concerned about the scope of the requirements of this part and the early acquisition part.

The FHWA believes that this rule balances the need to provide specific requirements for reimbursement against the need to provide flexibility. The FHWA is planning the development of an implementation guide and Frequently Asked Questions, which will address these two topics in more detail.

Comments on Real Property Donations—§ 710.505

The ITD and NYSDOT provided comments on this section. The ITD asked about a timeframe for determining fair market value, citing concerns about frequent changes in the real estate market and project influences on value. Further, it requested that FHWA establish a timeframe for determining fair market value in the regulation.

The FHWA believes the regulatory language in 23 CFR 710.507(b) addresses both questions. Specifically, the language requires that the credit to the State's matching share for donated property be based on fair market value established on the earlier date, either the date on which the donation becomes effective, or the date on which equitable title to the property vests in the State. Also, the fair market value may not include increases or decreases in value caused by the project.

The NYSDOT commented that it would like language added to § 710.505(a) to ensure that it's clear that Federal and State requirements on property donation must be followed.

The FHWA added ''subject to applicable state laws'' to this section of the regulatory text. However, FHWA cannot give a blanket approval of State laws, rules, and regulations since there may be some that conflict with Federal law.

Comment on State and Local Contributions—§ 710.507

The NYSDOT raised a question about whether credits for State and local contribution under this regulation would be subject to different rules. It believes the NPRM supports this interpretation because the NPRM stated in part that the provisions for credit for real property interests contributed to a project are not the same for State and local governments. It recommends that the wording in § 710.507 be changed to say that the real property can be used as a credit toward ''the State's or local government's matching share.''

The FHWA reviewed the NPRM and does not agree that the NPRM preamble creates separate standards for State and local credit. The FHWA notes that the NPRM stated that, ''The provisions governing credit for real property interests contributed to a project are now the same for State and local governments.'' The FHWA agrees that a clarification describing to whom these credit provisions apply would improve the regulation. The FHWA changed the wording in § 710.507 from ''State'' to ''Grantee or Subgrantee'' to more clearly describe the party receiving a credit for the State or local government contribution.

Comment on Functional Replacement—§ 710.509

The NYSDOT asked whether local public agencies would be eligible for providing functional replacements if they acquired real property interests from a publicly owned facility unless a State law prohibits it, and whether the SDOT could decide not to provide a functional replacement.

The FHWA holds SDOTs responsible for ensuring that activities by subgrantees (local public agencies in the context of this question), and contractors on Federal-aid projects are carried out in compliance with State and Federal legal requirements. Because SDOTs are responsible for oversight and stewardship of activities carried out by subgrantees (local public agencies in the context of this question), each SDOTs ROW manual must clearly detail the process for considering requests for functional replacements including

whether State law, regulation, or policy allow local public agencies to carry out functional replacements.

Comment on Transportation Alternatives (TA)—§ 710.511

On December 4, 2015, the FAST Act was signed into law. The FAST Act eliminated the MAP–21 Transportation Alternatives Program (TAP) and replaced it with a set-aside of Surface Transportation Block Grant (STBG) program funding for transportation alternatives (TA). As a result of these changes, references to the program name in this section of the final rule have been updated so that they are consistent with the FAST Act.

The AASHTO commented on Transportation Alternatives that ''States support the provision of having all property subject to the same requirements.''

The FHWA agrees that properties on TA projects should be subject to the Uniform Act and Federal-aid highway requirements under title 23.

Comment on Federal Land Transfers—§ 710.601(b) and (e)

The FHWA has made a clarification to § 710.601(b) by adding the phrase (''SDOTs and their Nominees'') to the end of this section. The FHWA believes that this will addresses comments which, in part, asked for clarification regarding which entities the regulation was referring to in this section.

The AASHTO, CDOT, PennDOT, and SDDOT all requested that a Federal land management agency (FLMA) should have a maximum period of 4 months, or less, in order to respond to a Federal land transfer request and ensure timely ROW clearance and project delivery.

The FHWA appreciates the importance of timely project delivery while allowing sufficient time for a FLMA to review the request and determine conditions necessary for the adequate protection and utilization of the reserve; or to determine whether the proposed appropriation is contrary to the public interest or inconsistent with the reserved purposes. The FHWA is unable to make the requested change because 23 U.S.C. 317(b) requires 4 months for the FMLA to process the Federal land transfer request. The FHWA believes that the 4-month timeframe is sufficient for the FLMA's review of the request.

Comment on Direct Federal Acquisition—§ 710.603(a)

The WSDOT commented that it believes the word ''not'' should be removed from the first sentence of this section. ''The provisions of this paragraph may be applied to any real property that is ~~not~~ owned by the United States and is . . . .''

The FHWA does not agree that the word ''not'' should be removed. The authority provided by this section does not allow for condemnation of Federal Government real estate. The authority and process for acquiring real property owned by the Federal Government is provided in the Federal Land Transfers section at § 710.601. The first sentence has not been modified by deleting the word ''not.''

III. Rulemaking Analyses and Notices

The FHWA considered all comments received before the close of business on the extended comment closing date indicated above, and the comments are available for examination in the docket (FHWA–2014–0026) at *Regulations.gov*. The FHWA also considered comments received after the comment closing date to the extent practicable.

Executive Orders 12866 and 13563 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The FHWA has determined that this action would not be a significant regulatory action under section 3(f) of Executive Order 12866 and would not be significant within the meaning of DOT's regulatory policies and procedures (44 FR 11032). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It is anticipated that the economic impact of this rulemaking will be minimal. The changes in this rule are requirements mandated by MAP–21 which add new authorities for early acquisition of property to part 710, and clarify the Federal-aid eligibility of a broad range of real property interests that constitute less than full fee ownership. This final rule also streamlines program requirements, clarifies the Federal-State partnership, and carries out a comprehensive update of part 710. Corresponding revisions have been made to related regulations in 23 CFR parts 635 and 810 to help ensure consistency in interpretation of title 23 requirements, and to better align the language of the regulations with current program needs and best practices. This final rule implements changes identified by the public in response to the DOT's initiative on Implementation of Executive Order 13563, Retrospective Review and Analysis of Existing Rules. The FHWA believes that the streamlining and updating in this final rule will result in a reduction of Federal requirements and will afford the States new flexibilities to more efficiently acquire real property.

The FHWA has had an ongoing dialog with stakeholders and has developed the final rule in a manner that balances stakeholders' concerns and practical implementation issues to allow SDOTs to utilize the new flexibilities while minimizing their effects on existing requirements and procedures. The FHWA believes that this rule is non-controversial due to the scope and nature of the proposed additions and changes to the regulation.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), FHWA has evaluated the effects of this final rule on small entities and anticipates that this action will not have a significant economic impact on a substantial number of small entities which includes SDOTs, LPAs, and other State governmental agencies.

Unfunded Mandates Reform Act of 1995

This final rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4,109 Stat.48). This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $148.1 million or more in any one year (2 U.S.C. 1532). Additionally, the definition of ''Federal Mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government.

Executive Order 13132 (Federalism Assessment)

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final action

has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and FHWA has determined that this final action does not warrant the preparation of a federalism assessment. The FHWA has also determined that this final action would not preempt any State law or State regulation or affect any State's ability to discharge traditional State governmental functions.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under Executive Order 13175 and believes that this final action does not have substantial direct effects on one or more Indian tribes, does not impose substantial direct compliance costs on tribal governments, and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this action under Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.* The FHWA has determined that the final rule action is not a significant energy action under that order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction, for further information.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for collections of information they conduct, sponsor, or require through regulations. The PRA applies to Federal agencies' collections of information imposed on 10 or more persons. ''Persons'' include a State, territorial, tribal, or local government, or branch thereof, or their political subdivisions.

This action is covered by the existing information collection requirements previously approved under OMB Control Number 2125–0586. The existing information collection is set to expire on September 30, 2016. As required by the PRA, any amendments resulting from this final will be incorporated into the existing information collection when it is renewed prior to expiration in September 2016.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, *Civil Justice Reform*, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 12898 (Environmental Justice)

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, and DOT Order 5610.2(a) (the DOT Order), 91 FR 27534 (May 10, 2012) (available online at *www.fhwa.dot.gov/enviornment/environmental_justice/ej_at_dot/order_56102a/index.cfm*), require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations in the United States. The DOT Order requires DOT agencies to address compliance with Executive Order 12898 and the DOT Order in all rulemaking activities. In addition, FHWA has issued additional documents relating to administration of Executive Order 12898 and the DOT Order. On June 14, 2012, FHWA issued an update to its EJ order, FHWA Order 6640.23A, *FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations* (the FHWA Order) (available online at *www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm*).

The FHWA has evaluated this final rule under the Executive Order, the DOT Order, and the FHWA Order. The FHWA has determined that the final rule will not cause disproportionately high and adverse human health and environmental effects on minority or low income populations. This final rule establishes procedures and requirements for grantees and others when acquiring, managing, and disposing of real property interests. The EJ principles, in the context of acquisition, management, and disposition of real property, should be considered during the planning and environmental review processes for the particular proposal. The FHWA will consider EJ when it makes a future funding or other approval decision on a project-level basis.

Executive Order 13045 (Protection of Children)

The FHWA has analyzed this action under Executive Order 13045, *Protection of Children from Environmental Health Risks and Safety Risks.* The FHWA certifies that this final rule will not concern an environmental risk to health or safety that might disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

The FHWA does not anticipate that this final rule would effect a taking of private property or otherwise have taking implications under Executive Order 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights.*

National Environmental Policy Act

Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: those that normally require preparation of an environmental impact statement; those that normally require preparation of an environmental assessment; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). This final rule adopts policies, procedures, and requirements for acquisition, management, and disposal of real property interests for Federal and federally assisted projects carried out under title 23, U.S.C. The final rule has no potential for environmental impacts until the regulations are applied at the project level. The FHWA would have an obligation to evaluate the potential environmental impacts of such a future project-level action if the action constitutes a major Federal action under NEPA.

This action qualifies for categorical exclusions under 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives) and § 771.117(c)(1) (activities that do not lead directly to construction). The FHWA has evaluated whether the final rule would involve unusual circumstances or extraordinary circumstances and has determined that this final rule would not involve such circumstances. As a result, FHWA finds that this final rulemaking would not

result in significant impacts on the human environment.

Regulation Identification Number

A Regulation Identification Number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects

23 CFR Part 635

Construction and maintenance, Grant programs-transportation, Highways and roads, Reporting and recordkeeping requirements.

23 CFR Part 710

Grant programs-transportation, Highways and roads, Real property acquisition, Reporting and recordkeeping requirements, Rights-of-way.

23 CFR Part 810

Grant programs-transportation, Highways and roads, Mass transportation, Rights-of-way.

Issued on: August 8, 2016.

Gregory G. Nadeau,

Administrator.

In consideration of the foregoing, FHWA amends title 23, Code of Federal Regulations, parts 635, 710, and 810 as follows:

PART 635—CONSTRUCTION AND MAINTENANCE

■ 1. The authority citation for part 635 continues to read as follows:

Authority: Sec. 1525 of Pub. L. 112–141, Sec. 1503 of Pub. L. 109–59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.*; Sec. 1041(a), Pub. L. 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.85(a)(1).

■ 2. Section 635.309 is revised to read as follows:

§ 635.309 Authorization.

Authorization to advertise the physical construction for bids or to proceed with force account construction thereof shall normally be issued as soon as, but not until, all of the following conditions have been met:

(a) The plans, specifications, and estimates (PS&E) have been approved.

(b) A statement is received from the State, either separately or combined with the information required by paragraph (c) of this section, that either all right-of-way (ROW) clearance, utility, and railroad work has been completed or that all necessary arrangements have been made for it to be undertaken and completed as required for proper coordination with the physical construction schedules. Where it is determined that the completion of such work in advance of the highway construction is not feasible or practical due to economy, special operational problems or the like, there shall be appropriate notification provided in the bid proposals identifying the ROW clearance, utility, and railroad work which is to be underway concurrently with the highway construction.

(c) Except as otherwise provided for design-build projects in § 710.309 of this chapter and paragraph (p) of this section, a statement is received from the State certifying that all individuals and families have been relocated to decent, safe, and sanitary housing or that the State has made available to relocatees adequate replacement housing in accordance with the provisions of the 49 CFR part 24 and that one of the following has application:

(1) All necessary ROW, including control of access rights when pertinent, have been acquired including legal and physical possession. Trial or appeal of cases may be pending in court but legal possession has been obtained. There may be some improvements remaining on the ROW but all occupants have vacated the lands and improvements and the State has physical possession and the right to remove, salvage, or demolish these improvements and enter on all land.

(2) Although all necessary ROW have not been fully acquired, the right to occupy and to use all ROW required for the proper execution of the project has been acquired. Trial or appeal of some parcels may be pending in court and on other parcels full legal possession has not been obtained but right of entry has been obtained, the occupants of all lands and improvements have vacated and the State has physical possession and right to remove, salvage, or demolish these improvements.

(3) The acquisition or right of occupancy and use of a few remaining parcels is not complete, but all occupants of the residences on such parcels have had replacement housing made available to them in accordance with 49 CFR 24.204. Under these circumstances, the State may request the Federal Highway Administration (FHWA) to authorize actions based on a conditional certification as provided in this paragraph.

(i) The State may request approval for the advertisement for bids based on a conditional certification. The FHWA will approve the request unless it finds that it will not be in the public interest to proceed with the bidding before acquisition activities are complete.

(ii) The State may request approval for physical construction under a contract or through force account work based on a conditional certification. The FHWA will approve the request only if FHWA finds there are exceptional circumstances that make it in the public interest to proceed with construction before acquisition activities are complete.

(iii) Whenever a conditional certification is used, the State shall ensure that occupants of residences, businesses, farms, or non-profit organizations who have not yet moved from the ROW are protected against unnecessary inconvenience and disproportionate injury or any action coercive in nature.

(iv) When the State requests authorization under a conditional certification to advertise for bids or to proceed with physical construction where acquisition or right of occupancy and use of a few parcels has not been obtained, full explanation and reasons therefor, including identification of each such parcel, will be set forth in the State's request along with a realistic date when physical occupancy and use is anticipated as well as substantiation that such date is realistic. Appropriate notification must be provided in the request for bids, identifying all locations where right of occupancy and use has not been obtained. Prior to the State issuing a notice to proceed with construction to the contractor, the State shall provide an updated notification to FHWA identifying all locations where right of occupancy and use has not been obtained along with a realistic date when physical occupancy and use is anticipated.

(v) Participation of title 23 funds in construction delay claims resulting from unavailable parcels shall be determined in accordance with § 635.124. The FHWA will determine the extent of title 23 participation in costs related to construction delay claims resulting from unavailable parcels where FHWA determines the State did not follow approved processes and procedures.

(d) The State transportation department (SDOT), in accordance with 23 CFR 771.111(h), has submitted public hearing transcripts, certifications and reports pursuant to 23 U.S.C. 128.

(e) An affirmative finding of cost effectiveness or that an emergency exists has been made as required by 23 U.S.C.

112, when construction by some method other than contract based on competitive bidding is contemplated.

(f) Minimum wage rates determined by the Department of Labor in accordance with the provisions of 23 U.S.C. 113, are in effect and will not expire before the end of the period within which it can reasonably be expected that the contract will be awarded.

(g) A statement has been received that ROW has been acquired or will be acquired in accordance with 49 CFR part 24 and part 710 of this chapter, or that acquisition of ROW is not required.

(h) A statement has been received that the steps relative to relocation advisory assistance and payments as required by 49 CFR part 24 have been taken, or that they are not required.

(i) The FHWA has determined that appropriate measures have been included in the PS&E in keeping with approved guidelines, for minimizing possible soil erosion and water pollution as a result of highway construction operations.

(j) The FHWA has determined that requirements of 23 CFR part 771 have been fulfilled and appropriate measures have been included in the PS&E to ensure that conditions and commitments made in the development of the project to mitigate environmental harm will be met.

(k) Where utility facilities are to use and occupy the right-of-way, the State has demonstrated to the satisfaction of the FHWA that the provisions of § 645.119(b) of this chapter have been fulfilled.

(l) The FHWA has verified the fact that adequate replacement housing is in place and has been made available to all affected persons.

(m) Where applicable, area wide agency review has been accomplished as required by 42 U.S.C. 3334 and 4231 through 4233.

(n) The FHWA has determined that the PS&E provide for the erection of only those information signs and traffic control devices that conform to the standards developed by the Secretary of Transportation or mandates of Federal law and do not include promotional or other informational signs regarding such matters as identification of public officials, contractors, organizational affiliations, and related logos and symbols.

(o) The FHWA has determined that, where applicable, provisions are included in the PS&E that require the erection of funding source signs, for the life of the construction project, in accordance with section 154 of the Surface Transportation and Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Pub. L. 91–646, 84 Stat. 1894; primarily codified in 42 U.S.C. 4601 *et seq.*;) (Uniform Act).

(p) In the case of a design-build project, the following certification requirements apply:

(1) The FHWA's project authorization for final design and physical construction will not be issued until the following conditions have been met:

(i) All projects must conform with the statewide and metropolitan transportation planning requirements (23 CFR part 450).

(ii) All projects in air quality nonattainment and maintenance areas must meet all transportation conformity requirements (40 CFR parts 51 and 93).

(iii) The NEPA review process has been concluded. (*See* § 636.109 of this chapter).

(iv) The Request for Proposals document has been approved.

(v) A statement is received from the SDOT that either all ROW, utility, and railroad work has been completed or that all necessary arrangements will be made for the completion of ROW, utility, and railroad work.

(vi) If the SDOT elects to include ROW, utility, and/or railroad services as part of the design-builder's scope of work, then the Request for Proposals document must include:

(A) A statement concerning scope and current status of the required services or, in the case of right-of-way work, a certification in accordance with § 710.309(d)(1) of this chapter; and

(B) A statement which requires compliance with the Uniform Act, 23 CFR part 710, and the acquisition processes and procedures are in the FHWA-approved ROW manual.

(2) During a conformity lapse, an Early Acquisition Project carried out in accordance with § 710.501 of this chapter or a design-build project (including ROW acquisition activities) may continue if, prior to the conformity lapse, the National Environmental Policy Act (NEPA) (42 U.S.C. 4321, *et seq.*) process was completed and the project has not changed significantly in design scope, FHWA authorized the early acquisition or design-build project, and the project met transportation conformity requirements (40 CFR parts 51 and 93).

(3) Changes to the design-build project concept and scope may require a modification of the transportation plan and transportation improvement program. The project sponsor must comply with the metropolitan and statewide transportation planning requirements in 23 CFR part 450 and the transportation conformity requirements (40 CFR parts 51 and 93) in air quality nonattainment and maintenance areas, and provide appropriate approval notification to the design-builder for such changes.

PART 710—RIGHT-OF-WAY AND REAL ESTATE

■ 3. The authority citation for part 710 is revised to read as follows:

Authority: Secs.1302 and 1321, Pub. L. 112–141, 126 Stat. 405. Sec. 1307, Pub. L. 105–178, 112 Stat. 107; 23 U.S.C. 101(a), 107, 108, 111, 114, 133, 142(f), 156, 204, 210, 308, 315, 317, and 323; 42 U.S.C. 2000d *et seq.,* 4633, 4651–4655; 2 CFR 200.311; 49 CFR 1.48(b) and (cc), parts 21 and 24; 23 CFR 1.32.

■ 4. Revise subparts A through F to read as follows:

Subpart A—General

Sec.
710.101 Purpose.
710.103 Applicability.
710.105 Definitions.

Subpart B—Program Administration

710.201 Grantee and subgrantee responsibilities.
710.203 Title 23 funding and reimbursement.

Subpart C—Project Development

710.301 General.
710.303 Project authorization and agreements.
710.305 Acquisition.
710.307 Construction advertising.
710.309 Design-build projects.

Subpart D—Real Property Management

710.401 General.
710.403 Management.
710.405 ROW use agreements.
710.407 [Reserved]
710.409 Disposal of excess real property.

Subpart E—Property Acquisition Alternatives

710.501 Early acquisition.
710.503 Protective buying and hardship acquisition.
710.505 Real property donations.
710.507 State and local contributions.
710.509 Functional replacement of real property in public ownership.
710.511 Transportation Alternatives.

Subpart F—Federal Assistance Program

710.601 Federal land transfers.
710.603 Direct Federal acquisition.

Subpart A—General

§ 710.101 Purpose.

The primary purpose of the requirements in this part is to ensure the prudent use of Federal funds under title 23, United States Code, in the acquisition, management, and disposal of real property. In addition to the

requirements of this part, other real property related provisions apply and are found at 49 CFR part 24.

§ 710.103 Applicability.

(a) This part applies whenever title 23, United States Code, grant funding is used, including when grant funds are expended or participate in project costs incurred by the State or other Title 23 grantee. This part applies to programs and projects administered by the Federal Highway Administration (FHWA) and, unless otherwise stated in this part, to all property purchased with title 23 grant funds or incorporated into a project carried out with grant funding provided under title 23, except property for which the title is vested in the United States upon project completion. Grantees are accountable to FHWA for complying with, and are responsible for ensuring their subgrantees, contractors, and other project partners comply with applicable Federal laws, including this part.

(b) The parties responsible for ROW and real estate activities, and for compliance with applicable Federal requirements, can vary by the nature of the responsibility or the underlying activity. Throughout this part, the FHWA identifies the parties subject to a particular provision through the use of terms of reference defined as set forth in § 710.105. It is important to refer to those definitions, such as ''State Department of Transportation (SDOT),'' ''grantee,'' ''subgrantee,'' ''State agency'' and ''acquiring agency,'' when applying the provisions in this part.

(c) Where title 23 funds are transferred to other Federal agencies to administer, those agencies' ROW and real estate procedures may be utilized. Additional guidance is available electronically at the FHWA Real Estate Services Web site: *http://www.fhwa.dot.gov/realestate/index.htm.*

§ 710.105 Definitions.

(a) Terms defined in 23 U.S.C. 101(a) and 49 CFR part 24 have the same meaning where used in this part, except as modified in this section.

(b) The following terms where used in this part have the following meaning:

Access rights mean the right of ingress to and egress from a property to a public way.

Acquiring agency means a State agency, other entity, or person acquiring real property for title 23, United States Code, purposes. When an acquiring agency acquires real property interests that will be incorporated into a project eligible for title 23 grant funds, the acquiring agency must comply with Federal real estate and ROW requirements applicable to the grant.

Acquisition means activities to obtain an interest in, and possession of, real property.

Damages means the loss in the value attributable to remainder property due to the severance or consequential damages, as limited by State law, that arise when only part of an owner's real property is acquired.

Disposal means the transfer by sale or other conveyance of permanent rights in excess real property, when the real property interest is not currently or in the foreseeable future needed for highway ROW or other uses eligible for funding under title 23 of the United States Code. A disposal must meet the requirements contained in § 710.403(b) of this part. The term ''disposal'' includes actions by a grantee, or its subgrantees, in the nature of relinquishment, abandonment, vacation, discontinuance, and disclaimer of real property or any rights therein.

Donation means the voluntary transfer of privately owned real property, by a property owner who has been informed in writing by the acquiring agency of rights and benefits available to owners under the Uniform Act and this section, for the benefit of a public transportation project without compensation or with compensation at less than fair market value.

Early acquisition means acquisition of real property interests by an acquiring agency prior to completion of the environmental review process for a proposed transportation project, as provided under 23 CFR 710.501 and 23 U.S.C. 108.

Early Acquisition Project means a project for the acquisition of real property interests prior to the completion of the environmental review process for the transportation project into which the acquired property will be incorporated, as authorized under 23 U.S.C. 108 and implemented under § 710.501 of this part. It may consist of the acquisition of real property interests in a specific parcel, a portion of a transportation corridor, or an entire transportation corridor.

Easement means an interest in real property that conveys a right to use or control a portion of an owner's property or a portion of an owner's rights in the property either temporarily or permanently.

Excess real property means a real property interest not needed currently or in the foreseeable future for transportation purposes or other uses eligible for funding under title 23, United States Code.

Federal-aid project means a project funded in whole or in part under, or requiring an FHWA approval pursuant to provisions in chapter 1 of title 23, United States Code.

Federally assisted means a project or program that receives grant funds under title 23, United States Code.

Grantee means the party that is the direct recipient of title 23 funds and is accountable to FHWA for the use of the funds and for compliance with applicable Federal requirements.

Mitigation property means real property interests acquired to mitigate for impacts of a project eligible for funding under title 23.

Option means the purchase of a right to acquire real property within an agreed-to period of time for an agreed-to amount of compensation or through an agreed-to method by which compensation will be calculated.

Person means any individual, family, partnership, corporation, or association.

Real Estate Acquisition Management Plan (RAMP) means a written document that details how a non-State department of transportation grantee, subgrantee, or design-build contractor will administer the title 23 ROW and real estate requirements for its project or program of projects. The document must be approved by the SDOT, or by the funding agency in the case of a non-SDOT grantee, before any acquisition work may begin. It must lay out in detail how the acquisition and relocation assistance programs will be accomplished and any anticipated issues that may arise during the process. If relocations are reasonably expected as part of the title 23 projects or program, the Real Estate Acquisition Management Plan (RAMP) must address relocation assistance and related procedures.

Real property or *real property interest* means any interest in land and any improvements thereto, including fee and less-than-fee interests such as: temporary and permanent easements, air or access rights, access control, options, and other contractual rights to acquire an interest in land, rights to control use or development, leases, and licenses, and any other similar action to acquire or preserve ROW for a transportation facility. As used in this part, the terms ''real property'' and ''real property interest'' are synonymous unless otherwise specified.

Relinquishment means the conveyance of a portion of a highway ROW or facility by a grantee under title 23, United States Code, or its subgrantee, to another government agency for continued transportation use. (See part 620, subpart B of this chapter.)

Right-of-way (ROW) means real property and rights therein obtained for the construction, operation, maintenance, or mitigation of a transportation or related facility funded under title 23, United States Code.

ROW manual means an operations manual that establishes a grantee's acquisition, valuation, relocation, and property management and disposal requirements and procedures, and has been approved in accordance with § 710.201(c).

ROW use agreement means real property interests, defined by an agreement, as evidenced by instruments such as a lease, license, or permit, for use of real property interests for non-highway purposes where the use is in the public interest, consistent with the continued operation, maintenance, and safety of the facility, and such use will not impair the highway or interfere with the free and safe flow of traffic (see also 23 CFR 1.23). These rights may be granted only for a specified period of time because the real property interest may be needed in the future for highway purposes or other purposes eligible for funding under title 23.

Settlement means the result of negotiations based on fair market value in which the amount of just compensation is agreed upon for the purchase of real property or an interest therein. This term includes the following:

(1) An *administrative settlement* is a settlement reached prior to filing a condemnation proceeding based on value related evidence, administrative consideration, or other factors approved by an authorized agency official.

(2) A *legal settlement* is a settlement reached by an authorized legal representative or a responsible official of the acquiring agency who has the legal power vested in him by State law, after filing a condemnation proceeding, including agreements resulting from mediation and stipulated settlements approved by the court in which the condemnation action had been filed.

(3) A *court settlement* or *court award* is any decision by a court that follows a contested trial or hearing before a jury, commission, judge, or other legal entity having the authority to establish the amount of just compensation for a taking under the laws of eminent domain.

State agency means: A department, agency, or instrumentality of a State or of a political subdivision of a State; any department, agency, or instrumentality of two or more States or of two or more political subdivisions of a State or States; or any person who has the authority to acquire property by eminent domain, for public purposes, under State law.

State department of transportation (SDOT) means the State highway department, transportation department, or other State transportation agency or commission to which title 23, United States Code, funds are apportioned.

Stewardship/Oversight Agreement means the written agreement between the SDOT and FHWA that defines the respective roles and responsibilities of FHWA and the State for carrying out certain project review, approval, and oversight responsibilities under title 23, including those activities specified by 23 U.S.C. 106(c)(3).

Subgrantee means a government agency or legal entity that enters into an agreement with a grantee to carry out part or all of the activity funded by title 23 grant funds. A subgrantee is accountable to the grantee for the use of the funds and for compliance with applicable Federal requirements.

Temporary development restriction means the purchase of a right to temporarily control or restrict development or redevelopment of real property. This right is for an agreed to time period, defines specifically what is restricted or controlled, and is for an agreed to amount of compensation.

Transportation project means any highway project, public transportation capital project, multimodal project, or other project that requires the approval of the Secretary. As used in this part, the term ''transportation project'' does not include an Early Acquisition Project as defined in this section.

Uneconomic remnant means a remainder property which the acquiring agency has determined has little or no utility or value to the owner.

Uniform Act means the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Pub. L. 91–646, 84 Stat. 1894; primarily codified in 42 U.S.C. 4601 *et seq.*), and the implementing regulations at 49 CFR part 24.

Subpart B—Program Administration

§ 710.201 Grantee and subgrantee responsibilities.

(a) *Program oversight.* States administer the Federal-aid highway program, funded under chapter 1 of title 23, United States Code, through their SDOTs. The SDOT shall have overall responsibility for the acquisition, management, and disposal of real property interests on its Federal-aid projects, including when those projects are carried out by the SDOT's subgrantees or contractors. This responsibility shall include ensuring compliance with the requirements of this part and other Federal laws, including regulations. Non-SDOT grantees of funds under title 23 must comply with the requirements under this part, except as otherwise expressly provided in this part, and are responsible for ensuring compliance by their subgrantees and contractors with the requirements of this part and other Federal laws, including regulations.

(b) *Organization.* Each grantee and subgrantee, including any other acquiring agency acting on behalf of a grantee or subgrantee, shall be adequately staffed, equipped, and organized to discharge its real property related responsibilities.

(c) *ROW manual.* (1) Every grantee must ensure that its title 23-funded projects are carried out using an FHWA-approved and up-to-date ROW manual or RAMP that is consistent with applicable Federal requirements, including the Uniform Act and this part. Each SDOT that receives funding under title 23, United States Code, shall maintain an approved and up-to-date ROW manual describing its ROW organization, policies, and procedures. Non-SDOT grantees may use one of the procedures in paragraph (d) to meet the requirements in this paragraph; however, the ROW manual options can only be used with SDOT approval and permission. The ROW manual shall describe functions and procedures for all phases of the ROW program, including appraisal and appraisal review, waiver valuation, negotiation and eminent domain, property management, relocation assistance, administrative settlements, legal settlements, and oversight of its subgrantees and contractors. The ROW manual shall also specify procedures to prevent conflict of interest and avoid fraud, waste, and abuse. The ROW manual shall be in sufficient detail and depth to guide the grantee, its employees, and others involved in acquiring, managing, and disposing of real property interests. Grantees, subgrantees, and their contractors must comply with current FHWA requirements whether or not the requirements are included in the FHWA-approved ROW manual.

(2) The SDOT's ROW manual must be developed and updated, as a minimum, to meet the following schedule:

(i) The SDOTs shall prepare and submit for approval by FHWA an up-to-date ROW Manual by no later than August 23, 2018.

(ii) Every 5 years thereafter, the chief administrative officer of the SDOT shall certify to the FHWA that the current SDOT ROW manual conforms to

existing practices and contains necessary procedures to ensure compliance with Federal and State real estate law and regulation, including this part.

(iii) The SDOT shall update its ROW manual periodically to reflect changes in operations and submit the updated materials for approval by the FHWA.

(d) *ROW manual alternatives.* Non-SDOT grantees, and all subgrantees, design-build contractors, and other acquiring agencies carrying out a project funded by a grant under title 23, United States Code, must demonstrate that they will use FHWA-approved ROW procedures for acquisition and other real estate activities, and that they have the ability to comply with current FHWA requirements, including this part. This can be done through any of the following methods:

(1) Certification in writing that the acquiring agency will adopt and use the FHWA-approved SDOT ROW manual;

(2) Submission of the acquiring agency's own ROW manual to the grantee for review and determination whether it complies with Federal and State requirements, together with a certification that once the reviewing agency approves the manual, the acquiring agency will use the approved ROW manual; or

(3)(i) Submission of a RAMP setting forth the procedures the acquiring agency or design-build contractor intends to follow for a specified project or group of projects, along with a certification that if the reviewing agency approves the RAMP, the acquiring agency or design-build contractor will follow the approved RAMP for the specified program or project(s). The use of a RAMP is appropriate for a subgrantee, non-SDOT grantee, or design-build contractor if that party infrequently carries out title 23 programs or projects, the program or project is non-controversial, and the project is not complex.

(ii) Subgrantees, design-build contractors, and other acquiring agencies carrying out a project for an SDOT submit the required certification and information to the SDOT, and the SDOT will review and make a determination on behalf of FHWA. Non-SDOT grantees submit the required certification and information directly to FHWA. Non-SDOT grantees are responsible for submitting to FHWA the required certification and information for any subgrantee, contractor, and other acquiring agency carrying out a project for the non-SDOT grantee.

(e) *Record keeping.* The acquiring agency shall maintain adequate records of its acquisition and property management activities.

(1) Acquisition records, including records related to owner or tenant displacements, and property inventories of improvements acquired shall be in sufficient detail to demonstrate compliance with this part and 49 CFR part 24. These records shall be retained at least 3 years from the later of either:

(i) The date the SDOT or other grantee receives Federal reimbursement of the final payment made to each owner of a property and to each person displaced from a property; or

(ii) The date of reimbursement for early acquisitions or credit toward the State share of a project is approved based on early acquisition activities under § 710.501.

(2) Property management records shall include inventories of real property interests considered excess to project or program needs, as well as all authorized ROW use agreements for real property acquired with title 23 funds or incorporated into a program or project that received title 23 funding.

(f) *Procurement.* Contracting for all activities required in support of an SDOT's or other grantee's ROW projects or programs through the use of private consultants and other services shall conform to 2 CFR 200.317, except to the extent that the procurement is required to adhere to requirements under 23 U.S.C. 112(b)(2) and 23 CFR part 172 for engineering and design related consultant services.

(g) *Use of other public land acquisition organizations, conservation organizations, or private consultants.* The grantee may enter into written agreements with other State, county, municipal, or local public land acquisition organizations, conservation organizations, private consultants, or other persons to carry out its authorities under this part. Such organizations, firms, or persons must comply with the grantee's ROW manual or RAMP as approved in accordance with paragraphs (c) or (d) of this section. The grantee shall monitor any such real property interest acquisition activities to ensure compliance with State and Federal law, and is responsible for informing such persons of all such requirements and for imposing sanctions in cases of material non-compliance.

(h) *Assignment of FHWA approval actions to an SDOT.* The SDOT and FHWA will agree in their Stewardship/Oversight Agreement on the scope of property-related oversight and approvals under this part that will be performed directly by FHWA and those that FHWA will assign to the SDOT. This assignment provision does not apply to other grantees of title 23 funds. The content of the most recent Stewardship/Oversight Agreement shall be reflected in the FHWA-approved SDOT ROW manual. The agreement, and thus the SDOT ROW manual, will indicate which Federal-aid projects require submission of materials for FHWA review and approval. The FHWA retains responsibility for any approval action not expressly assigned to the SDOT in the Stewardship/Oversight Agreement.

§ 710.203 Title 23 funding and reimbursement.

(a) *General conditions.* Except as otherwise provided in § 710.501 for early acquisition, a State agency only may acquire real property, including mitigation property, with title 23 grant funds if the following conditions are satisfied:

(1) The project for which the real property is acquired is included in an approved Statewide Transportation Improvement Program (STIP);

(2) The grantee has executed a project agreement or other agreement recognized under title 23 reflecting the Federal funding terms and conditions for the project;

(3) Preliminary acquisition activities, including a title search, appraisal, appraisal review and waiver valuation preparation, preliminary property map preparation and preliminary relocation planning activities, limited to searching for comparable properties, identifying replacement neighborhoods and identifying available public services, can be advanced under preliminary engineering, as defined in § 646.204 of this chapter, prior to completion of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321, *et seq.*) review, while other work involving contact with affected property owners for purposes of negotiation and relocation assistance must normally be deferred until after NEPA approval, except as provided in § 710.501, early acquisition; and in § 710.503 for protective buying and hardship acquisition; and

(4) Costs have been incurred in conformance with State and Federal requirements.

(b) *Direct eligible costs.* Federal funds may only participate in direct costs that are identified specifically as an authorized acquisition activity such as the costs of acquiring the real property incorporated into the final project and the associated direct costs of acquisition, except in the case of a State that has an approved indirect cost allocation plan as stated in § 710.203(d)

or specifically provided by statute. Participation is provided for:

(1) *Real property acquisition.* Usual costs and disbursements associated with real property acquisition as required under the laws of the State, including the following:

(i) The cost of contracting for private acquisition services or the cost associated with the use of local public agencies;

(ii) Ordinary and reasonable costs of acquisition activities, such as, appraisal, waiver valuation development, appraisal review, cost estimates, relocation planning, ROW plan preparation, title work, and similar necessary ROW related work;

(iii) The compensation paid for the real property interest and costs normally associated with completing the purchase, such as document fees and document stamps. The costs of acquiring options and other contractual rights to acquire an interest in land, rights to control use or development, leases, ROWs, and any other similar action to acquire or preserve rights-of way for a transportation facility are eligible costs when FHWA determines such costs are actual, reasonable and necessary costs. Costs under this paragraph do not include salary and related expenses for an acquiring agency's employees (see payroll-related expenses in paragraph (b)(5) of this section);

(iv) The cost of administrative settlements in accordance with 49 CFR 24.102(i), legal settlements, court awards, and costs incidental to the condemnation process. This includes reasonable acquiring agency attorney's fees, but excludes attorney's fees for other parties except where required by State law (including an order of a court of competent jurisdiction) or approved by FHWA;

(v) The cost of minimum payments and waiver valuation amounts included in the approved ROW manual or approved RAMP; and

(vi) Ordinary and reasonable costs associated with closing, and costs of finalizing the acquisition.

(2) *Relocation assistance and payments.* Usual costs and disbursements associated with the following:

(i) Relocation assistance and payments required under 49 CFR part 24; and

(ii) Relocation assistance and payments provided under the laws of the State that may exceed the requirements of 49 CFR part 24, except for relocation assistance and payments provided to aliens not lawfully present in the United States.

(3) *Damages.* The cost of severance and/or consequential damages to remaining real property resulting from a partial acquisition, actual or constructive, of real property for a project based on elements compensable under State law.

(4) *Property management.* The net cost of managing real property prior to and during construction to provide for maintenance, protection, and the clearance and disposal of improvements until final project acceptance.

(5) *Payroll-related expenses.* Salary and related expenses (compensation for personal services) of employees of an acquiring agency for work on a project funded by a title 23 grant are eligible costs in accordance with 2 CFR part 225 (formerly OMB Circular A–87), as are salary and related expenses of a grantee's employees for work with an acquiring agency or a contractor to ensure compliance with Federal requirements on a title 23 project if the work is dedicated to a specific project and documented in accordance with 2 CFR part 225.

(6) *Property not incorporated into a project funded under title 23, United States Code.* The cost of property not incorporated into a project may be eligible for reimbursement in the following circumstances:

(i) *General.* Costs for construction material sites, property acquisitions to a logical boundary, eligible Transportation Alternatives (TA) projects, sites for disposal of hazardous materials, environmental mitigation, environmental banking activities, or last resort housing; and

(ii) *Easements and alternate access not incorporated into the ROW.* The cost of acquiring easements and alternate access points necessary for highway construction and maintenance outside the approved ROW limits for permanent or temporary use.

(7) *Uneconomic remnants.* The cost of uneconomic remnants purchased in connection with the acquisition of a partial taking for the project as required by the Uniform Act.

(8) *Access rights.* Payment for full or partial control of access on an existing road or highway (*i.e.,* one not on a new location), based on elements compensable under applicable State law. Participation does not depend on another real property interest being acquired or on further construction of the highway facility.

(9) *Utility and railroad property.* (i) The cost to replace operating real property owned by a displaced utility or railroad and conveyed to an acquiring agency for a project, as provided in 23 CFR part 140, subpart I, Reimbursement for Railroad Work, and 23 CFR part 645, subpart A, Utility Relocations, Adjustments and Reimbursement, and 23 CFR part 646, subpart B, Railroad-Highway Projects; and

(ii) Participation in the cost of acquiring non-operating utility or railroad real property shall be in the same manner as that used in the acquisition of other privately owned property.

(c) *Withholding payment.* The FHWA may withhold payment under the conditions described in 23 CFR 1.36 for failure to comply with Federal law or regulation, State law, or under circumstances of waste, fraud, and abuse.

(d) *Indirect costs.* Indirect costs may be claimed under the provisions of 2 CFR part 225 (formerly OMB Circular A–87). Indirect costs may be included on billings after the indirect cost allocation plan has been prepared in accordance with 2 CFR part 225 and approved by FHWA, other cognizant Federal agency, or, in the case of an SDOT subgrantee without a rate approved by a cognizant Federal agency, by the SDOT. Indirect costs for an SDOT may include costs of providing program-level guidance, consultation, and oversight to other acquiring agencies and contractors where ROW activities on title 23-funded projects are performed by non-SDOT personnel.

Subpart C—Project Development

§ 710.301 General.

The project development process typically follows a sequence of actions and approvals in order to qualify for funding. The key steps in this process typically are planning, environmental review, project agreement/authorization, acquisition, construction advertising, and construction.

§ 710.303 Project authorization and agreements.

As a condition of Federal funding under title 23, the grantee shall obtain FHWA authorization in writing or electronically before proceeding with any real property acquisition using title 23 funds, including early acquisitions under § 710.501(e) and hardship acquisition and protective buying under § 710.503. For projects funded under chapter 1, title 23, United States Code, the grantee must prepare a project agreement in accordance with 23 CFR part 630, subpart A. Authorizations and agreements shall be based on an acceptable estimate for the cost of acquisition.

§ 710.305 Acquisition.

(a) *General.* The process of acquiring real property includes appraisal, appraisal review, waiver valuations, establishing estimates of just compensation, negotiations, relocation assistance, administrative and legal settlements, and court settlements and condemnations. Grantees must ensure all acquisition and related relocation assistance activities are performed in accordance with 49 CFR part 24 and this part. If a grantee does not directly own the real property interests used for a title 23 project, the grantee must have an enforceable subgrant agreement or other agreement with the owner of the ROW that permits the grantee to enforce applicable Federal requirements affecting the real property interests, including real property management requirements under subpart D of this part.

(b) *Adequacy of real property interest.* The real property interests acquired for any project funded under title 23 must be adequate to fulfill the purpose of the project. Except in the case of an Early Acquisition Project, this means adequate for the construction, operation, and maintenance of the resulting facility, and for the protection of both the facility and the traveling public.

(c) *Establishment and offer of just compensation.* The amount believed to be just compensation shall be approved by a responsible official of the acquiring agency. This shall be done in accordance with 49 CFR 24.102(d).

(d) *Description of acquisition process.* The acquiring agency shall provide persons affected by projects or acquisitions advanced under title 23 of the United States Code with a written description of its real property acquisition process under State law and this part, and of the owner's rights, privileges, and obligations. The description shall be written in clear, non-technical language and, where appropriate, be available in a language other than English in accordance with 49 CFR 24.5, 24.102(b), and 24.203.

§ 710.307 Construction advertising.

(a) The grantee must manage real property acquired for a project until it is required for construction. Except for properties acquired under the early acquisition provisions of 23 CFR 710.501(e), clearance of improvements can be scheduled during the acquisition phase of the project using sale/removal agreements, separate demolition contracts, or be included as a work item in the construction contract. The grantee shall develop ROW availability statements and certifications related to project acquisitions as described in 23 CFR 635.309.

(b) The FHWA–SDOT Stewardship/Oversight Agreement will specify SDOT responsibility for the review and approval of the ROW availability statements and certifications in accordance with applicable law. Generally, for non-National Highway System projects, the SDOT has full responsibility for determining that right-of-way is available for construction. For non-SDOT grantees, FHWA will be responsible for the review and approval.

§ 710.309 Design-build projects.

(a) In the case of a design-build project, ROW must be acquired and cleared in accordance with the Uniform Act and the FHWA-approved ROW manual or RAMP, as provided in § 710.201(c) and (d). The grantee shall submit a ROW certification in accordance with 23 CFR 635.309(p) when requesting FHWA's authorization. The grantee shall ensure that ROW is available prior to the start of physical construction on individual properties.

(b) The decision to advance a ROW segment to the construction stage shall not impair the safety or in any way be coercive in the context of 49 CFR 24.102(h) with respect to unacquired or occupied properties on the same or adjacent segments of project ROW.

(c) The grantee may choose not to allow construction to commence until all property is acquired and relocations have been completed; or, the grantee may permit the construction to be phased or segmented to allow ROW activities to be completed on individual properties or a group of properties, with ROW certifications done in a manner satisfactory to the grantee for each phase or segment.

(d) If the grantee elects to include ROW services within the design-builder's scope of work for the design-build contract, the following provisions must be addressed in the request for proposals document:

(1) The design-builder must submit written certification in its proposal that it will comply with the process and procedures in the FHWA-approved ROW manual or RAMP as provided in § 710.201(c) and (d).

(2) When relocation of displaced persons from their dwellings has not been completed, the grantee or design-builder shall establish a hold off zone around all occupied properties to ensure compliance with ROW procedures prior to starting construction activities in affected areas. The limits of this zone should be established by the grantee prior to the design-builder entering onto the property. There should be no construction-related activity within the hold off zone until the property is vacated. The design-builder must have written notification of vacancy from the grantee prior to entering the hold off zone.

(3) Contractors activities must be limited to those that the grantee determines do not have a material adverse impact on the quality of life of those in occupied properties that have been or will be acquired.

(4) The grantee will provide a ROW project manager who will serve as the first point of contact for all ROW issues.

(e) If the grantee elects to perform all ROW services relating to the design-build contract, the provisions in § 710.307 will apply. The grantee will notify potential offerors of the status of all ROW issues in the request for proposal document.

Subpart D—Real Property Management

§ 710.401 General.

This subpart describes the grantee's responsibilities to control the use of real property acquired for a project in which Federal funds participated in any phase of the project. The grantee shall specify in its approved ROW manual or RAMP, the procedures for the maintenance, ROW use agreements, and disposal of real property interests acquired with title 23 funds. The grantee shall ensure that subgrantees, including local agencies, follow Federal requirements and approved ROW procedures as provided in § 710.201(c) and (d).

§ 710.403 Management.

(a) As provided in § 710.201(h), FHWA and SDOT may use their Stewardship/Oversight Agreement to enter into a written agreement establishing which approvals the SDOT may make on behalf of FHWA, provided FHWA may not assign to the SDOT the decision to allow any ROW use agreement or any disposal on or within the approved ROW limits of the Interstate, including any change in access control. The assignment agreement provisions in § 710.201(h) and this paragraph do not apply to non-SDOT grantees.

(b) The grantee must ensure that all real property interests within the approved ROW limits or other project limits of a facility that has been funded under title 23 are devoted exclusively to the purposes of that facility and the facility is preserved free of all other public or private alternative uses, unless such non-highway alternative uses are permitted by Federal law (including regulations) or the FHWA. An alternative use, whether temporary

under § 710.405 or permanent as provided in § 710.409, must be in the public interest, consistent with the continued operation, maintenance, and safety of the facility, and such use must not impair the highway or interfere with the free and safe flow of traffic (see also 23 CFR 1.23). Park and Ride lots are exempted from the provisions of this part. Park and Ride lots requirements are found 23 U.S.C. 137 and 23 CFR 810.106.

(c) Grantees shall specify procedures in their approved ROW manual or RAMP for determining when a real property interest is excess real property and may be disposed of in accordance with this part. These procedures must provide for coordination among relevant State organizational units that may be interested in the proposed use or disposal of the real property. Grantees also shall specify procedures in their ROW manual or RAMP for determining when a real property interest is excess and when a real property interest may be made available under a ROW use agreement for an alternative use that satisfies the requirements described in paragraph (b) of this section.

(d) Disposal actions and ROW use agreements, including leasing actions, are subject to 23 CFR part 771.

(e) Current fair market value must be charged for the use or disposal of all real property interests if those real property interests were obtained with title 23, United States Code, funding except as provided in paragraphs (e)(1) through (6) of this section. The term fair market value as used for acquisition and disposal purposes is as defined by State statute and/or State court decisions. Exceptions to the requirement for charging fair market value must be submitted to FHWA in writing and may be approved by FHWA in the following situations:

(1) When the grantee shows that an exception is in the overall public interest based on social, environmental, or economic benefits, or is for a nonproprietary governmental use. The grantee's ROW manual or RAMP must include criteria for evaluating disposals at less than fair market value, and a method for ensuring the public will receive the benefit used to justify the less than fair market value disposal.

(2) Use by public utilities in accordance with 23 CFR part 645.

(3) Use by railroads in accordance with 23 CFR part 646.

(4) Use for bikeways and pedestrian walkways in accordance with 23 CFR part 652.

(5) Uses under 23 U.S.C. 142(f), Public Transportation. Lands and ROWs of a highway constructed using Federal-aid highway funds may be made available without charge to a publicly owned mass transit authority for public transit purposes whenever the public interest will be served, and where this can be accomplished without impairing automotive safety or future highway improvements.

(6) Use for other transportation projects eligible for assistance under title 23 of the United States Code, provided that a concession agreement, as defined in § 710.703, shall not constitute a transportation project exempt from fair market value requirements.

(f) The Federal share of net income from the use or disposal of real property interests obtained with title 23 funds shall be used by the grantee for activities eligible for funding under title 23. Where project income derived from the use or disposal of real property interests is used for subsequent title 23-eligible projects, the funds are not considered Federal financial assistance and use of the income does not cause title 23 requirements to apply.

§ 710.405 ROW use agreements.

(a) A ROW use agreement for the non-highway use of real property interests may be executed with a public entity or private party in accordance with § 710.403 and this section. Any non-highway alternative use of real property interests requires approval by FHWA, including a determination by FHWA that such occupancy, use, or reservation is in the public interest; is consistent with the continued use, operations, maintenance, and safety of the facility; and such use does not impair the highway or interfere with the free and safe flow of traffic as described in § 710.403(b). Except for Interstate Highways, where the SDOT controls the real property interest, the FHWA may assign its determination and approval responsibilities to the SDOT in their Stewardship/Oversight Agreement.

(1) This section applies to highways as defined in 23 U.S.C. 101(a) that received title 23, United States Code, financial assistance in any way.

(2) This section does not apply to the following:

(i) Uses by railroads and public utilities which cross or otherwise occupy Federal-aid highway ROW and that are governed by other sections of this title;

(ii) Relocations of railroads or utilities for which reimbursement is claimed under 23 CFR part 140, subparts E and H, 23 CFR part 645, or 23 CFR part 646, subpart B; and

(iii) Bikeways and pedestrian walkways as covered in 23 CFR part 652.

(b) Subject to the requirements in this subpart, ROW use agreements for a time-limited occupancy or use of real property interests may be approved if the grantee has acquired sufficient legal right, title, and interest in the ROW of a federally assisted highway to permit the non-highway use. A ROW use agreement must contain provisions that address the following items:

(1) Ensure the safety and integrity of the federally assisted facility;

(2) Define the term of the agreement;

(3) Identify the design and location of the non-highway use;

(4) Establish terms for revocation of the ROW use agreement and removal of improvements at no cost to the FHWA;

(5) Provide for adequate insurance to hold the grantee and the FHWA harmless;

(6) Require compliance with nondiscrimination requirements;

(7) Require grantee and FHWA approval, if not assigned to SDOT, and SDOT approval if the agreement affects a Federal-aid highway and the SDOT is not the grantee, for any significant revision in the design, construction, or operation of the non-highway use; and

(8) Grant access to the non-highway use by the grantee and FHWA, and the SDOT if the agreement affects a Federal-aid highway and the SDOT is not the grantee, for inspection, maintenance, and for activities needed for reconstruction of the highway facility.

(9) Additional terms and conditions appropriate for inclusion in ROW use agreements are described in FHWA guidance at *http://www.fhwa.dot.gov/real_estate/right-of-way/corridor_management/airspace_guidelines.cfm.* The terms and conditions listed in the guidance are not mandatory requirements.

(c) Where a proposed use requires changes in the existing highway, such changes shall be provided without cost to Federal funds unless otherwise specifically agreed to by the grantee and FHWA.

(d) Proposed uses of real property interests shall conform to the current design standards and safety criteria of FHWA for the functional classification of the highway facility in which the property is located.

(e) An individual, company, organization, or public agency desiring to use real property interests shall submit a written request to the grantee, together with an application supporting the proposal. If FHWA is the approving authority, the grantee shall forward the request, application, and the SDOT's

recommendation if the proposal affects a Federal-aid highway, and the proposed ROW use agreement, together with its recommendation and any necessary supplemental information, to FHWA. The submission shall affirmatively provide for adherence to all requirements contained in this subpart and must include the following information:

(1) Identification of the party responsible for developing and operating the proposed use;

(2) A general statement of the proposed use;

(3) A description of why the proposed use would be in the public interest;

(4) Information demonstrating the proposed use would not impair the highway or interfere with the free and safe flow of traffic;

(5) The proposed design for the use of the space, including any facilities to be constructed;

(6) Maps, plans, or sketches to adequately demonstrate the relationship of the proposed project to the highway facility;

(7) Provision for vertical and horizontal access for maintenance purposes;

(8) A description of other general provisions such as the term of use, insurance requirements, design limitations, safety mandates, accessibility, and maintenance as outlined further in this section; and

(9) An adequately detailed three-dimensional presentation of the space to be used and the facility to be constructed if required by FHWA or the grantor. Maps and plans may not be required if the available real property interest is to be used for leisure activities (such as walking or biking), beautification, parking of motor vehicles, public mass transit facilities, and similar uses. In such cases, an acceptable metes and bounds description of the surface area, and appropriate plans or cross sections clearly defining the vertical use limits, may be furnished in lieu of a three-dimensional description, at the grantee's discretion.

§ 710.407 [Reserved]

§ 710.409 Disposal of excess real property.

(a) Excess real property outside or within the approved right-of-way limits or other project limits may be sold or conveyed to a public entity or to a private party in accordance with § 710.403(a), (c), (d), (e), (f) and this section. Approval by FHWA is required for disposal of excess real property unless otherwise provided in this section or in the FHWA–SDOT Stewardship/Oversight Agreement.

(b) Federal, State, and local agencies shall be afforded the opportunity to acquire excess real property considered for disposal when such real property interests have potential use for parks, conservation, recreation, or related purposes, and when such a transfer is allowed by State law. When this potential exists, the grantee shall notify the appropriate agencies of its intentions to dispose of the real property interests determined to be excess.

(c) The grantee may decide to retain excess real property to restore, preserve, or improve the scenic beauty and environmental quality adjacent to the transportation facility.

(d) Where the transfer of excess real property to other agencies at less than fair market value for continued public use is clearly justified as in the public interest and approved by FHWA under § 710.403(e), the deed shall provide for reversion of the property for failure to continue public ownership and use. Where property is sold at fair market value, no reversion clause is required.

(e) No FHWA approval is required for disposal of excess real property located outside of the approved ROW limits or other project limits if Federal funds did not participate in the acquisition cost of the real property.

(f) Highway facilities in which Federal funds participated in either the ROW or construction may be relinquished to another governmental agency for continued highway use under the provisions of 23 CFR part 620, subpart B.

(g) A request for approval of a disposal must demonstrate compliance with the requirements of § 710.403(a), (c), (d), (e), (f) and this section. An individual, company, organization, or public agency requesting a grantee to approve of a disposal of excess real property within the approved ROW limits or other project limits, or to approve of a disposal of excess real property outside the ROW limits that was acquired with title 23 of the United States Code funding, shall submit a written request to the grantee, together with an application supporting the proposal. If the FHWA is the approving authority, the grantee shall forward the request, the SDOT recommendation if the proposal affects a Federal-aid highway, the application, and proposed terms and conditions, together with its recommendation and any necessary supplemental information, to FHWA. The submission shall affirmatively provide for adherence to requirements contained in this section and must include the information specified in § 710.405(e)(1) through (9).

Subpart E—Property Acquisition Alternatives

§ 710.501 Early acquisition.

(a) *General.* A State agency may initiate acquisition of real property interests for a proposed transportation project at any time it has the legal authority to do so. The State agency may undertake Early Acquisition Projects before the completion of the environmental review process for the proposed transportation project for corridor preservation, access management, or other purposes. Subject to the requirements in this section, State agencies may fund Early Acquisition Project costs entirely with State funds with no title 23 participation; use State funds initially but seek title 23 credit or reimbursement when the acquired property is incorporated into a transportation project eligible for Federal surface transportation program funds; or use the normal Federal-aid project agreement and reimbursement process to fund an Early Acquisition Project pursuant to paragraph (e) of this section. The early acquisition of a real property interest under this section shall be carried out in compliance with all requirements applicable to the acquisition of real property interests for federally assisted transportation projects.

(b) *State-funded early acquisition without Federal credit or reimbursement.* A State agency may carry out early acquisition entirely at its expense and later incorporate the acquired real property into a transportation project or program for which the State agency receives Federal financial assistance or other Federal approval under title 23 for other transportation project activities. In order to maintain eligibility for future Federal assistance on the project, early acquisition activities funded entirely without Federal participation must comply with the requirements of § 710.501(c)(1) through (5).

(c) *State-funded early acquisition eligible for future credit.* Subject to § 710.203(b) (direct eligible costs), § 710.505(b), and § 710.507 (State and local contributions), Early Acquisition Project costs incurred by a State agency at its own expense prior to completion of the environmental review process for a proposed transportation project are eligible for use as a credit toward the non-Federal share of the total project costs if the project receives surface transportation program funds, and if the following conditions are met:

(1) The property was lawfully obtained by the State agency;

(2) The property was not land described in 23 U.S.C. 138;

(3) The property was acquired, and any relocations were carried out, in accordance with the provisions of the Uniform Act and regulations in 49 CFR part 24;

(4) The State agency complied with the requirements of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4);

(5) The State agency determined, and FHWA concurred, the early acquisition did not influence the environmental review process for the proposed transportation project, including:

(i) The decision on need to construct the proposed transportation project;

(ii) The consideration of any alternatives for the proposed transportation project required by applicable law; and

(iii) The selection of the design or location for the proposed transportation project; and

(6) The property will be incorporated into the project for which surface transportation program funds are received and to which the credit will be applied.

(d) *State-funded early acquisition eligible for future reimbursement.* Early Acquisition Project costs incurred by a State agency prior to completion of the environmental review process for the transportation project are eligible for reimbursement from title 23 funds apportioned to the State once the real property interests are incorporated into a project eligible for surface transportation program funds if the State agency demonstrates, and FHWA concurs, that the terms and conditions specified in the requirements of § 710.501(c)(1) through (5), and the requirements of § 710.203(b) (direct eligible costs) have been met. The State agency must demonstrate that it has met the following requirements, as set forth in 23 U.S.C. 108(c)(3):

(1) Any land acquired, and relocation assistance provided, complied with the Uniform Act;

(2) The requirements of title VI of the Civil Rights Act of 1964 have been complied with;

(3) The State has a mandatory comprehensive and coordinated land use, environment, and transportation planning process under State law and the acquisition is certified by the Governor as consistent with the State plans before the acquisition;

(4) The acquisition is determined in advance by the Governor to be consistent with the State transportation planning process pursuant to 23 U.S.C. 135;

(5) The alternative for which the real property interest is acquired is selected by the State pursuant to regulations issued by the Secretary which provide for the consideration of the environmental impacts of various alternatives;

(6) Before the time that the cost incurred by a State is approved for Federal participation, environmental compliance pursuant to the National Environmental Policy Act has been completed for the project for which the real property interest was acquired by the State, and the acquisition has been approved by the Secretary under this Act, and in compliance with section 303 of title 49, section 7 of the Endangered Species Act, and all other applicable environmental laws that shall be identified by the Secretary in regulations; and

(7) Before the time that the cost incurred by a State is approved for Federal participation, the Secretary has determined that the property acquired in advance of Federal approval or authorization did not influence the environmental assessment of the project, the decision relative to the need to construct the project, or the selection of the project design or location.

(e) *Federally funded early acquisition.* The FHWA may authorize the use of funds apportioned to a State under title 23 for an Early Acquisition Project if the State agency certifies, and FHWA concurs, that all of the following conditions have been met:

(1) The State has authority to acquire the real property interest under State law; and

(2) The acquisition of the real property interest—

(i) Is for a transportation project or program eligible for funding under title 23 that will not require FHWA approval under 23 CFR 774.3;

(ii) Will not cause any significant adverse environmental impacts either as a result of the Early Acquisition Project or from cumulative effects of multiple Early Acquisition Projects carried out under this section in connection with a proposed transportation project;

(iii) Will not limit the choice of reasonable alternatives for a proposed transportation project or otherwise influence the decision of FHWA on any approval required for a proposed transportation project;

(iv) Will not prevent the lead agency from making an impartial decision as to whether to accept an alternative that is being considered in the environmental review process for a proposed transportation project;

(v) Is consistent with the State transportation planning process under 23 U.S.C. 135;

(vi) Complies with other applicable Federal laws (including regulations);

(vii) Will be acquired through negotiation, without the threat of, or use of, condemnation; and

(viii) Will not result in a reduction or elimination of benefits or assistance to a displaced person required by the Uniform Act and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*).

(3) The Early Acquisition Project is included as a project in an applicable transportation improvement program under 23 U.S.C. 134 and 135 and 49 U.S.C. 5303 and 5304.

(4) The environmental review process for the Early Acquisition Project is complete and FHWA has approved the Early Acquisition Project. Pursuant to 23 U.S.C. 108(d)(4)(B), the Early Acquisition Project is deemed to have independent utility for purposes of the environmental review process under NEPA. When the Early Acquisition Project may result in a change to the use or character of the real property interest prior to the completion of the environmental review process for the proposed transportation project, the NEPA evaluation for the Early Acquisition Project must consider whether the change has the potential to cause a significant environmental impact as defined in 40 CFR 1508.27, including a significant adverse impact within the meaning of paragraph (e)(2)(ii) of this section. The Early Acquisition Project must comply with all applicable environmental laws.

(f) *Prohibited activities.* Except as provided in this paragraph, real property interests acquired under paragraph (e) of this section and pursuant to 23 U.S.C. 108(d) cannot be developed in anticipation of a transportation project until all required environmental reviews for the transportation project have been completed. For the purpose of this paragraph, ''development in anticipation of a transportation project'' means any activity related to demolition, site preparation, or construction that is not necessary to protect public health or safety. With prior FHWA approval, a State agency may carry out limited activities necessary for securing real property interests acquired as part of an Early Acquisition Project, such as limited clearing and demolition activity, if the activities are necessary to protect the public health or safety and are considered during the environmental review of the Early Acquisition Project.

(g) *Reimbursement.* If Federal-aid reimbursement is made for real property interests acquired early under this section and the real property interests are not subsequently incorporated into a project eligible for surface transportation funds within the time allowed by 23 U.S.C. 108 (a)(2), FHWA must offset the amount reimbursed against funds apportioned to the State.

(h) *Relocation assistance eligibility.* In the case of an Early Acquisition Project, a person is considered to be displaced when required to move from the real property as a direct result of a binding written agreement for the purchase of the real property interest(s) between the acquiring agency and the property owner. Options to purchase and similar agreements used for Early Acquisition Projects that give the acquiring agency a right to prevent new development or to decide in the future whether to acquire the real property interest(s), but do not create an immediate commitment by the acquiring agency to acquire and do not require an owner or tenant to relocate, do not create relocation eligibility until the acquiring agency legally commits itself to acquiring the real property interest(s).

§ 710.503 Protective buying and hardship acquisition.

(a) *General conditions.* Prior to final environmental approval of a transportation project, the grantee may request FHWA agreement to provide reimbursement for advance acquisition of a particular parcel or a limited number of parcels, to prevent imminent development and increased costs on the preferred location (Protective Buying), or to alleviate hardship to a property owner or owners on the preferred location (Hardship Acquisition), provided the following conditions are met:

(1) The transportation project is included in the currently approved STIP;

(2) The grantee has complied with applicable public involvement requirements in 23 CFR parts 450 and 771;

(3) A determination has been completed for any property interest subject to the provisions of 23 U.S.C. 138; and

(4) Procedures of the Advisory Council on Historic Preservation are completed for properties subject to (54 U.S.C. 306108), (historic properties).

(b) *Protective buying.* The grantee must clearly demonstrate that development of the property is imminent and such development would limit future transportation choices. A significant increase in cost may be considered as an element justifying a protective purchase.

(c) *Hardship acquisitions.* The grantee must accept and concur in an owner's request for a hardship acquisition based on a property owner's written submission that—

(1) Supports the hardship acquisition by providing justification, on the basis of health, safety or financial reasons, that remaining in the property poses an undue hardship compared to other property owners; and

(2) Documents an inability to sell the property because of the impending project, at fair market value, within a time period that is typical for properties not impacted by the impending project.

(d) *Environmental decisions.* Acquisition of property under this section is subject to environmental review under part 771 of this chapter. Acquisitions under this section shall not influence the environmental review of a transportation project which would use the property, including decisions about the need to construct the transportation project or the selection of an alternative.

§ 710.505 Real property donations.

(a) *Donations of property being acquired.* A non-governmental owner whose real property is required for a title 23 project may donate the property. Donations may be made at any time during the development of a project subject to applicable State laws. Prior to accepting the property, the owner must be informed in writing by the acquiring agency of his/her right to receive just compensation for the property, the right to an appraisal or waiver valuation of the real property, and of all other applicable financial and non-financial assistance provided under 49 CFR part 24 and applicable State law. All donations of property received prior to the approval of the NEPA document for the project must meet the requirements specified in 23 U.S.C. 323(d).

(b) *Credit for donations.* Donations of real property may be credited to the State's matching share of the project in accordance with 23 U.S.C. 323. As required by 23 U.S.C. 323(b)(2), credit to the State's matching share for donated property shall be based on fair market value established on the earlier of the following: Either the date on which the donation becomes effective, or the date on which equitable title to the property vests in the State. The fair market value shall not include increases or decreases in value caused by the project. The grantee shall ensure sufficient documentation is developed to indicate compliance with paragraph (a) of this section and with the provisions of 23 U.S.C. 323, and to support the amount of credit applied. The total credit cannot exceed the State's pro-rata share under the project agreement to which it is applied.

(c) *Donations and conveyances in exchange for construction features or services.* A property owner may donate property in exchange for construction features or services. The value of the donation is limited to the fair market value of property donated less the cost of the construction features or services. If the value of the donated property exceeds the cost of the construction features or services, the difference may be eligible for a credit to the State's share of project costs.

§ 710.507 State and local contributions.

(a) *Credit for State and local government contributions.* If the requirements of 23 U.S.C. 323 are met, real property owned by State and local governments that is incorporated within a project receiving financial assistance from the Highway Trust Fund can be used as a credit toward the grantee or subgrantee's matching share of total project cost. A credit cannot exceed the grantee or subgrantee's matching share required by the project agreement. The grantee must ensure there is documentation supporting all credits, including the following:

(1) A certification that the State or local government acquisition satisfied the conditions in 23 CFR 710.501(c)(1) through (6); and

(2) Justification of the value of credit applied. Acquisition costs incurred by the State or local government to acquire title can be used as justification for the value of the real property.

(b) *Exemptions.* Credits are not available for real property acquired with any form of Federal financial assistance except as provided in 23 U.S.C. 120(j), or for real property already incorporated into existing ROW and used for transportation purposes.

(c) *Contributions without credit.* Property may be presented for project use with the understanding that no credit for its use is sought. In such case, the grantee shall assure that the acquisition satisfied the conditions in 23 CFR 710.501(c)(1) through (6).

§ 710.509 Functional replacement of real property in public ownership.

(a) *General.* When publicly owned real property, including land and/or facilities, is to be acquired for a project receiving grant funds under title 23, in lieu of paying the fair market value for the real property, the acquiring agency may provide compensation by functionally replacing the publicly owned real property with another

facility that will provide equivalent utility.

(b) *Federal participation.* Federal-aid funds may participate in functional replacement costs only if the following conditions are met:

(1) Functional replacement is permitted under State law and the acquiring agency elects to provide it;

(2) The property in question is in public ownership and use;

(3) The replacement facility will be in public ownership and will continue the public use function of the acquired facility;

(4) The acquiring agency has informed, in writing, the public entity owning the property of its right to an estimate of just compensation based on an appraisal of fair market value and of the option to choose either just compensation or functional replacement;

(5) The FHWA concurs in the acquiring agency determination that functional replacement is in the public interest; and

(6) The real property is not owned by a utility or railroad.

(c) *Federal land transfers.* Use of this section for functional replacement of real property in Federal ownership shall be in accordance with Federal land transfer provisions in subpart F of this part.

(d) *Limits upon participation.* Federal-aid participation in the costs of functional replacement is limited to costs that are actually incurred in the replacement of the acquired land and/or facility and are—

(1) Costs for facilities that do not represent increases in capacity or betterments, except for those necessary to replace utilities, to meet legal, regulatory, or similar requirements, or to meet reasonable prevailing standards; and

(2) Costs for land to provide a site for the replacement facility.

(e) *Procedures.* When a grantee determines that payments providing for functional replacement of public facilities are allowable under State law, the grantee will incorporate within its approved ROW manual, or approved RAMP, full procedures covering review and oversight that will be applied to such cases.

§ 710.511 Transportation Alternatives.

(a) *General.* 23 U.S.C. 133(h) sets aside an amount from each State's Surface Transportation Block Grant apportionment for Transportation Alternatives (TA). The TA projects that involve the acquisition, management, and disposition of real property, and the relocation of families, individuals, and businesses, are governed by the general requirements of the Federal-aid program found in titles 23 and 49 of the CFR, except as specified in paragraph (b)(2) of this section.

(b) *Requirements.* (1) Acquisition and relocation activities for TA projects are subject to the Uniform Act.

(2) When a person or agency acquires real property for a project receiving title 23 grant funds on behalf of an acquiring agency with eminent domain authority, the requirements of the Uniform Act apply as if the acquiring agency had acquired the property itself.

(3) When, subsequent to Federal approval of property acquisition, a person or agency acquires real property for a project receiving title 23 grant funds, and there will be no use or recourse to the power of eminent domain, the limited requirements of 49 CFR 24.101(b)(2) apply.

(c) *Property management and disposal of property acquired for TA projects.* Subpart D of this part applies to the management and disposal of real property interests acquired with TA funds, including alternate uses authorized under ROW use agreements. A TA project involving acquisition of any real property interest must have a real property agreement between FHWA and the grantee that identifies the expected useful life of the TA project and establishes a pro rata formula for repayment of TAP funding by the grantee if—

(1) The acquired real property interest is used in whole or in part for purposes other than the TA project purposes for which it was acquired; or

(2) The actual TA project life is less than the expected useful life specified in the real property agreement.

Subpart F—Federal Assistance Programs

§ 710.601 Federal land transfers.

(a) The provisions of this subpart apply to any project constructed on a Federal-aid highway or under Chapter 2 of title 23, of the United States Code. When the FHWA determines that a strong Federal transportation interest exists, these provisions may also be applied to highway projects that are eligible for Federal funding under Chapters 1 and 2 of title 23, of the United States Code, and to highway-related transfers that are requested by a State in conjunction with a military base closure under the Defense Base Closure and Realignment Act of 1990 (Pub. L. 101–510, 104 Stat. 1808, as amended).

(b) Under certain conditions, real property interests owned by the United States may be transferred to a non-Federal owner for use for highway purposes. Sections 107(d) and 317 of title 23, United States Code, establish the circumstances under which such transfers may occur, and the parties eligible to receive such transfers (SDOTs and their nominees).

(c) An eligible party may file an application with FHWA, or can make application directly to the Federal land management agency if the Federal land management agency has its own authority for granting interests in land.

(d) Applications under this section shall include the following information:

(1) The purpose for which the lands are to be used;

(2) The estate or interest in the land required for the project;

(3) The Federal project number or other appropriate references;

(4) The name of the Federal agency exercising jurisdiction over the land and identity of the installation or activity in possession of the land;

(5) A map showing the survey of the lands to be acquired;

(6) A legal description of the lands desired; and

(7) A statement of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321, *et seq.*) and any other applicable Federal environmental laws, including the National Historic Preservation Act (54 U.S.C. 306108), and 23 U.S.C. 138.

(e) If the FHWA concurs in the need for the transfer, the Federal land management agency will be notified and a right-of-entry requested. For projects not on the Interstate System, the Federal land management agency shall have a period of 4 months in which to designate conditions necessary for the adequate protection and utilization of the reserve or to certify that the proposed appropriation is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved. The FHWA may extend the reply period at the timely request of the Federal land management agency for good cause.

(f) The FHWA may participate in the payment of fair market value or the functional replacement of impacted facilities under 710.509 and the reimbursement of the ordinary and reasonable direct costs of the Federal land management agency for the transfer when reimbursement is required by the Federal land management agency's governing laws as a condition of the transfer.

(g) Deeds for conveyance of real property interests owned by the United States shall be prepared by the eligible party and must be certified as being legally sufficient by an attorney licensed

within the State where the real property is located. Such deeds shall contain the clauses required by FHWA and 49 CFR 21.7(a)(2). After the eligible party prepares the deed, it will submit the proposed deed with the certification to FHWA for review and execution.

(h) Following execution by FHWA, the eligible party shall record the deed in the appropriate land record office and so advise FHWA and the affected Federal land management agency.

(i) When the need for the interest acquired under this subpart no longer exists, the party that received the real property must restore the land to the condition which existed prior to the transfer, or to a condition that is acceptable to the Federal land management agency to which such property would revert, and must give notice to FHWA and to the affected Federal land management agency that such interest will immediately revert to the control of the Federal land management agency from which it was appropriated or to its assigns. Where authorized by Federal law, the Federal land management agency and such party may enter into a separate agreement to release the reversion clause and make alternative arrangements for the sale, restoration, or other disposition of the lands no longer needed.

§ 710.603 Direct Federal acquisition.

(a) The provisions of this paragraph may not be applied to any real property that is owned by the United States and is needed in connection with a project for the construction, reconstruction, or improvement of any section of the Interstate System or for a Defense Access Road project under 23 U.S.C. 210, if the SDOT is unable to acquire the required ROW or is unable to obtain possession with sufficient promptness. If the landowner tenders a right-of-entry or other right of possession document required by State law any time before FHWA makes a determination that the SDOT is unable to acquire the ROW with sufficient promptness, the SDOT is legally obligated to accept such tender and FHWA may not proceed with Federal acquisition. To enable FHWA to make the necessary findings and to proceed with the acquisition of the ROW, the SDOT's written application for Federal acquisition must include the following:

(1) Justification for the Federal acquisition of the lands or interests in lands;

(2) The date FHWA authorized the SDOT to commence ROW acquisition, the date of the project agreement, and a statement that the agreement contains the provisions required by 23 U.S.C. 111;

(3) The necessity for acquisition of the particular lands under request;

(4) A statement of the specific interests in lands to be acquired, including the proposed treatment of control of access;

(5) The SDOT's intentions with respect to the acquisition, subordination, or exclusion of outstanding interests, such as minerals and utility easements, in connection with the proposed acquisition;

(6) A statement on compliance with the provisions of parts 771 and 774 of this chapter, as applicable;

(7) Adequate legal descriptions, plats, appraisals, and title data;

(8) An outline of the negotiations that have been conducted with landowners;

(9) An agreement that the SDOT will pay its pro rata share of costs incurred in the acquisition of, or the attempt to acquire, ROW; and

(10) A statement that assures compliance with the applicable provisions of the Uniform Act.

(b) Except as provided in paragraph (a) of this section, direct Federal acquisitions from non-Federal owners for projects administered by the FHWA Office of Federal Lands Highway may be carried out in accordance with applicable Federal condemnation laws. The FHWA will proceed with such a direct Federal acquisition only when the public agency responsible for the road is unable to obtain the ROW necessary for the project. The public agency must make a written request to FHWA for the acquisition and, if the public agency is a Federal agency, the request shall include a commitment that any real property obtained will be under that agency's sole jurisdiction and control and FHWA will have no jurisdiction or control over the real property as a result of the acquisition. The FHWA may require the applicant to provide any information FHWA needs to make the required determinations or to carry out the acquisition.

(c) If the applicant for direct Federal acquisition obtains title to a parcel prior to the filing of the Declaration of Taking, it shall notify FHWA and immediately furnish the appropriate U.S. Attorney with a disclaimer together with a request that the action against the landowner be dismissed (ex parte) from the proceeding and the estimated just compensation deposited into the registry of the court for the affected parcel be withdrawn after the appropriate motions are approved by the court.

(d) When the United States obtains a court order granting possession of the real property, FHWA shall authorize the applicant for direct Federal acquisition to immediately take over supervision of the property. The authorization shall include, but need not be limited to, the following:

(1) The right to take possession of unoccupied properties;

(2) The right to give 90 days notice to owners to vacate occupied properties and the right to take possession of such properties when vacated;

(3) The right to permit continued occupancy of a property until it is required for construction and, in those instances where such occupancy is to be for a substantial period of time, the right to enter into rental agreements, as appropriate, to protect the public interest;

(4) The right to request assistance from the U.S. Attorney in obtaining physical possession where an owner declines to comply with the court order of possession;

(5) The right to clear improvements and other obstructions;

(6) Instructions that the U.S. Attorney be notified prior to actual clearing, so as to afford him an opportunity to view the lands and improvements, to obtain appropriate photographs, and to secure appraisals in connection with the preparation of the case for trial;

(7) The requirement for appropriate credits to the United States for any net salvage or net rentals obtained by the applicant for direct Federal acquisition, as in the case of ROW acquired by an SDOT for Federal-aid projects; and

(8) Instructions that the authority granted to the applicant for direct Federal acquisition is not intended to preclude the U.S. Attorney from taking action, before the applicant has made arrangements for removal, to reach a settlement with the former owner which would include provision for removal.

(e) If the Federal Government initiates condemnation proceedings against the owner of real property in a Federal court and the final judgment is that FHWA cannot acquire the real property by condemnation, or the proceeding is abandoned, the court is required by law to award such a sum to the owner of the real property that in the opinion of the court provides reimbursement for the owner's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings.

(f) As soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of the compensation in a Federal condemnation, FHWA shall

reimburse the owner to the extent deemed fair and reasonable, the following costs:

(1) Recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States;

(2) Penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such real property; and

(3) The pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States or the effective date of possession, whichever is the earlier.

(g) The lands or interests in lands, acquired under this section, will be conveyed to the State or the appropriate political subdivision thereof, upon agreement by the SDOT, or said subdivision to:

(1) Maintain control of access where applicable;

(2) Accept title thereto;

(3) Maintain the project constructed thereon;

(4) Abide by any conditions which may set forth in the deed; and

(5) Notify the FHWA at the appropriate time that all the conditions have been performed.

(h) The deed from the United States to the State, or to the appropriate political subdivision thereof, or in the case of a Federal applicant for a direct Federal acquisition any document designating jurisdiction, shall include the conditions required by 49 CFR part 21 and shall not include any grant of jurisdiction to FHWA. The deed shall be recorded by the grantee in the appropriate land record office, and the FHWA shall be advised of the recording date.

■ 5. Revise § 710.703(f) to read as follows:

§ 710.703 Definitions.

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(f) *Highway agency* in this subpart means any SDOT or other public authority with jurisdiction over a federally funded highway.

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PART 810—MASS TRANSIT AND SPECIAL USE HIGHWAY PROJECTS

■ 6. The authority citation for part 810 continues to read as follows:

Authority: 23 U.S.C. 137, 142, 149 and 315; sec. 4 of Pub. L. 97–134, 95 Stat. 1699; secs. 118, 120, and 163 of Pub. L. 97–424, 96 Stat. 2097; 49 CFR 1.48(b) and 1.51(f).

■ 7. Revise § 810.212 to read as follows:

§ 810.212 Use without charge.

The use and occupancy of the lands made available by the State to the publicly owned transit authority may be without charge. Costs incidental to making the lands available for mass transit shall be borne by the publicly owned mass transit authority.

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